No. 3-13-0696

IN THE ILLINOIS APPELLATE COURT
THIRD JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. BETHANY MCKEE, Defendant-Appellee, and JOSEPH HOSEY, Respondent-Appellant.	Appeal from the Circuit Court of Will County, Illinois; Twelfth Judicial Circuit; Trial Judge Gerald R. Kinney; Notice of Appeal: Sept. 20, 2013; Date of Appealable Order: Sept. 20, 2013; Jurisdiction Conferred Upon Illinois Appellate Court Pursuant to Sup. Ct. R. 304(b)(5).

BRIEF OF RESPONDENT-APPELLANT JOSEPH HOSEY

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ORAL ARGUMENT REQUESTED

I.

POINTS AND AUTHORITIES

II.

NATURE OF THE CASE

This appeal arises from a criminal case in which the Circuit Court granted Defendant Bethany McKee's petition to divest Respondent Joseph Hosey of his statutory reporter's privilege. The Circuit Court ordered Mr. Hosey to disclose the confidential source of his published news articles about the criminal case and rejected his opposition based on the qualified privilege protecting the anonymity of a reporter's source, 735 ILCS 5/8-901 *et seq.*, and the Illinois Special Witness Doctrine. The Circuit Court then held Mr. Hosey in contempt for refusing to disclose his confidential source. No question is raised on the pleadings.

III.

ISSUE PRESENTED FOR REVIEW

Whether the Circuit Court erred by failing to properly apply the Illinois statutory privilege protecting a reporter's source, 735 ILCS 5/8-901 *et seq.*, and the Illinois Special Witness Doctrine, by ordering Mr. Hosey, a reporter, to disclose the confidential source of his news articles when the identity of the source is not relevant to the merits of the underlying criminal case, the Circuit Court based its ruling on speculation about collateral matters, ordering disclosure is not essential to protect any public interest, and all other available sources of information have not been exhausted.

IV.

STATEMENT OF JURISDICTION

Jurisdiction is proper under Illinois Supreme Court Rule 304(b)(5). On September 20, 2013, the Circuit Court entered an order holding Mr. Hosey in criminal and civil contempt and fining him $1,000 plus costs, in addition to potential future fines

if he fails to purge himself of contempt. Mr. Hosey timely filed his Notice of Appeal on September 20, 2013.

V.

STATUTES INVOLVED

735 ILCS 5/8-901

Source of information. No court may compel any person to disclose the source of any information obtained by a reporter except as provided in Part 9 of Article VIII of this Act.

735 ILCS 5/8-903

Application to court. (a) In any case, except a libel or slander case, where a person claims the privilege conferred by Part 9 of Article VIII of this Act, the person or party, body or officer seeking the information so privileged may apply in writing to the circuit court serving the county where the hearing, action or proceeding in which the information is sought for an order divesting the person named therein of such privilege and ordering him or her to disclose his or her source of information.

735 ILCS 5/8-904

Contents of application. The application provided in Section 8-903 of this Act shall allege: the name of the reporter and of the news medium with which he or she was connected at the time the information sought was obtained; the specific information sought and its relevancy to the proceedings; and . . . a specific public interest which would be adversely affected if the factual information sought were not disclosed . . . .

735 ILCS 5/8-906

Consideration by Court. In granting or denying divestiture of the privilege provided in Part 9 of Article VIII of this Act the court shall have due regard to the nature of the proceedings, the merits of the claim or defense, the adequacy of the remedies otherwise

available, if any, the relevancy of the source, and the possibility of establishing by other means that which it is alleged the source requested will tend to prove.

735 ILCS 5/8-907

Court's findings. An order granting divestiture of the privilege provided in Part 9 of Article VIII of this Act shall be granted only if the court, after hearing the parties, finds:

(1) that the information sought does not concern matters, or details in any proceeding, required to be kept secret under the laws of this State or of the Federal government; and

(2) that all other available sources of information have been exhausted and . . . disclosure of the information sought is essential to the protection of the public interest involved . . . .

If the court enters an order divesting the person of the privilege granted in Part 9 of Article VIII of this Act it shall also order the person to disclose the information it has determined should be disclosed, subject to any protective conditions as the court may deem necessary or appropriate.

VI.

STATEMENT OF FACTS

Two men were murdered in Joliet, Illinois in early January 2013. (R. C263)[1] Defendant McKee was arrested and charged along with three co-defendants for those murders. (*Id.*) Between February 26, 2013 and March 18, 2013, Mr. Hosey, a reporter and editor for Patch Media Corporation, wrote a series of online articles about the murders based partly on police documents that were provided to him by a confidential

[1] Citations are to the Common Law Record ("C"), the Impounded Common Law Record ("IC"), and the Report of Proceedings ("ROP").

source. (R. C263-64) No gag order was in place when Mr. Hosey received the documents from his source and began publishing his articles. No party has claimed that the articles inaccurately reported the contents of the police documents.

On March 1, 2013, Defendant McKee served a subpoena on Mr. Hosey for the stated purpose of confiscating his files, silencing further articles about the case, and forcing him to disclose his confidential source. (R. C72; IC222) Mr. Hosey moved to quash the subpoena on a variety of substantive and procedural grounds, including his statutory reporter's privilege, 735 ILCS 5/8-901, *et seq.*, and the Illinois Special Witness doctrine. (R. C80-91) Defendant McKee responded to the motion to quash, asserting that the leak must be "an illegal State action." (R. IC217, 219) She asserted that her right to a fair trial was jeopardized by the pre-trial publicity from Mr. Hosey's stories and requested that the Circuit Court confiscate Mr. Hosey's files in the hope of plugging the leak and preventing Mr. Hosey from publishing any more stories. (R. IC214-16, 222)

Also on March 1, 2013, after Mr. Hosey had already received the police documents and published several of the articles at issue, Defendant McKee moved for a gag order. (R. C50-54) The Circuit Court entered a temporary gag order on March 1, 2013, (R. C148-49), a permanent gag order on March 27, 2013, (R. C68), and then a modified gag order on May 21, 2013, (R. C193-96). Defendant McKee has never claimed that any gag order was ever violated.

In that same motion, Defendant McKee also asked the Circuit Court to order the Will County State's Attorney's Office ("State's Attorney's Office"), the Joliet Police Department, the Will County Adult Detention Center ("Detention Center"), and any other person who had access to the documents to provide affidavits indicating their role, if any,

in the leak. (R. C54) The Circuit Court ordered the defendants' attorneys, the State's Attorney's Office, and the Joliet Police Department to submit affidavits from their employees about their role, if any, in providing the police documents to Mr. Hosey. (R. C148-49)

After Mr. Hosey's Motion to Quash the Subpoena was fully briefed, but before the Circuit Court ruled on that motion, Defendant McKee filed a petition seeking to divest Mr. Hosey of his statutory privilege under 735 ILCS 5/8-901 *et seq.* (R. IC466-80) She attached to the petition affidavits from the defendants' attorneys and employees of the Will County Public Defender's Office ("Public Defender's Office"), the State's Attorney's Office, and the Joliet Police Department.[2] The affidavits of the private defense attorneys aver that neither they, nor any of their employees, disclosed the police documents to Mr. Hosey. The Public Defender's Office, the State's Attorney's Office, and the Joliet Police Department submitted affidavits from employees stating, in essence, that each individual was not Mr. Hosey's source. Defendant McKee did not identify other methods she used to try to discern Mr. Hosey's confidential source.

No evidentiary hearing was held on Defendant McKee's petition. On August 29, 2013, after the petition was fully briefed and argued, the Circuit Court entered an order divesting Mr. Hosey of his statutory reporter's privilege and directing him to provide for an *in camera* inspection copies of all documents received from the source and all documents which would identify the source. (R. C271) If the documents did not identify

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[2] The affidavits and other exhibits to the petition to divest Mr. Hosey's reporter's privilege were filed as part of the record on appeal on a disc as Supplemental Impounded Record EX1. Because it appears that the affidavits were not individually numbered, the affidavits will be referred to by agency or office, rather than by individual affidavit.

the source, the Circuit Court ordered Mr. Hosey to provide an affidavit stating details of how and when these documents were obtained, and who provided the documents to him. (*Id.*) The Court held that it would "determine the specific relevance of the disclosure and further disclose the information only as the Court deems necessary to address the issues in the appropriate manner." (*Id.*) Mr. Hosey respectfully declined to do so, and asked that the Circuit Court hold him in contempt so that he could immediately appeal the order divesting him of his reporter's privilege. (R. ROP 285:21-287:5, 287:15-289:17) The Circuit Court held him in minor direct criminal contempt, fining him $1,000.00 plus costs, and direct civil contempt, fining him $300.00 each day he did not comply with the order, though the Circuit Court orally stayed the daily accumulation of fines pending this appeal. (R. ROP 305:21-24) The Circuit Court also ordered that in the event its order was affirmed on appeal, and Mr. Hosey still failed to comply within 180 days after that affirmance, Mr. Hosey be committed to the Will County Jail and held there until he complies. (R. C277-279)

In explaining its ruling, the Circuit Court initially determined that the reporter's privilege statute applied. Specifically, the Circuit Court found that "Joseph Hosey is a reporter and works for a news medium that are intended to be covered by Illinois law." (R. C267) The Circuit Court also found that "Hosey gave assurances of confidentiality to his source at the time of obtaining this information." (*Id.*)

In concluding that Mr. Hosey should be divested of his reporter's privilege and ordered to disclose his confidential source, the Circuit Court first held "if the source of the information to the reporter is an attorney involved in this matter, [then] the Supreme Court rules relative to discovery have clearly been violated." (*Id.*) Defendant McKee, in

her petition, never alleged or established that a discovery rule had been violated. The Circuit Court added that "[t]he timing of the release of this information to the news media also creates a concern as to whether or not the secrecy of the Grand Jury process was violated," though Defendant McKee never alleged such a violation in her petition and the Circuit Court acknowledged that there was no evidence of such a violation. (R. C268) Next, the Circuit Court, observing that attorneys and employees in various offices submitted affidavits stating that each was not Mr. Hosey's source, concluded that "[u]nder the circumstances of this case . . . all other available sources of obtaining the information have been exhausted," (R. C269), and that "the filing of a false affidavit could lead to charges or court imposed sanctions," (R. C268).[3] Last, the Circuit Court stated that it could not "ignore the fact that there is the potential for financial gains that come from one reporter obtaining this information sooner than other reporters" and that the Circuit "Court can envision circumstances where significant income can result from obtaining information and using that information to author articles, books, plays, screenplays in order to profit from exclusively obtained information." (R. C269-70)

In summarizing its holding, the Circuit Court stated that it recognized "its duty and obligation to protect the First Amendment rights of reporters," but indicated that it "cannot envision where those rights are superior to the fair trial rights of individuals charged by the State with the most serious criminal offenses." (R. C270).

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[3] The Circuit Court also determined that First Assistant State's Attorney Ken Grey "indicated that it was the understanding of his office the Joliet Police Department leaked the reports in this case to the media." (R. C264) However, that assertion was made in an unverified brief filed by Defendant McKee, (R. IC469), but denied in the State's verified pleading, (R. IC92-93). No evidentiary hearing was held on this disputed assertion.

VII.

STANDARD OF REVIEW

This Court should apply a de novo standard of review to all issues in this appeal because the issues are limited to application of the law to undisputed facts. *MidAmerica Bank, FSB v. Charter One Bank, FSB*, 232 Ill.2d 560, 565 (2009); *see also Forest Preserve Dist. of Du Page Cnty. v. First Nat'l Bank of Franklin Park*, 2011 IL 110759, ¶ 24 (applying de novo standard because the appeal raised "purely legal questions without any factual disputes"); *First Nat'l Bank of Ottawa v. Dillinger*, 386 Ill. App. 3d 393, 395 (3d Dist. 2008) (applying de novo standard "[b]ecause this case involves the interpretation of a statute and the application of the statute to undisputed facts"); *People v. Slover*, 323 Ill. App. 3d 620, 623 (4th Dist. 2001) (applying de novo standard to interpretation of Illinois Reporter's Privilege Act). Likewise, a de novo standard applies because the Circuit Court based its ruling on documentary evidence without holding an evidentiary hearing. *Addison Ins. Co. v. Fay*, 232 Ill.2d 446, 453 (2009) ("Without . . . live testimony . . . a more deferential standard of review is not warranted. . . . [W]here the evidence . . . [is] documentary . . . a reviewing court . . . may review the record de novo."); *Townsend v. Sears, Roebuck & Co.*, 227 Ill.2d 147, 154 (2007) (review is de novo "[w]here the circuit court . . . bases its decision on documentary evidence . . . .").

VIII.

ARGUMENT

The Circuit Court erred by circumventing the protections of the reporter's privilege and the Special Witness Doctrine under circumstances never before recognized in Illinois or elsewhere, and in a manner that was far too dismissive of the protections these laws provide to significant and critical interests of the press and the public.

The Illinois Reporter's Privilege Act provides that "[n]o court may compel any person to disclose the source of any information obtained by a reporter except as provided" elsewhere in the Act. 735 ILCS 5/8-901.[4] The privilege evolved "from a common law recognition that the compelled disclosure of a reporter's sources could compromise the news media's First Amendment right to freely gather and disseminate information." *Cukier v. Am. Med. Ass'n*, 259 Ill. App. 3d 159, 163 (1st Dist. 1994) (citing *In re Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act*, 104 Ill.2d 419, 424 (1984)). It protects a critical public interest by "assur[ing] a better informed public [and] allowing reporters to seek the truth without fear that sources of information will be cut off by unnecessary disclosures." *In re Arya*, 226 Ill. App. 3d 848, 852 (4th Dist. 1992) (quoting Governor Ogilvie, who signed the act into law); *Cukier*, 259 Ill. App. 3d at 163 ("The objective of the privilege is 'to preserve the autonomy of the press by allowing reporters to assure their sources of confidentiality, thereby permitting the public to receive complete, unfettered information.'") (quoting *Arya*, 226 Ill. App. 3d at 852).

As a result, an order divesting a reporter of his privilege is to be a "last resort," *Arya*, 226 Ill. App. 3d at 862, and granted only when the applicant has satisfied a stringent burden that Defendant McKee did not come close to reaching. The applicant must identify the specific information sought, its relevancy to the proceeding, and a specific public interest which would be adversely affected if the factual information

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[4] A protected "source" is the person who provided information to a reporter as well as the "means from or through which the news or information was obtained," 735 ILCS 5/8-902(c), such as photographs, police reports, or other materials containing news information, whether confidential or not. *Slover*, 323 Ill. App. 3d at 624.

sought were not disclosed. 735 ILCS 5/8-903-904. Further, a court considering a divestiture application must give "due regard to the nature of the proceedings, the merits of the claim or defense, the adequacy of the remedy otherwise available, if any, the relevancy of the source, and the possibility of establishing by other means that which it is alleged the source requested will tend to prove." 735 ILCS 5/8-906. The applicant also must prove by a preponderance of the evidence that (1) no state or federal secrets are compromised by disclosure of the information requested, (2) all other available sources of information have been exhausted, and (3) disclosure of the information is essential to the protection of the public interest involved. 735 ILCS 5/8-907; *see also People v. Pawlaczyk,* 189 Ill.2d 177, 188 (2000).

The Circuit Court ruling divesting Mr. Hosey of his reporter's privilege erred in several ways. The documents and testimony sought were not remotely relevant to the "merits of the claim or defense" of the underlying criminal case. 735 ILCS 5/8-906. There is no public interest which is "essential" to protect by confiscating Mr. Hosey's files and forcing him to disclose his source. 735 ILCS 5/8-907(2). Defendant McKee's primary argument – that negative publicity implicates her due process rights – is one that is commonly addressed through jury instructions, juror exclusion, or sometimes a change of venue, but never by forcing a reporter to disclose a confidential source. Defendant McKee's secondary arguments were based on speculation about matters collateral to her underlying criminal case. In effect, the Circuit Court improperly accepted Defendant McKee's attempt to force the disclosure of a reporter's confidential source as a means to discover whether or not there may be some collateral matter to explore. The Circuit Court also erred in finding that the burden of exhausting all available alternatives for

discovering the source's identity had been satisfied. Further, the Circuit Court order that Mr. Hosey produce confidential source information and testimony would violate additional protections given to reporters under the common law Special Witness Doctrine because Defendant McKee could not demonstrate that the requested testimony was necessary (much less relevant) to her case.

The Circuit Court effectively ignored these and other considerations required by statute and disregarded applicable caselaw, relying instead on collateral and entirely speculative rationales: that perhaps an attorney violated a discovery rule; or maybe someone violated the secrecy of the Grand Jury process; or potentially an affiant submitted a false affidavit; or one day Mr. Hosey may write a book about this case and earn money off of that effort. No Illinois Court – and to our knowledge no court in any jurisdiction in the country – has ever ordered a reporter to disclose a confidential source, threatening fines and jail if he continues to protect his source, based on speculation about such collateral matters. The Circuit Court erred and should be reversed.

I. The Circuit Court Erred by Divesting Mr. Hosey of His Reporter's Privilege and Ordering Him to Identify His Source.

A. Defendant McKee failed to establish the elements required to divest Mr. Hosey of his reporter's privilege.

1. The identity of Mr. Hosey's source is not relevant to the merits of the underlying criminal case.

The Circuit Court erred by expanding the concept of relevance beyond the underlying criminal case. As a threshold matter, the forced disclosure must actually be relevant to the merits of the underlying proceeding. 735 ILCS 5/8-904 (application shall allege "the specific information sought and its relevancy to the proceedings"); 735 ILCS 5/8-906 (the court "shall have due regard to the nature of the proceedings, the merits of

the claim or defense . . . [and] the relevancy of the source . . . ."). Here, it is not. Even the Circuit Court admitted that the identity of Mr. Hosey's source is "off topic when it comes to focusing on four (4) Defendants charged with Murder," but then claimed it is not off topic when determining collateral matters, in particular, if there have been other "violations of Illinois law or Supreme Court Rules." (R. C270) That concern, however, has nothing to do with the "merits of the claim or defense." 735 ILCS 5/8-906.

Courts in Illinois and elsewhere determine whether the requested source information is relevant to the merits of the underlying proceeding before considering whether other necessary factors have been satisfied in determining whether to order as a "last resort," *In re Arya*, 226 Ill. App. 3d 848, 862 (4th Dist. 1992), the forced disclosure of a reporter's source. When that threshold is not satisfied, courts do not compel that disclosure. Indeed, this is made clear even in the cases relied on by Defendant McKee below. (R. IC475-77)

In *Arya,* a reporter investigating a murder case interviewed and videotaped several witnesses – one of whom told the reporter about a confession supposedly made by someone who had not yet been charged. *Arya*, 226 Ill. App. 3d at 850. The reporter told police officials the name of the uncharged suspect, but refused to disclose his source or produce his notes to a grand jury. *Id.* at 851. Unlike this case, therefore, all parties in *Arya* conceded that the reporter's testimony was directly relevant to an individual's guilt or innocence; thus, the sole question was whether the State had met its burden of proving that it had exhausted all other available resources of information (the court found it had

not). *Id.* at 854.[5] Here, however, the identity of Mr. Hosey's source has no bearing on Defendant McKee's statements to the police or her guilt or innocence of the crime she is charged with.

Defendant McKee also relied on *People v. Pawlaczyk*, 189 Ill.2d 177 (2000). Yet in *Pawlaczyk*, again unlike this case, the reporter's testimony was directly relevant to the critical issue in a grand jury proceeding: whether two local officials had committed perjury in their depositions in a civil libel lawsuit in which the reporter was a defendant. The Illinois Supreme Court held that the allegedly false statements were material and relevant to the separate grand jury proceeding because the reporter had direct knowledge pertaining to the only issue in that proceeding: whether the officials perjured themselves. *Id.* at 193-94. Recognizing the public interest in the effective functioning of the grand jury, the court ordered divestiture of the privilege. Here, by contrast, there is no grand jury proceeding investigating perjury, and Defendant McKee does not and could not suggest that divesting Mr. Hosey's privilege would result in testimony that is directly, or even indirectly, relevant to any claim or defense in the criminal case against her. There is no suggestion that Mr. Hosey has knowledge relevant to the guilt or innocence of Defendant McKee or her co-defendants.

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[5] The Appellate Court's reversal of the Circuit Court's divestiture order despite the clear, direct relevance of the reporter's testimony to the central subject of the investigation (unlike in the instant case) clearly demonstrates how stringent the burden is on an applicant seeking to overcome the reporter's privilege. Although the police had generated thousands of pages of discovery and had spoken with the uncharged suspect, his family and many of his friends and acquaintances, the Appellate Court in *Arya* still ruled that the state had not met its burden of demonstrating that it had exhausted all alternative means of securing the necessary evidence before an order of disclosure might be warranted. *Id.* at 851.

Courts across the country have repeatedly refused to divest reporters of their privilege where a confidential source's identity did not relate to claims or defenses in the underlying case or where disclosure was sought, as here, merely as a means of discovery to determine whether witnesses could be impeached or for other collateral or speculative matters. *Liberty Lobby, Inc. v. Rees*, 111 F.R.D. 19, 22-23 (D.D.C. 1986) (refusing to divest privilege where the disclosure of the confidential source's identity "would go only to a facet of the case and, at most, would involve a collateral matter and result in cumulative evidence undermining the credibility" of a witness); *Dowd v. Calabrese,* 577 F. Supp. 238, 241-42 (D.D.C. 1983) (refusing to divest privilege in defamation case where sources' testimony would provide no information concerning the truth or falsity of allegedly defamatory statements or question of actual malice, but only the general credibility of the defendant); *New York v. Marahan*, 368 N.Y.S.2d 685, 692 (N.Y. Sup. Ct. 1975) (refusing to order disclosure where need was "both tangential and speculative in nature" and rejecting the "attempt to use the reporter's testimony for impeachment purposes on a collateral issue"); *Brown v. Virginia,* 204 S.E.2d 429, 431 (Va. 1974) (holding that newsman's privilege does not yield unless information is material to "any element of a criminal offense," "the defense asserted by defendant," or reduction or mitigation of penalty); *see also Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring) ("[I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation . . . he will have access to the court on a motion to quash and an appropriate protective order may be entered."); *In re Willen,* 55 Cal. Rptr. 2d 245, 248-49 (Cal. App. Ct. 1996) (refusing to compel a reporter to disclose confidential source even in a proceeding to determine how a gag

order was violated because any leaked information could be addressed by means short of ordering a reporter to divulge his source).

Indeed, courts have specifically refused to require a reporter to provide the identity of police officers who were also witnesses where the information sought went only to impeachment and credibility issues. In *Keefe v. City of Minneapolis*, No. 09-2941, 2012 WL 7766299 (D. Minn. May 25, 2012), the petitioner sought to have a reporter identify whether his confidential source was one of five police officers, who had each been deposed and had denied being the source. *Id.* at *2. The court refused to divest the privilege based on the "mere speculation that it may lead to possible impeachment evidence" because the reporter was "neither a party nor a witness to the facts upon which the lawsuit is based." *Id.* at *5; *see also New York v. Monroe*, 317 N.Y.S.2d 1007, 1014 (N.Y. Sup. Ct. 1975) (refusing to require disclosure of possibly inconsistent statements by police officers, who were likely to be prosecution witnesses, because "the inconsistent statements uncovered were not material to the proof of the crimes, the proof of any potential defenses, or to the reduction of the classification or penalties related to the offenses charged").

The Circuit Court erred by failing to apply the statutory requirements and caselaw requiring, as a threshold matter, that the source material requested at least be relevant to the merits of the underlying proceeding.

2. Disclosure of Mr. Hosey's source is not essential to protect Defendant McKee's rights.

Even if Defendant McKee could demonstrate as a threshold matter that the forced disclosure would be relevant to the merits of the underlying case (which she cannot), Defendant McKee would also be required to demonstrate that disclosing Mr. Hosey's

confidential source is "essential" to protect the public interest. 735 ILCS 5/8-907(2). The Circuit Court further erred by accepting Defendant McKee's position that confiscating Mr. Hosey's files and forcing him to disclose his source was somehow "essential" to protect the public interest of her right to a fair trial, and by failing to account for the "adequacy of the remedy otherwise available" to protect that interest. 735 ILCS 5/8-906.

The concern that both Defendant McKee and the Circuit Court overwhelmingly rely on – the impact of pre-trial publicity on her right to a fair trial, (R. IC471-78; C269-70) – has always been addressed through remedies such as jury instructions, careful questioning during voir dire, extra peremptory challenges, or, in a more extreme case, a change of venue, but never by the unprecedented remedy of divesting a reporter's privilege. Even the cases Defendant McKee cited below make clear that concerns raised by criminal defendants about pre-trial publicity are addressed through jury instruction, juror exclusions, or a change of venue. (R. IC472-73) In *none of these cases cited by Defendant McKee* did the Court order or even consider confiscating a reporter's files or divesting his privilege in order to safeguard a defendant's right to a fair trial. *See People v. Sims,* 244 Ill. App. 3d 966, 983-85 (5th Dist. 1993) (upholding conviction where substantial pretrial publicity was adequately addressed and did not violate the defendant's right to a fair trial); *People v. Taylor,* 101 Ill.2d 377, 392-93, 399 (1984) (reversing conviction with direction to grant the defendant's motion for a change of venue to another county); *Irvin v. Dowd,* 366 U.S. 717, 727-29 (1961) (identifying a "pattern of deep and bitter prejudice" impacting defendant's right to a fair trial, but giving state time to correct the deficiency and retry the defendant); *Marshall v. United*

States, 360 U.S. 310, 311-13 (1959) (granting new trial based on the exposure of some jurors during the trial to inadmissible newspaper articles concerning prior convictions).

Defendant McKee tried in her papers below to identify other purported interests, but they are little more than speculation that is insufficient to meet her burden here. She suggested, for example, that someone may be too scared to cooperate in the investigation of this case if the privilege is not divested (without explaining why that is so or why it is relevant even if true), (R. IC472, 474); that divestiture is necessary to scare future leakers from talking with the press in future cases (a goal contrary to the purposes of the Reporter's Privilege), (R. IC474-75, 477); and that compelled disclosure is necessary to preserve the public's trust in government (an unexplained and unsupported argument). (R. IC472, 475, 477-78) Not surprisingly, she did not cite a single case divesting a reporter's privilege based on any such amorphous interests so far from any conceivable relevance to the merits of the case. Even the Circuit Court gave short shrift to these concerns. This Court should as well.

3. Defendant McKee also failed to demonstrate that all other available sources of information have been exhausted.

Defendant McKee also failed to satisfy her burden to demonstrate that all other available sources of information have been exhausted. She submitted affidavits of employees of each of the relevant offices, each of which essentially states that the affiant did not disclose discovery or reports other than as required or requested by the State's Attorney's office. She did not, however, identify any investigation that was ordered or undertaken, cite to any hearings that were held, identify any effort to ascertain if there are other people with access to copies of the relevant documents, or cite anything beyond summary employee affidavits. That is insufficient. *E.g.*, *In re Special Grand Jury*

Investigation of Alleged Violation of the Juvenile Court Act, 104 Ill.2d 419, 427-29 (1984) (reversing trial court's divestiture order due to applicant's failure to demonstrate that he had exhausted all other means of securing the same information from alternative source, and noting that others who possessed the transcripts that had been disclosed had not been questioned and whose questioning could have provided relevant information to the grand jury); *In re Arya,* 226 Ill. App. 3d 848, 861 (4th Dist. 1992) (reversing divestiture order for failure to exhaust all other available sources of information despite extensive police investigation and interviews of the relevant suspects and witnesses).

The statute and Illinois courts have intentionally made this burden a difficult one, reflecting the seriousness with which the legislature and courts treat efforts to force reporters to disclose confidential sources. Indeed, only if the source information is directly relevant to the merits of the underlying proceeding (which it is not here) would most parties have the incentive to undertake the investigative burden required by statute and caselaw. An attempt to subpoena a reporter without truly exhausting alternative sources "is precisely the reverse of that intended by the General Assembly. . . . [T]he statute requires more than a showing of inconvenience to the investigator before a reporter can be compelled to disclose his sources . . . ." *In re Special Grand Jury,* 104 Ill.2d at 428-29 (holding that "at least those of the State's Attorney's staff who had possession of the transcripts should have appeared before the grand jury and testified as to their knowledge of the facts"). "[T]he legislature did not intend to compel reporters to become investigators for . . . anyone . . . . It is *not* sufficient investigation . . . to merely assert that [the] investigation has not revealed the information sought." *Arya,* 226 Ill.

App. 3d at 861 (emphasis in original); *Cukier v. Am. Med. Ass'n*, 259 Ill. App. 3d 159, 165 (1st Dist. 1994) (statute requires a "thorough investigation").

Defendant McKee failed to exhaust all available sources of information. For this reason as well, the Circuit Court's decision should be reversed.

B. The Circuit Court's speculation about collateral matters is no basis to divest Mr. Hosey of his reporter's privilege.

Rather than appropriately evaluating the statutory factors, the Circuit Court instead incorrectly relied on four speculative bases to justify its decision. The Circuit Court's speculations are legally and logically insufficient to support its decision.

First, the Circuit Court posited that "if the source of the information to the reporter is an attorney or a member of the staff of any of the attorneys involved in this matter . . . the Supreme Court rules relative to discovery have clearly been violated." (R. C267) The Circuit Court expressed a concern about a discovery rule which provides that "materials furnished to an attorney pursuant to these rules shall remain in his exclusive custody and be used only for the purpose of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide." Ill. S. Ct. R. 415(c). However, there has been no allegation and no evidence that any lawyer violated a discovery rule. Moreover, no court in Illinois, and to our knowledge no court in any jurisdiction in the country, has compelled a reporter's disclosure of confidential sources based on the possibility that a lawyer violated a discovery rule.

Second, the Circuit Court speculated that perhaps the secrecy of the Grand Jury process may have been violated. (R. C268) Again, there was no allegation and no evidence of such a violation. In any event, the Illinois Supreme Court vigorously applies the reporter's privilege even in cases where the source broke the law. *In re Special*

Grand Jury Investigation of Alleged Violation of the Juvenile Court Act, 104 Ill.2d 419, 428 (1984); *see also New York Times Co. v. United States*, 403 U.S. 713 (1971) (*per curium)* (upholding press rights to publish information obtained from documents stolen by a third party).

Third, the Circuit Court speculated that perhaps one of the affiants may have filed a false affidavit. (R. C268) The Circuit Court – having ordered at Defendant McKee's request that nearly 500 police officers, attorneys, and other employees sign affidavits stating that they did not disclose discovery materials to anyone – now seeks to boot-strap that order into a potential, future collateral proceeding about whether an affiant submitted a false affidavit. No effort was made by the Circuit Court or Defendant McKee to focus the inquiry on individuals who may have some relevance to, or who may testify in, the underlying case. Regardless, a party should not be able to construct a tangential controversy over a confidential source by first requesting affidavits and then claiming a need for privileged, confidential source material in order to verify the accuracy of those affidavits. In any event, courts across the country uphold the reporter's privilege against claims that identifying a confidential source may reflect on a witness's credibility. *E.g.*, *Keefe v. City of Minneapolis*, No. 09-2941, 2012 WL 7766299, at *5 (D. Minn. May 25, 2012) ("The mere possibility of impeachment evidence is an insufficient reason to vitiate the qualified privilege."); *Campbell v. Klevenhagen*, 760 F. Supp. 1206, 1215 (S.D. Tex. 1991) (holding that reporter's privilege does not yield to defendant's right to fair trial where defendant's need was based "on a series of contingencies" including whether the "sources would be called to testify"); *Liberty Lobby, Inc. v. Rees*, 111 F.R.D. 19, 22-23 (D.D.C. 1986) (refusing to divest privilege where the disclosure of the confidential

source's identity "at most, would involve a collateral matter and result in cumulative evidence undermining the credibility" of a witness); *Dowd v. Calabrese*, 577 F. Supp. 238, 241-42 (D.D.C. 1983) (refusing to divest privilege based on plaintiff's "speculations" that sources would contradict defendant's testimony and because sources' testimony "would relate solely to [defendant's] credibility on collateral matters"); *New York v. Marahan*, 368 N.Y.S.2d 685, 692 (N.Y. Sup. Ct. 1975) (refusing to order disclosure of source's identity for the "sole purpose" of impeaching police officer affiants on a search warrant and noting that the "attempt to use the reporter's testimony for impeachment purposes on a collateral issue will entitle the reporter to First Amendment protection"); *Brown v. Virginia*, 204 S.E.2d 429, 431 (Va. 1974) (refusing to require identification of confidential sources because when "the right to impeach the credibility of a prosecution witness . . . collides with the newsman's privilege of confidentiality, the privilege prevails unless the inconsistent statements are material" to the underlying criminal case).

Indeed, courts uphold the privilege barring discovery or testimony from a reporter – even where the source has already been identified – if the discovery relates to impeachment or a witness's credibility rather than the merits of the underlying claims or defenses. *Jimenez v. City of Chicago*, 733 F. Supp. 2d 1268, 1273 (W.D. Wash. 2010) (granting protective order to reporter where the only claimed relevance of discovery was the "impeachment of a third party"); *Concerned Citizens of Belle Haven v. The Belle Haven Club*, No. 3:99CV1467, 2004 WL 3246719, at *2 (D. Conn. Mar. 22, 2004) ("[Defendant's treasurer's] prior statements to [reporter] are inadmissible hearsay, and would only be admissible to impeach him at trial. This is an insufficient reason to vitiate

the privilege."); *Holland v. Centennial Homes, Inc.*, Nos. 3:92–CV–1533–T, 3:92–CV–1534–T, 1993 WL 755590, at *4, *6 (N.D. Tex. Dec. 21, 1993) ("[T]he discovery sought does not go to the heart of any claim or defense" but rather defendants argued that "plaintiffs' recorded statements, not taken under oath, may reveal inconsistencies in their deposition testimony, or that to be given at trial."); *New York v. Monroe*, 370 N.Y.S.2d 1007, 1014 (N.Y. Sup. Ct. 1975) (refusing to divest privilege where defendants sought potentially inconsistent statements of police officer witnesses because the inconsistent statements were "collateral to the issues" in the case); *see also In re Copeland*, 291 B.R. 740, 756 n.3 (Bankr. E.D. Tenn. 2003) ("[A]ttacking a witness's credibility was not what the General Assembly contemplated when it enacted Tennessee's Shield Law . . . .").

Finally, the Circuit Court stated that it "cannot ignore the fact that there is the potential for financial gains that come from one reporter obtaining this information sooner than other reporters" and that reporters may earn "significant income [from] using that information to author articles, books, plays, screenplays in order to profit from exclusively obtained information." (R. C269-70) By focusing on irrelevant, speculative gains that reporters may or may not ever receive from books that may never be written, the Circuit Court lost sight of the true purpose of the reporter's privilege and the vital role it plays in protecting the rights of reporters and the reading public. The privilege exists to "encourage[e] a free press and a well-informed citizenry." *Pawlaczyk*, 189 Ill.2d at 187. As Governor Ogilvie explained upon signing the Reporter's Privilege Act into law: "[This] Act is more than a declaration of fair play for newsmen. It also assures a better informed public, for it allows reporters to seek the truth wherever it is to be found, without fear that their sources of information will be cut off by unnecessary disclosures."

Arya, 226 Ill. App. 3d at 852. The Circuit Court's speculation about the pecuniary interests of reporters is irrelevant.

Although the Circuit Court stated that it "has attempted to review all relevant caselaw" it did not cite that caselaw, but instead referenced an American Law Reports ("ALR") article. (R. C266-67) While an ALR article can provide a useful general overview of a legal topic, or better yet citations to relevant cases, it does not provide the same guidance or authority as statutory text or specific, applicable caselaw. Further, the Circuit Court cited no cases or text from the article itself. It is not surprising that there is no actual caselaw supporting the forced disclosure of a reporter's confidential source under the circumstances of this case. Indeed, the lack of any gag order in place when Mr. Hosey was given reports from his confidential source means that the police records at issue were public records "presumed to be open to inspection or copying." 5 ILCS 140/1.2.[6]

II. The Special Witness Doctrine Also Protects Mr. Hosey from Having to Testify or Otherwise Provide Information About the Identity of His Source.

The Circuit Court's order also should be reversed because the Special Witness Doctrine protects Mr. Hosey from having to testify or otherwise provide information about a variety of matters, including the identity of his source. *People v. Palacio*, 240 Ill.

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[6] Defendant McKee argued below that exemptions to the Illinois Freedom of Information Act bar public bodies from disclosing public records. (R. IC474) That is incorrect. "[E]xemptions do not . . . prohibit the dissemination of information; rather, they merely authorize the withholding of information" ILLINOIS ATTORNEY GENERAL, A GUIDE TO THE ILLINOIS FREEDOM OF INFORMATION ACT ("Guide") 13 (2004) (citing *Roehrborn v. Lambert,* 277 Ill. App. 3d 181, 186 (1st Dist. 1995), *appeal denied*, 166 Ill.2d 544 ("The purpose of the Act is to ensure disclosure of information, not to protect information from disclosure. . . . The exemptions cannot be read to prohibit dissemination of such information, but rather are simply cases where disclosure is not required."). Excerpts from the Guide are included in the Appendix at A-28-29.

App. 3d 1078, 1101-02 (4th Dist. 1993). The Special Witness Doctrine began as a "common law doctrine [that] developed nationwide [requiring] trial courts to treat efforts by criminal defendants to subpoena prosecutors and judges differently than those courts would treat defense subpoenas of other witnesses." *Id.* at 1094; *see also People v. Ernest,* 141 Ill.2d 412, 422 (1990) (rejecting defendant's attempt to subpoena trial judge because it "disparaged the court's authority and dignity").

In *Palacio,* the Illinois Appellate Court applied this doctrine to protect reporters to safeguard against "an implicit threat that if the reporter speaks or writes something about the attorney's client or case, the attorneys will find some ground to subpoena the reporter to force him to testify under oath on the witness stand. *Such an outcome is intolerable in a free society that depends on a vigorous, untrammeled press, and we hold that courts have a duty not to permit their process – which, after all, a subpoena is – to be abused* . . . ." *Palacio*, 240 Ill. App. 3d at 1101-02 (emphasis added).

A party seeking to force a reporter to testify over the reporter's objection must satisfy three requirements. First, the party subpoenaing the reporter must specifically state the testimony that the party expects to elicit from the reporter. Second, that party must specifically state why that testimony is not only relevant, but *necessary*, to the party's case. Third, that party must specifically state the efforts that the party made to secure the same evidence through alternative means. *Id.* at 1102. The Circuit Court failed to address the Special Witness Doctrine in its order, much less find the requirements to overcome it had been met, despite ordering the production of files and conditionally ordering Mr. Hosey to testify by affidavit about the identity of and circumstances surrounding his source. Defendant McKee did not even attempt to

demonstrate that the disclosure was "necessary" to her case. As explained above, the disclosure is neither relevant nor necessary and, even if it were relevant and necessary, Defendant McKee failed to demonstrate adequate efforts to secure the information from sources other than a reporter.

The Special Witness Doctrine prevents this kind of forced testimony from a reporter and, as such, provides a separate basis for reversing the Circuit Court's order.

III. Mr. Hosey's Good Faith Warrants Vacating the Contempt Order.

Mr. Hosey requests that this Court vacate the fines entered against him as he disobeyed the Circuit Court's discovery order in good faith to test the order on appeal. "The proper procedure to test on appeal a circuit court's discovery order is for the contemnor to request the trial court to enter a citation of contempt." *In re Estate of Rosinski*, 2012 IL App (3d) 110942, at ¶ 20 (quoting *Dufour v. Mobile Oil Corp.*, 301 Ill. App. 3d 156, 162 (1st Dist. 1998)). Mr. Hosey was not disrespectful to the Circuit Court and refused in good faith to comply with the order so that he could test the order on appeal. In these circumstances, this Court should direct the Circuit Court to vacate the contempt order and the fines against Mr. Hosey. *See Dufour*, 301 Ill. App. 3d at 162-63; *In re Marriage of Nettleton*, 348 Ill. App. 3d 961, 971-72 (2d Dist. 2004).

IX.

CONCLUSION

Respondent Joseph Hosey respectfully requests that this Court:

a. reverse the Circuit Court's order divesting Mr. Hosey of his reporter's privilege, compelling him to produce his files, and compelling him to identify his source,

b. vacate the Circuit Court's order holding Mr. Hosey in civil and criminal contempt,

c. vacate the fines imposed against Mr. Hosey, and

d. any other relief this Court considers just.

Dated: March 14, 2014

Respectfully submitted,

JOSEPH HOSEY

By: _____
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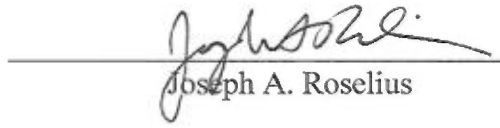
No. 3-13-0696

IN THE ILLINOIS APPELLATE COURT
THIRD JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff, v. BETHANY MCKEE, Defendant-Appellee, and JOSEPH HOSEY, Respondent-Appellant.	Appeal from the Circuit Court of Will County, Illinois; Twelfth Judicial Circuit; Trial Judge Gerald R. Kinney; Notice of Appeal: Sept. 20, 2013; Date of Appealable Order: Sept. 20, 2013; Jurisdiction Conferred Upon Illinois Appellate Court Pursuant to Sup. Ct. R. 304(b)(5).

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 26 pages.



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NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Joseph A. Roselius, an attorney, certify that I caused nine copies of **Respondent-Appellant Joseph Hosey's Opening Brief** and the **Appendix to Brief of Respondent-Appellant Joseph Hosey** to be filed with the Clerk of the Illinois Appellate Court, Third Judicial District, Illinois, by hand delivery on March 14, 2014:

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