APPEAL NO. 3-13-0696

IN THE APPELLATE COURT OF THE STATE OF ILLINOIS
THIRD DISTRICT COURT, OTTAWA, ILLINOIS

THE PEOPLE OF THE STATE, OF ILLINOIS	)	Appeal from the 12th Circuit Court
	)	of Will County, Joliet, Illinois
	)	Circuit Court No. 13 CF 100
Plaintiff-Appellee,	)	Date of Notice of Appeal: 9/20/13
	)	The Honorable Gerald Kinney
vs.	)	Judge Presiding
	)	
BETHANY MCKEE,	)	Felony (x)
	)	In custody (x)
Defendant-Appellee	)	
	)	
And	)	
	)	
JOSEPH HOSEY,	)	
	)	
Subpoenaed Party-Appellant	)	

BRIEF FOR THE DEFENDANT-APPELLEE BETHANY MCKEE

Counsel for Defendant-Appellant

Neil G. Patel A.R.D.C.# 6290421
Chuck Bretz & Associates, P.C.
58 North Chicago Street, 2nd Floor
Joliet, Illinois 60432
(815) 740-1545

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITES

1. **The standard of review regarding the trial court's order of divesture is whether or not it was against the manifest weight of the evidence.**

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735 ILCS 5/8-904 7

735 ILCS 5/8-905 7

735 ILCS 5/8-906 7

735 ILCS 5/8-907 7

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735 ILCS 5/8-906 20

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ISSUES PRESENTED

McKee established to the trial court that the identity of Hosey's source is relevant to the proceedings in which she is involved.

"McKee established to the trial court that disclosure of Hosey's source is essential to protect specific public interests that would be adversely affected if the factual information sought were not disclosed."

"McKee established to the trial court that she exhausted all available sources of information before seeking divesture of Hosey's privilege."

"The trial court did not engage in speculation regarding collateral matters."

"The requirements for the Special Witness Doctrine have been met."

"Hosey's good faith does not warrant an order that vacates the contempt petition."

"Any presumption that police reports are available through FOIA requests is overcome by the facts of this case."

"The Amicus in this case overstate the effects of divesture."

"The State has waived any rights to be a party to this appeal."

"The State lacks standing to be party in this appeal."

"The State's arguments do not support the Court overturning the trial court's findings."

STATEMENT OF FACTS

Those additional facts necessary for an understanding of the issues raised on this appeal will be included, together with the appropriate record references, in the argument portion of this brief.

ARGUMENT

1. The standard of review regarding the trial court's order of divesture is whether or not it was against the manifest weight of the evidence.

A party seeking to divest a reporter of his privilege must comply with the requirements of the Illinois Reporter's Privilege Act. 735 ILCS 5/901 *et al.* The party seeking divesture must meet its burden by a preponderance of the evidence. 735 ILCS 5/8-905; People v. Pawlaczyk, 189 Ill. 2d 177, 188 (2000). The standard of review of the lower court's ruling on an application to divest privilege is if the ruling was against the manifest weight of the evidence. Pawlaczyk at 188. ("We will disturb the lower court's findings under the statute only if they are against the manifest weight of the evidence."); In re Arya, 226 Ill. App. 3d 848, 854 (4th Dist. 1992) ("Likewise, we cannot reverse the trial court's factual findings on appeal unless they are against the manifest weight of the evidence."). *See also* In re Special Grand Jury Investigation of Alleged Violation of Juvenile Court Act, 104 Ill. 2d 419, 424-429 (1984). Furthermore, when the matter is civil in nature and the findings need to be supported by a preponderance of the evidence, the circuit court's finding will not be reversed unless it is contrary to the manifest weight of the evidence." Best v. Best, 223 Ill. 2d 342, 349 (2006).

In the case at bar, the trial court granted McKee's petition to divest Hosey of his privilege. (C263-272). The trial court held Hosey in direct criminal and direct civil contempt of court. (C277-279). There are three seminal cases in Illinois regarding an application of the Illinois Reporter's Privilege Act. Of the three, two explicitly state that the standard of review is if the trial court's decision was against the manifest weight of the evidence. Pawlaczyk at 188, In re Arya at 854. The remaining case, In re Special Grand Jury Investigation of Alleged Violation of Juvenile Court Act, suggests the same

standard of review. In re Special Grand Jury Investigation of Alleged Violation of Juvenile Court Act, 104 Ill. 2d 419, 424-429 (1984).[1] Thus, in this case, based on the binding precedent regarding the Illinois Reporter's Privilege Act and the fact that the burden of proof is a preponderance of the evidence standard, this Court overturn the trial court's ruling only if it is against the manifest weight of the evidence.

Hosey argues that the standard of review is *de novo*. (Respondent's br. at 8). First, this is not the standard that has been consistently applied in cases involving applications to divest a reporter's privilege. Hosey further argues that the standard of review is *de novo* due to application of the law to undisputed facts, and cites to various cases in support of his position. (Respondent's br. at 8) However, Hosey's argument is not supported by the record or other portions of his brief. For example, Hosey states that McKee did not identify other methods used to try to discern Hosey's source. (Respondent's br. at 5, 17). Yet the record shows various avenues that McKee undertook various efforts to discover the leak. (IC475-476, IC521, R77-78, R88, R215-221). Furthermore, in McKee's application to divest, she referred the trial court to earlier efforts made by the State in discovering the leak. (IC521, R81-82, R95). The trial court considered all these matters in granting divesture in this case. (C264, C269).[2] Hosey argues that McKee never alleged a discovery violation. (Respondent's br. at 7, 19). However, discovery violations were alleged and argued in the application to divest.

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[1] Though the standard of review is not explicitly stated in the opinion, the Court does refer to the preponderance standard. In re Special Grand Jury at 426. The language of the opinion, in reversing the trial court's ruling which granted divesture, suggests the standard of against the manifest weight of the evidence. Id at 428. ("...we simply cannot agree with the circuit court that all other available sources of information have been exhausted as the statute require.")

[2] The trial court specifically stated that "Under the facts and circumstances of this case, the Court finds....." (C269).

(IC474, IC508, IC515, R209-212). Hosey also disputes the statements of First Assistant State's Attorney Ken Grey. (Respondent's br. at 7). Hosey also disputes that McKee has an essential public interest in this case. (Respondent's br. 15-17). Based on this and more, the facts are clearly in dispute. As such, the *de novo* standard should not be applied since the facts in this case are in dispute.

Hosey cites to Slover to suggest that a *de novo* standard is to be applied to the Illinois Reporter's Privilege Act. In Slover, the defendant subpoenaed a photographer to obtain unpublished photographs. People v. Slover, 323 Ill. App. 3d 620, 622 (4th Dist. 2001). The photographer claimed privilege under the Illinois Reporter's Privilege Act. Id. The trial court refused to find privilege and eventually held the photographer in contempt. Id. at 622-623. The only issue for appeal was if the photographer qualified as a "reporter" and whether the photographs were a "source of information" as defined by the Illinois Reporter's Privilege Act. Slover at 623. Thus, the issue was one of statutory construction and, accordingly "[s]tatutory construction is a matter of law and is considered *de novo*". Id. Clearly, the issue in this case is not one of statutory construction. There is no dispute as to Hosey's ability to claim a privilege. Second, in the case at bar, unlike Slover, the party seeking privileged information filed an application to divest. Id. at 625. ("We remand for the trial court to allow defendants to file an application to divest the privilege, pursuant to section 8–903(a)...if they so desire".) Thus, the issues before this Court are entirely dissimilar. Therefore, Slover does not support applying the *de novo* standard.

Hosey finally argues that the standard of review is *de novo* because the trial court based its ruling on documentary evidence without holding an evidentiary hearing. (Respondent's br. at 8). Hosey cites to Addison Ins. Co. and Townsend, in support of this

position. However, neither of those cases is applicable to the case at bar. First, neither case deals with the Illinois Reporter's Privilege Act.[3] Second, per the language in Addison Ins. Co., a *de novo* review is not required when a trial court bases its ruling on documentary evidence. Addison Ins. Co. v. Fay, 232 Ill. 2d 446, 453 (2009) ("...a reviewing court is not bound by the trial court's findings and **may** review the record *de novo.*) (emphasis added). Thus, this Court, even if it agrees that the trial court only based its ruling on documentary evidence, which it did not, it is not required to review this matter *de novo*. It should follow the precedent set in In re Arya and Pawlaczyk, and set aside the trial court's order only if it was against the manifest weight of the evidence.

The Court held in Townsend that regardless of the factual issues raised at the trial level, the issue of the appeal, choice-of-law in a conflicts of law case, "...is a matter of law rather than fact and one that is more properly left to the judge". Townsend v. Sears, Roebuck & Co., 227 Ill. 2d 147, 154 (2007) ("Because these issues involve the selection, interpretation, and application of legal precepts, review is *de novo*"). Thus, Townsend is similar to Slover, and not applicable to this case.

Second, there is nothing that suggests that the trial court relied **exclusively** on documentary evidence. This was an issue that the Court considered in Addison Ins. Co. in arriving at its opinion. Addison Ins. Co. at 452. ("Nothing within the appellate court's opinion in either case indicates that the trial court relied exclusively on documentary

[3] Townsend is a result of an interlocutory appeal dealing with a choice-of-law issue in a products liability case. Townsend v. Sears, Roebuck & Co., 227 Ill. 2d 147, 152 (2007). Addison Ins. Co. involves an appeal where the Court decided if injuries to victims constitute a single or multiple occurrences under the terms of the plaintiff's insurance policy. Addison Ins. Co. v. Fay, 232 Ill. 2d 446, (2009).

evidence.") In fact, the trial court's ruling suggests the opposite. The trial court apparently found Mr. Bretz credible when regarding his representations at to the hallway conversation with Ken Grey. (C246). The trial court also considered all the facts and circumstances of this case finding the issues of exhaustion. (C269). It is noteworthy that McKee specifically requested an evidentiary hearing as it related to the leak, which was denied. (C92). Hosey never requested an evidentiary hearing regarding the application, nor did he raise any objection that an evidentiary hearing was not conducted in the matter. Thus, should the Court consider the lack of an evidentiary hearing as an issue worthy of consideration, it should be noted that it is McKee, not Hosey, that is prejudiced due to not being able to address this at the trial level to create the appropriate record. Any failure to hold an evidentiary hearing should be considered waived for this appeal. People v. Knight, 75 Ill.2d 291, 300 (1979).

Finally, even if the Court finds that the trial court relied exclusively on documentary evidence, the standard of review is still whether the trial court's ruling was against the manifest weight of the evidence. In Pawlaczyk, the same procedure to divest a reporter's privilege was used in the case at bar. Pawlaczyk at 183-85. There is nothing to suggest the Pawlaczyk court considered if there was an evidentiary hearing at the trial level, what testimony should or should not have been considered, or the method by which the special prosecutor met his burden of proof at the trial level. Despite this, the Court reviewed the lower court's findings and held they were not against the manifest weight of the evidence. Pawlaczyk at 188, 199.

As stated above, the standard of review in this matter is whether the trial court's ruling was against the manifest weight of the evidence. The cases which this Court will

likely rely upon in rendering its decision all have the same standard of review. Hosey is arguing for a change in the law that is not supported by the facts of this case or by the well-established law regarding the Illinois Reporter's Privilege Act.

A finding that the requirements of the Special Witness Doctrine have been met will not be set aside absent an abuse of discretion. People v. Palacio, 240 Ill. App. 3d 1078, 1102 (4th Dist. 1993) ("...we conclude that the balancing of these factors should be left to the sound discretion of the trial court. Further, a court of review ought not overturn the trial court's determination on this issue absent an abuse of that discretion.").

Finally, Hosey appeals the contempt findings. "On appeal, the standard of review for direct criminal contempt is whether there is sufficient evidence to support the finding of contempt and whether the judge considered facts outside of the judge's personal knowledge." People v. Simac, 161 Ill. 2d 297, 306 (1994). Clearly, this is a manifest weight of the evidence standard. The standard of review for direct civil contempt is that "a reviewing court will not disturb the finding unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion". In re Marriage of Logston, 103 Ill. 2d 266, 286-87 (1984).

In summation, the standard of review for this appeal is not *de novo*. The standard of review for the divesture application is if the trial court's ruling will be set aside only if it was against the manifest weight of the evidence. Regarding the Special Witness Doctrine, the Court must find that the trial court abused its discretion. Finally, the contempt charges should be set aside only if such a finding was against the manifest weight of the evidence or was an abuse of discretion.

2. **The trial court did not err when granting McKee's Petition to Divest Hosey of his Reporter's Privilege.**

A reporter may be divested of the privilege only by the successful completion of a multistep process as required by 735 ILCS 5/8-903 – 735 ILCS 5/8-907. To divest privilege, McKee was required to allege the name of the reporter and of the news medium, the specific information sought, its relevancy to the proceedings, and that a specific public interest would be adversely affected if the factual information sought were not disclosed. 735 ILCS 5/8-904. McKee was required to prove, by a preponderance of the evidence, that no state or federal secrets are compromised by disclosure, that all other available sources of information have been exhausted, and that disclosure of the information is essential to the protection of the public interest involved. 735 ILCS 5/8-907. In arriving at its decision, the trial court shall consider the nature of the proceedings, the merits of the claim or defense, the adequacy of remedies otherwise available, if any, the relevancy of the source, and whether alternative means of proof are available. 735 ILCS 5/8-906.

In reviewing Hosey's brief, it is clear that he is only raising a few issues for this appeal. There can be no dispute that McKee properly identified the name of the reporter and of the news medium and the specific information sought. (IC407). Furthermore, there is no dispute that any state or federal secrets would be compromised by disclosure.

The trial court's ruling granting divesture was not against the manifest weight of the evidence. Disclosure of the source is relevant to the proceedings that McKee is facing. Disclosure of the source is essential to protecting specific public interests and failing to disclose would adversely affect those interests. Finally, the trial court did not err in finding that McKee exhausted all available sources of information before seeking

divesture. Hosey argues that there is no relevance, there is no public interest, and therefore no protection of such interest, and that McKee did not exhaust all available sources of information. Hosey focuses on very limited areas of McKee's application, ignores the rest, and fails to address the concerns of both McKee and the trial court. Ultimately, the trial court's ruling was the correct one - for while the rights under the First Amendment are compelling, in this instance, where there has been a total leak of McKee's police reports, those First Amendment rights must give way to McKee's own constitutional rights to a fair trial and to due process.

a. McKee established to the trial court that the identity of Hosey's source is relevant to the proceedings in which she is involved.

Disclosure of Hosey's source is relevant to the proceedings in which McKee is involved. 735 ILCS 5/8-904 requires only a showing that the information requested is relevant to the proceedings. 735 ILCS 5/8-904, Pawlaczyk at 193. The "proceeding[s]" in which relevancy must be proved is defined in 735 ILCS 5/8-903(a). "...The application for divestiture shall be filed in the circuit court serving the county hearing the * * * proceeding in which the information is sought." Pawlaczyk at 193. "A fact is 'relevant' if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Id.

In Pawlaczyk, a special prosecutor impaneled a grand jury to investigate alleged criminal conduct of a town's mayor and commissioner. Id. at 183. As part of his investigation, he sought to divest two reporters of their privilege with the circuit court. Id. at 184. The defendants in Pawlaczyk argued that the proceedings were a libel suit, not the grand jury proceeding, and that perjury were irrelevant since any perjured statements would not sustain a perjury charge. Id. at 192-193. The Court held that the "proceedings"

which defined the relevant scope of the inquiry was the special grand jury proceedings. Id. at 193. The Court further held that:

> The State must also demonstrate the materiality of the supposedly perjurious statement or statements to the claims alleged in the Hurst case. However, whether the State can prove that element of a perjury charge is not dispositive of this court's inquiry in the instant matter. It is sufficient if the privileged material is relevant to a "fact of consequence" to the perjury allegations. By its materiality to the question of whether Brede and Cook testified truthfully or falsely at deposition, the privileged information is relevant to a fact of consequence in the "proceedings" in which the proposition arose. Id. at 194-195 (internal citations omitted).

In applying the above to the instant case, we see the following: the proceeding in this case is a criminal case, and any fact that is of consequence for the criminal case is deemed relevant. While evidence of guilt or innocence is relevant to a criminal proceeding, such evidence is not exclusive to what is relevant in the case. It is relevant to know if the State violated a person's Due Process rights, whether the Illinois Supreme Court Rules regarding discovery have been complied with, or if an attorney is acting within his ethical confines. If it was not relevant, there would never be any litigation regarding Due Process violations, there would be not need to prescribe rules for discovery, and there would be no need for Rules of Professional Conduct. By analogy, giving a person his Miranda warnings is not relevant to an element of a criminal charge, but it is relevant to the case itself, since no confession can be admitted if it was in violation of Miranda. McKee alleged and argued many different issues showing why the source was relevant. (IC472-475, IC508-509, IC513, IC519, R224, R265-267). This case involves an unprecedented leak of police and toxicology reports to the press. (IC468-469, Exhibits A-F). McKee seeks to discover which person leaked these materials. If the person is a state actor, the person violated McKee's Due Process Rights. If the person is employed or involved in the prosecution or defense of McKee, the person violated the

Illinois Rules of Professional Conduct and Illinois Supreme Court Rules regarding criminal discovery. The person who leaked this material engaged in unnecessary and damaging pre-trial publicity. Who violated these rules or McKee's Due Process rights is absolutely relevant to the proceedings in which she is involved.

The issue in In re Special Grand Jury was who leaked confidential juvenile transcripts and whether or not a reporter's privilege could be divested to find out who leaked said transcripts. In re Special Grand Jury at 423-24. Per the Juvenile Court Act, such records are confidential. 705 ILCS 405/1 *et. al*. The issue in In re Special Grand Jury was ultimately whether the State exhausted all available sources before seeking divesture. In re Special Grand Jury at 425. However, the Court was not concerned with the relevancy of the source, and for good reason. In that matter, just like the one here, the relevancy is obvious. Such a leak is in clear violation of the law and accepted practices in criminal cases.

Furthermore, the relevancy is established by the history of the case itself. The trial court heard McKee's Motion for a Gag Order, To Seal Court Records, and for Other Relief, heard representations from both parties regarding the leak, and ruled what relief should follow. (C49-64, R75-100). The parties acted in reliance on the relief granted, which shed no further light on the identity of the source. Accordingly, in reference to McKee's application to divest, the trial court has an interest in ensuring that its orders were complied with, both candidly and accurately.

The trial court made specific findings as to the relevancy of the source. First, the trial court said that if the source was an attorney or was a member of the staff of any attorney involved in this case, the Supreme Court rules relative to discovery were

violated. (C267). Secondly, the trial court discussed the timing of the leak and issues relating to the secrecy of the Grand Jury. (C268). It is worth noting that McKee was indicted on this matter on January 31, 2013. A Superseding Bill of Indictment was filed on April 25, 2013. The articles came out in between those dates; thus the trial court's concerns are absolutely justified. The trial court again referred to these issues again in finding relevancy. (C270). The trial court further stated that the inquiry is not off-topic when there have been violations of Illinois law and Supreme Court rules, and that the source of the leak would be an issue for appeal. (C270).

The trial court's findings are not against the manifest weight of the evidence. When considering the nature of the leak, the history of the case, and issues involved in criminal cases, and the simple fact that this was an unprecedented and damaging leak of material, the relevancy of the identity of the source is obvious. The trial court specifically said "[t]he issue of relevancy is not essentially limited to relevancy for trial issues". (C270) This is clearly in line with the standards of Pawlaczyk, in that the proceedings define the scope of relevancy. This case, which is a proceeding of a murder charge, has a scope beyond simply "guilty or not guilty".

The trial court also made note of Illinois Supreme Court Rule 415(c) and 415(g) along with the comments. (C266) Discovery was ordered in this case pursuant to Illinois Supreme Court Rules. (C288-289). These rules create an obligation to keep discovery material confidential. It is well established the trial court can enforce discovery rules and violations. Illinois Supreme Court Rule 415(g). Also, the trial court has inherent powers to punish contempt. "Such power is essential to the maintenance of their authority and the administration of judicial powers." Simac at 305. Additionally, a trial judge has a duty to

protect defendants from the inherently prejudicial publicity. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

In Farr, a reporter obtained materials that were covered by a gag order. Farr v. Superior Court of Los Angeles, 22 Cal.App.3d 60, 64-65 (2nd Dist 1971). The reporter confirmed he obtained the materials from two of the six attorneys on the case as well as from another, undisclosed source. Id. at 65-66. He would not provide the name of the persons who provided the material. Id. Among the issues in the case included if the trial court had any duty or obligation to discover who leaked the material. Id. at 66-69. The Court held that "…the court's power does not end with the right to control its ministerial officer and all other persons in any manner connected with a judicial proceeding, but also in the furtherance of justice it may compel the attendance of persons to testify in an action or proceeding pending therein". Id. at 67. The Court further held that the trial judge could not blind himself to the possible issues for appeal. Id. at 68. It also held that if the prosecution or defense leaked the material, this would merit serious consideration for appeal. Id. Such an inquiry was necessary to control its own officers, to perfect a record for appeal, and protect the integrity of the very process of the prosecution and defense of the principal case. Farr at 68.

This echoes the concerns the trial court had in the case at bar. The fact pattern of Farr closely matches that of the case at bar. Here, the trial court has inherent authority to enforce its "authority and administration" along with the Supreme Court Rules. That authority and the same concerns voiced by the court in Farr are present in this case, and thus, support the relevancy of McKee's application. This is further supported by the

limitations on discovery and the court's duty to protect McKee from prejudicial pre-trial publicity.

As it related to the privilege statute, the court in Farr found that without the ability to compel the reporter to reveal which attorney leaked the material, the trial court lacked the power to discipline the attorneys who did so, not only for their violations of the court order but also for their misstatements. Id. at 70. It further held that to apply the privilege would unconstitutionally interfere with the court's power and duties. Id. at 71. As it related to freedom of the press issues, the court held that there was an undeniable need for disclosure to ensure the court is not thwarted in its efforts to enforce orders against pretrial publicity. Id. at 72. Despite the need for public access in criminal trials, the public can be denied access to court controllable sources. Id. Based on Sheppard, if prejudicial material is to be kept away from the media, than no public purpose is frustrated by compelling a newsman to reveal his source. Id. at 72-73. Again, as in this case, this supports the relevancy of McKee's petition along with demonstrating a specific public interest and protecting that interest.

Hosey's arguments against relevancy are not supported. (Hosey's br. at 12). To suggest that violations of court rules have nothing to do with the merits of the case or defense is shortsighted. The Court has broad discretion to enforce the Supreme Court Rules regarding discovery and has the same discretion in crafting a sanction for violating those rules, including suppression of evidence, a sanction towards the violating party, and dismissal of the charges. These issues and those raised above are critical to any claim or defense in McKee's case.

Hosey cites to In re Arya and Pawlaczyk in support of his position regarding relevancy and merits of the claim or defense. (Hosey's br. at 12-13). First, the issue in In re Arya was exhaustion, not relevancy of the source, and is not applicable to this case. In re Arya at 854. Second, nothing in Pawlaczyk limits its application to grand jury proceedings. Finally, and as argued above and articulated by the trial court, statements to police and guilt or innocence are not the only concerns, claims, or defenses one has when facing a murder charge.

Hosey also cites to a series of cases suggesting that divesture should not be granted when divesture relates to impeachment issues or collateral matters. (Hosey's, br. 14-15). Most of these cases were cited to by Hosey at the trial level and distinguished by McKee in her pleadings and arguments, and McKee would incorporate those arguments into this brief. (IC508-523, R227-232). These cases are irrelevant when considering the trial court's order in granting divesture. None involve the Illinois Reporter's Privilege Act. In fact, some involve an absolute privilege statute, as opposed to a qualified one like in Illinois. Hosey also cites to Branzburg, which held and has been consistently affirmed that "the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or **criminal trial**..."(emphasis added) Branzburg v. Hayes, 408 U.S. 665, 690-91 (1972).

Keefe v. City of Minneapolis is also easily distinguishable from this case. First, the litigant in Keefe acknowledged that there were other sources of information which he did not investigate. Keefe v. City of Minneapolis, 2012 U.S. Dist. Lexis 187017, 19 (D.

Minn. 2012). Second, Keefe is civil in nature, not criminal as is the case at bar. Third, the case at bar deals with issues beyond impeachment, unlike Keefe.

Most striking is that none of these cases deal with a fact pattern remotely similar to this case. They also fail to address the concerns raised by the trial court or the specific relevancy it found. From the very beginning of this case, the trial court has expressed concerns about the leak; concerns which were echoed by all parties. (C4-15). The trial court is in the best position to decide what is "relevant" to the instance proceedings. This is clearly why the standard of review is if the trial court's ruling was against the manifest weight of the evidence. The trial court has broad authority to ensure orders are complied with, to hold accountable those who engage in contemptuous conduct, and to ensure that McKee's rights are protected. Thus, the trial court did not err in finding that revealing the source in this case was relevant to the proceedings and Hosey's claim of error should be denied.

b. McKee established to the trial court that disclosure of Hosey's source is essential to protect specific public interests that would be adversely affected if the factual information sought were not disclosed.

In a petition to divest privilege, McKee was required to allege a specific public interest which would be adversely affected if the factual information sought were not disclosed. 735 ILCS 5/8-904. McKee was required to prove, by a preponderance of the evidence, that disclosure of the information is essential to the protection of the public interest involved. 735 ILCS 5/8-907. In arriving at its decision regarding divesture, the trial court shall consider the nature of the proceedings, the merits of the claim or defense, the adequacy of remedies otherwise available, if any, the relevancy of the source, and whether alternative means of proof are available. 735 ILCS 5/8-906.

In In re Arya, the reporter at issue conceded there was a specific public interest and that the sought after information was essential to protect the public interest involved. In re Arya at 854. In re Arya involved the State seeking divesture of a reporter's privilege where the reporter conducted his own investigation into a robbery. Id. at 850-851. It seems apparent that the interests present in In re Arya are the same as the ones present in Branzburg - the public has an interest in effective law enforcement and criminal trials. These interests supersede the newsman's privilege. Branzburg at 690-91. In In re Special Grand Jury, the Court held that "we have little difficulty concluding that a compelling public interest will be served by ascertaining the person or persons who violated the confidentiality provisions of the Juvenile Court Act". In re Special Grand Jury at 452. Again, the interest is obvious; violations of confidentiality provisions undermine the very purpose of such provisions, which is to protect the rights of those people whose confidentiality is to be maintained. The Court in Pawlaczyk found that grand jury proceedings constitute a "compelling interest" that outweighs the public's interest in the reporter-source privilege. Pawlaczyk at 197.

"No right ranks higher than the right of the accused to a fair trial." Press-Enter. Co. v. Superior Court of California, Riverside Cnty., 464 U.S. 501, 508 (1984) (discussing a trial court's order to not release transcripts of *voir dire).* It is well settled that extensive pre-trial publicity can undermine the sanctity of a trial. People v. Sims, 244 Ill. App. 3d 966 (5th Dist. 1993). A person facing criminal charges is entitled to Due Process under the both the U.S. and Illinois Constitutions. Clearly, McKee has a right to a fair trial. Those rights in this case were affected by a person, involved in the prosecution or defense in this case, who engaged in overt actions designed to undermine these rights.

The individual who leaked these materials had a clear mandate not to disclose such materials and discovery of that individual will serve to protect those rights.

Police reports are confidential. Any material furnished as part of discovery must be kept in exclusive custody, and is further subject to order of court. Illinois Supreme Court Rule 415(c). The purpose of this rule is that if the matters disclosed were publicly available, "the administration of criminal justice would likely be prejudiced". See Paragraph C of Illinois Supreme Court Rule 415. The rule is equally binding on the State. Id. As discussed below in greater detail, police reports are generally exempted from inspection and copying under the Illinois Freedom of Information Act. Additionally, attorneys have an ethical duty to avoid pre-trial publicity, thus making a disclosure of reports an ethical violation. IL R P C 3.6 & IL R P C 3.8.

Based of the ruling in In re Special Grand Jury, if a specific public interest exists when there is a release of confidential transcripts, a specific public interest exists in the case at bar when police reports are leaked. This is especially true when considering the Illinois Supreme Court Rules regarding discovery, Illinois F.O.I.A limitations, the Rules of Professional Conduct, and McKee's Due Process rights. These rights would be protected through discovering the actor who violated McKee's rights, why they engaged such action, and what sanction should follow. This is precisely the interests that were implicated in Farr.

The public interests involved in this case can be seen in a variety of cases. McKee would rely on Branzburg, where the public's interest in effective law enforcement is greater than a reporter's privilege. *See also* Brown v. Virginia, 204 S.E.2d. 429, 431 (Va. 1974) (Finding that those accused of a crime are entitled to no less dignity than the

government and that the fact that privilege will yield to law enforcement is no superior than the privilege yield to a defendant's due process rights); Sheppard at 349-51 ("...no one be punished for a crime without a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power"). These cases further support McKee's position – she has a right to a fair trial, to be prosecuted fairly, to be defended fairly, and to avoid unnecessary publicly for her case.

In this case, the trial court ruled that the rights under the First Amendment are not superior to the fair trial rights of a defendant charged with the most serious of criminal offenses. (C270). It further ruled that the source of the leak would be an issue for appeal or in a post-conviction petition. (C270). The purpose of an appeal in criminal cases includes protecting defendants against prejudicial legal error in the proceedings leading to conviction. This is also a mandate the trial court follows as well; to protect the fair trial rights of defendants. Clearly, the trial court agreed with McKee and the above case law in finding essential public interests and protecting such interests. The trial court, in discussing discovery rules and Grand Jury secrecy, also found essential public interests and protecting such interests. (C267-268). If the Illinois Supreme Court promulgated a rule regarding keeping discovery confidential and commenting that release of that material would be prejudicial, there is a public interest at stake when the rule is violated. Given the above, such findings are not against the manifest weight of the evidence.

Hosey apparently concedes the existence of an essential right based on his arguing other remedies to protect fair trial rights. (Hosey's br. at 16). While voir dire, changing venue, preemptory challenges, and the like can help protect fair trial rights, they are not the exclusive remedies in a case such as this. If the Illinois Supreme Court Rules

regarding discovery were violated, the trial court can impose a sanction. Illinois Supreme Court Rule 415(g). If the source is employed by the State, it is likely that a special prosecutor would be appointed, due to the conflict of interest. If it is a defense attorney in this case, that attorney would be removed from the case, as leaking such material is an oblivious ethical and Sixth Amendment violation. Finally, extensive pre-trial publicity impacts a defendant's ability to receive a fair trial, which in turn, violates a defendant's due process rights. Irvin v. Dowd, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process"). Thus, a Due Process violation in this case has occurred. If the State, though one if its employees or police officers, is responsible for that violation, the trial court should grant a remedy to McKee.

This case is distinguishable from most pre-trial publicity cases, which carry one of two fact patterns. In most of the cases, a single, inflammatory fact such exposure to inadmissible evidence or the fact that a suspect confessed is released to the public and highly publicized. *See generally* Irvin v. Dowd, 366 U.S. 717 (1961) and Marshall v. United States, 360 U.S. 310, 312-313 (1959). Alternatively, there could be a media frenzy surrounding the case, given its heinous nature, and thus the case is extensively reported. *See Generally* People v. Sims, 244 Ill. App. 3d 966, 983 (5th Dist. 1993) and Sheppard v. Maxwell, 384 U.S. 333 (1966). The publicity in this case was not the result of those actions however. The pre-trial publicity in this case occurred not due to a press release by the State, the nature of the offense, or an errant statement to the public. It occurred because a person, who had an obligation not to disclose such material, gave the

material to the press. Therefore, the remedies normally used in to reduce the effect of pre-trial publicity cannot be found by voir dire and the like.

Disclosure is the first, necessary step to protect McKee's rights – rights which were trampled on when a person decided to release prejudicial material to the public. While the goals of the First Amendment are of great concern, especially when considering how the press acts as a check to the government, the concerns of confidential sources do not outweigh the greater rights of a defendant to getting a fair trial. Press-Enter. Co. at 508. As such, the trial court's ruling was not against the manifest weight of the evidence, and the court did not error in finding a specific public interest and that disclosure would protect that interest and Hosey's claim should be denied.

c. McKee established to the trial court that she exhausted all available sources of information before seeking divesture of Hosey's privilege.

To divest a reporter of his privilege, an applicant must prove, by a preponderance of the evidence, that all other available sources of information have been exhausted. 735 ILCS 5/8-907. In arriving at its decision regarding divesture, the trial court shall consider, among others, whether alternative means of proof are available. 735 ILCS 5/8-906.

Two cases regarding the Illinois Reporter's Privilege Act have discussed the issue of exhaustion as it relates to divesture. The investigation into available sources "cannot be reduced to any precise formula or definition but must, in view of the competing interests involved, depend on the facts and circumstances of the particular case". In re Special Grand Jury at 427. Exhaustion does not include the applicant showing it used specific, alternative methods of investigation, which were unsuccessful. In re Arya, at 859. "...Methods of investigation do not constitute sources of information; instead, these methods *produce* sources of information." Id. Sources of information means specific

persons or things that can themselves provide the sought-after testimony or evidence. Id. at 860. Available sources means those sources that are identified or known, or those sources that are likely to become identified or known, as a result of a thorough and comprehensive investigation. Id. "A petitioner must satisfy the court that its investigation has been sufficiently thorough and comprehensive that further efforts to obtain the sought-after information would not likely be successful." Id. at 861.

In this case, applying the above standards to the facts of this case, McKee has exhausted all available sources. Among the efforts in this case to secure this information through alternative means included the following:

a. Affidavits were secured from the only investigative agency, the Joliet Police Department, the State and its employees, and each defense attorney and their employees, all swearing that each individual had no role in the leak. (Exhibits H-M).
b. The reports were not released as part of a FOIA request. (IC470).
c. The reports were not given to the Joliet Clerk's Office by the Joliet Police Department. (IC470, R220).
d. A high ranking State's Attorney stated to McKee's defense counsel that he was "very disappointed" in the leak, and that it was his understanding the leak came from the Joliet Police Department. (IC469, R77-78).
e. The State did everything in their power to prevent a disclosure and ensures limited access to the discovery material. (R81).
f. The Joliet Police Department, upon the arrest of one of the suspects, placed one officer on leave due to the relationship with the suspect, limited access to the reports, and interviewed every person involved with the case. (R81, R220)
g. McKee requested an evidentiary hearing into the leak, which would grant certain investigative powers to McKee, such as subpoena power, which was denied. (R271).
h. McKee requested that the State and Joliet Police Department do a formal investigation, or that the trial court ordered the same – this was denied. (R89-100).

This information is then framed with the simple fact that, in pending criminal cases, police reports go from the police, to the State, and end with the defendant or his attorneys. They do not get published, they are not easily obtainable by the public, and if

they are, they are heavily redacted. There are rules in place regarding control of the discovery, via Supreme Court Rules, and ethical rules which limit a prosecutor's and defense attorney's ability to discuss cases publicly. *See Generally* IL R P C 1.6, IL R P C 3.6, and IL R P C 3.8. Based on this, all available sources, including those known and likely to become known have been exhausted. The affidavits obviously include sworn statements from individuals who have nothing directly do with the investigation, prosecution, or defense of this case. There are no other sources, as defined in In re Arya, to which McKee can turn to for additional investigation. As such, McKee exhausted all available sources.

The trial court arrived at the same conclusion. The trial court ordered that affidavits be provided from "each and every individual who had an opportunity to have provided the information to Respondent Hosey". (C269). The trial court also considered the facts and circumstances of this case. (C269). The trial court reviewed the affidavits and found that each and every individual denied being the leak. (C265). The trial court clearly agrees with the above, in that police reports go from the police, to the prosecutors, to the defense attorneys. There is no phantom person who obtained these reports and gave them to Hosey. Thus, in light of the standards regarding exhaustion, the trial court's ruling was not against the manifest weight of the evidence.

Hosey cites to the same cases in support of his position. However, while the cases do set forth the standards to judge exhaustion, they are each factually distinguishable. In In re Special Grand Jury, there were at least four identified individuals who could have had access to the disclosed material who were not questioned. In re Special Grand Jury at 429. In this case, there are no such identified individuals who were not examined or did

not submit affidavits. Also, the assertion of exhaustion and the volume of materials suggesting exhaustion are not sufficient to show exhaustion. In re Arya at 861. In this case, there is no mere assertion, but a complete and thorough investigation. Furthermore, the trial court considered all the facts and circumstances of this case, including a review of all the affidavits submitted. (C265, C269). Finally, Cukier is entirely distinguishable from the present case. In that case, there was no petition to divest privilege filed. Cukier v. Am. Med. Ass'n, 259 Ill. App. 3d 159, 165-66 (1st Dist. 1994). There was also no allegation of exhaustion by the party seeking confidential information. Id. This case, however, has the proper petition, an allegation of exhaustion, and proof showing a thorough investigation. Finally, Hosey argues that McKee failed to identify other areas of investigation. (Hosey's br. at 17). As stated above, there is no precise formula to show exhaustion and methods of investigations are not sources of information, and McKee properly identified her efforts. Furthermore, the trial court denied a chance to conduct a hearing into the leak, did not order an investigation, and there are no other parties who would have the reports that would likely become known to McKee. Hosey may not like the quality of the affidavits, but each clearly state that there was no disclosure other than requested by the State, as required by law, or given to any outside source. (Exhibits H-M). The State, the Joliet Police Department, and all defense attorneys all disclaimed a role in the leak. The applicable law and ethical rules prohibit disclosure of such records. As such, the affidavits that Hosey calls "summary" are actually concise and thorough.

Based on the above, McKee demonstrated that she exhausted of all available sources of information before seeking divesture. The trial court's ruling on this issue was not against the manifest weight of the evidence. As such, Hosey's claim of error should

be denied. The trial court considered the proper factors in a petition to divest Hosey of his privilege. Based on the record and the law, the trial court's ruling granting divesture was not against the manifest weight of the evidence. As such, McKee requests that this court deny Hosey's claims on this issue.

3. The trial court did not engage in speculation regarding collateral matters.

Hosey argues that the trial court did not rely on statutory factors regarding privilege, which is incorrect. First, Hosey argues that the there is no allegation of a discovery violation. (Hosey's br. at 19). As argued above, a discovery violation was argued and alleged many times in this matter. Furthermore, a trial court has every right to ensure that its orders are being complied with. The fact that the trial court was concerned about a discovery violation shows that there are public interests at stake in this case, since the Illinois Supreme Court Rules regarding discovery are designed to allow those accused, and even those prosecuting, to be fully informed of the evidence in a case.

Hosey also argues that that the trial court speculated about Grand Jury violations. (Hosey's br. at 19-20). Hosey misinterprets the trial court's purpose behind such a discussion. As with discovery violations, if the Grand Jury process was violated, this impacts specific public interests. It also shows why it would be relevant to divest privilege in this case. As discussed above, there are legitimate concerns about the timing of the leak along with the fact that there were multiple Grand Jury proceedings in this case.

Third, Hosey takes issue with the trial court's concern about false affidavits. (Hosey's br. at 20-22). Again, the trial court has inherent powers to enforce its order and ensure that those before the court represent themselves with candor. Violations of these

rules, discovery or otherwise, are within the trial court's power to enforce. Additionally, the trial court's concern with the veracity of the affidavits finds support in Pawlaczyk. In that matter, the application to divest was made to see if a person lied about being the source of a leak to a Grand Jury. Pawlaczyk at 183-184. That is effectively the same as the case at bar - affidavits were submitted, and the trial court has the authority to see if those sworn statements were true or not. Based on the holding in Pawlaczyk, divesture is appropriate in this situation. None of the cases Hosey cited to dealt with an issue similar to the case at bar, including the power of a trial court to enforce it own rulings, to enforce regulations of discovery, or to address this situation where a person or an entity has leaked police reports to the public. As such, they have no bearing or impact on this case. As such, it was wholly proper for the trial court to consider these issues and Hosey has failed to show how considering this material was improper.

Hosey also takes issue with the trial court's failure to cite to case law. (Hosey's br. at 23). There is no requirement for the trial court to expound on the basis for a ruling or indicate what law it relied on in making its decision. Hosey discussion of this issue is contrary to the well established principle that the law presumes that a trial judge listened to and considered the evidence and knew and applied the law correctly. *See Generally* People v. McCoy, 207 Ill. 2d 352, 357 (2003). ("...we must presume that a trial judge knows the law."). However, notwithstanding Hosey's unsupported assertion that the trial court did not apply the law correctly, the trial court cited to the specific statutes in question, referred to an Illinois Supreme Court case on the issue, consulted secondary sources, and specifically stated it reviewed all relevant case law. (C265-271).

Finally, Hosey suggests that the lack of a gag order in place leads to a presumption that the police reports were not confidential. (Hosey's br. at 23). Hosey cites to nothing in support of this, save a limited quote of an Illinois FOIA statute. There is nothing that requires that a gag order be in place to ensure that records such as this are not disclosed. The rules regarding discovery, the ethical rules governing attorneys, and the principles of due process all stand for keeping this material confidential. Furthermore, as discussed below, police reports do not fall under the presumption that other government records enjoy.

The issues that Hosey calls collateral are anything but – they are directly related to this case, including the trial court's authority and McKee's own rights. The Court should find no merit in any of these arguments, and find that the trial court's ruling on divesture was not against the manifest weight of the evidence.

4. The requirements for the Special Witness Doctrine have been met.

Hosey argues that the trial court's ruling should be reversed due to the Special Witness Doctrine ("Doctrine"). (Hosey's br. 23-25). In applying the doctrine to this case, McKee must specifically state the testimony she expects to elicit from Hosey, why that testimony is not only relevant, but necessary to her case, and what efforts she has made to secure the same evidence through alternative means. People v. Palacio, 240 Ill. App. 3d 1078, 1102 (4th Dist. 1993).

Clearly, these requirements overlap or are the same as the requirements for divesture. The specific testimony to be elicited was alleged in the petition to divest. (IC471). As for the other two requirements, McKee would rely on the above arguments and the record of this case. Clearly, the trial court found that the burden of the Doctrine

was met by virtue of its ruling on divesture and a subsequent contempt finding. (C264-272, C277-279). If the trial court found that divesture was appropriate, implicit in such a ruling is that the burden of the Doctrine had been overcome as well. In ruling in this matter, the trial court heard Hosey's arguments as to this issue, along with his pleadings, and found that Hosey's testimony could still be compelled. The trial court did not abuse its discretion in its findings as it related to the Doctrine, and as such, Hosey's claim for relief should be denied.

5. Hosey's good faith does not warrant an order that vacates the contempt petition.

Hosey argues that the contempt finding and fines should be vacated due his "good faith" in this matter. 735 ILCS 5/8-909 specifically grants the trial court power to hold a person in contempt who fails to comply with the order of divesture. Should the Court grant this request, but deny McKee's request for regarding divesture, and there is no further consequences to this matter, Hosey is free to ignore the trial court's order. There would be nothing in place to compel compliance with the trial court's order. The order of contempt is required to give force to trial court's order.

Furthermore, the cases cited to by Hosey is support of his position do not deal with the specific type of contempt found in this case. The trial court found Hosey to be in direct criminal and direct civil contempt. (C277-278). The cases cited to by Hosey only deal with civil contempt, including indirect civil contempt. In re Marriage of Nettleton, 348 Ill. App. 3d 961, 965 (2nd Dist. 2004). In this case, the trial court found that Hosey's refusal derogated the authority of the Court, obstructed the administration of justice, and brought the administration of justice into disrepute. (C278). This is a key distinction between the cases relied on by Hosey and this situation. Given the nature of the

proceedings, the trial court made a specific choice to find direct criminal contempt. That choice should be respected by this Court, and the findings, under the standard of review, are wholly appropriate. It is also important to note that Hosey does not appeal this finding – but only argues that it should be set aside.

To vacate the order of contempt in this case would enable Hosey to disregard the trial court's ruling, should the Court uphold the divesture order. Hosey argued to the trial court that if this became a final non-appealable order, a different scenario would be in front of the court, implying there would be compliance with the trial court's ruling. (R301-302). That is purely speculative however and given the nature of the underlying case, unnecessary delay would occur, as a second appeal of the order would likely come. Thus the Court should deny relief to create finality to this issue and not vacate the contempt order in this case.

6. There is no presumption that police reports in this case are open to inspection or copying or otherwise publicly available.

Both Hosey and the Amicus in this matter argue that the police reports in question are not confidential, and thus, presumably, there are no problems, issues, or concerns with him obtaining such material. (Hosey's br..at 23, Amicus br. at 3-7). The arguments do not accurately reflect the law in Illinois as it relates to police reports. Certainly, there is specific information regarding criminal cases which can be disclosed to the public. However, there is nothing in the law which remotely suggests that the surreptitious release of police reports to the public, while the charge is pending, is somehow legal, favored, or appropriate.

"All records in the custody or possession of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2. However, certain records which are

exempt from being open to copying and inspection. 5 ILCS 140/7. Thus, based on the language of the Illinois FOIA statute, certain records are not presumed to be open to inspection and copying. Exempt records include law enforcement records that would interfere with pending law enforcement proceedings, create a substantial likelihood of depriving a person of a fair trial or impartial hearing, or obstruct an ongoing criminal investigation. 5 ILCS 140/7(d). Furthermore, an argument can be made that since disclosure is prohibited under the Illinois Supreme Court Rules regarding discovery, that 5 ILCS 140/7(a) applies as well. "The legislature recognized that even with such a policy, [referring to 5 ILCS 140/1] certain documents should not be disclosed, and it dedicated section 7 of FOIA to exemptions." Nat'l Ass'n of Criminal Def. Lawyers v. Chicago Police Dep't, 399 Ill. App. 3d 1, 10 (1st Dist. 2010). "Both the Illinois and federal Freedom of Information Acts are parallel in their recognition that investigatory files in ongoing criminal investigations should not be disclosed." Castro v. Brown's Chicken & Pasta, Inc., 314 Ill. App. 3d 542, 555 (2000).[4] Often times, FOIA exemptions become an issue for discovery in cases. *See Generally* In re Marriage of Daniels, 240 Ill. App. 3d 314 (1st Dist. 1992). Courts will rely on the FOIA exemptions for guidance regarding public policy concerns and weigh those concerns together with the needs of litigants in the discovery process - concerns which are no less a vital aspect of public policy." IMRO Daniels at 326. Statutory exemptions are based on values entitled to "weighty consideration. Id. The FOIA exemption regarding law enforcement investigatory files are consistent with a policy which favors protection of such records in court discovery. Id. at

[4] The Court denied access to law enforcement records for reasons covered by 5 ILCS 140/7(d). Castro at 555-556.

328. The public policy favoring protection of police files from casual public access can also be seen in section 7 of the Criminal Identification Act, now 20 ILCS 2630/7. Id.

In considering the above, while public policy dictates openness of government papers, that policy does not extend to law enforcement records of pending cases. The reasoning for limiting such a policy is clear – disclosure of these records, when a case is pending, hurts the State's ability to prosecute and a defendant's ability to obtain a fair trial. This policy is in line with the rules regarding control of discovery, ethical rules regarding pre-trial publicity, and Due Process requirements. Therefore, there is a strong policy against disclosure of such records, especially when considering the facts of the case at bar. This relates back to the issue in divesture as it relates to specific interest. Since there are strong reasons to keep this material confidential, the release of this material violates the goals furthered by said policy.

The Amicus suggests that arrest reports are a matter of public record, under 5 ILCS 140/2.15. (Amicus br. at 6). As defined by that section, arrest reports are essentially biographical information about suspects, charging information, bond information, arrest location, name of the investigating agency, and when the suspect was arrested and incarcerated. 5 ILCS 140/2.15(a). Reporters may obtain "arrest reports" but they do not obtain the full police reports of pending charges, including confessions, toxicology reports, and grizzly details of the crimes, such as sex on top of dead bodies. The Amicus completely misconstrue this section as to the material Hosey received, especially in light of 5 ILCS 140/7(d).Additionally, the Amicus ignore the fact that some of the information in arrest reports may be withheld if it would interfere with law enforcement proceedings. 5 ILCS 140/72.15(c). Lastly, "[t]he [Illinois Freedom of Information] Act does, however,

recognize that in order to enable public bodies to perform certain government functions properly,....some records and information may need to be kept confidential." Lisa Madigan, Illinois Attorney General, A Guide to the Illinois Freedom of Information Act, at pg. 9.

The Amicus cites to several cases suggesting that records that are protected by the court can be accessed and obtained though other, independent means. (Amicus br. at 6). Thus, they argue that that if Hosey obtained these reports though other means, there is no concern. Yet, the cases cited to for that provision are distinguishable from the case at bar. In Better Gov't Ass'n, the Court found that a FOIA request for a grand jury subpoenas was proper since none of the exemptions applied. Better Gov't Ass'n v. Blagojevich, 386 Ill. App. 3d 808, 818 (4th Dist. 2008). The court specifically found that the subpoenas were not "records compiled by any public body for administrative enforcement proceedings and any law enforcement or correctional agency for law enforcement purposes or for internal matters of a public body..." Id. Thus, unlike this case, the existence of grand jury subpoenas to a public official did not raise any of the concerns under 5 ILCS 140/7(d). Carbondale Convention Ctr. Inc. is of no consequence either. The Amicus misconstrue the holding in that matter - the Court did not rule on the legitimacy of a gag order in light of a FOIA request, but remanded to the trial court to determine if a FOIA exemption existed. Carbondale Convention Ctr., Inc. v. City of Carbondale, 245 Ill. App. 3d 474, 478 (5th Dist. 1993). Finally, while accurately quoted, Seattle Times Co. also went on to state that a litigant does not have an unrestrained right to disseminate discovery. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31, (1984). The Court went on to reaffirm that "...freedom of speech ... does not comprehend the right to speak on any

subject at any time". Id. The cases cited to by the Amicus seem to support McKee's position that these reports were not public records to be given out without restraint.

Finally, if police reports were so readily and easily available under the FOIA statues, Hosey could have simply filed a FOIA request to get the reports, rather than obtain these materials through a confidential source. He did not however. (IC470). Frankly, since he did not seek these materials through FOIA, there is no need to discuss the policy behind openness of government records - since Hosey did not avail himself to the procedures that are in place. Furthermore, to suggest that Hosey's source was honoring the openness spirit of FOIA is incredulous, since his actions deprived the government or anyone else an opportunity to exercise the statutory right to withhold the reports. To be frank, Hosey never made a FOIA request because he knew the response he would get - such material could not be disclosed given the exemptions in 5 ILCS 140/7(d). Based on the foregoing, it is clear that police reports, such as these, in a case such as the one at bar do not fall under the 5 ILCS 140/1.2 presumption. Neither the Amicus nor Hosey can pick and choose which parts of FOIA are worth following and which are not. As such, neither this Court nor anyone else should think that these reports are freely available and that their release, while possibly newsworthy, does not create substantial problems as it relates to McKee's rights.

7. The Amicus overstate the effects of divesture.

The position taken by the Amicus is a typical one in cases which involve the First Amendment - any action which could limit the freedom of the press runs afoul of the Constitution. It is important to note, however, this case is not about the First Amendment. It is about McKee's rights and the actor who engaged in an action that violated those

rights by giving confidential police reports to a member of the press. While it is regrettable that Hosey choose to publish information found in those reports, and thereby to further hurts the McKee's fair trial rights, it is not his publications that are issue in this case. The issue here is about the person who released the material to Hosey.

One of the chief complaints by the Amicus is the chilling effect that divesture will have on the press and potential sources. (Amicus br. at 10-14). This concern, however, has routinely been set aside, when there are public interests at stake when considering whether to allow a reporter to keep his privilege. "[T]he First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." Univ. of Pennsylvania v. E.E.O.C., 493 U.S. 182, 201 (1990). Furthermore, there is a clear reluctance to recognize privilege where it was "unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury". Id. The Court should not "seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof on the theory that it is better to write about crime than to do something about it". In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1147 (D.C. Cir. 2006). Thus, even in light of the possible, though speculative, chilling effects on the First Amendment, privilege will yield in light of specific considerations, including when privilege will have an effect on a criminal proceeding.

The Branzburg Court rejected the rationale of the Amicus "as inappropriate in criminal proceedings". U.S. v. Sterling, 724 F.3d 482, 493 (4th Cir. 2013). The court is Sterling further stated that:

> "The preference for anonymity of . . .confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, [but] this preference, while understandable, is hardly deserving of constitutional protection." It would be frivolous to assert – and no one does in these cases –that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. Id.

The court in Sterling has stated what this Court's position on this issue should be with eloquence and simplicity - protecting Hosey's source is less important than the improper and illegal impact of that person's actions. The effect that divesture will have on anonymous sources does not outweigh the impact to public interests, and should not be considered by this Court.

The Amicus also cite to two Illinois cases regarding divesture, which discuss balancing the First Amendment and defendant's rights - as the trial court did in this case. (Amicus br. at 8-10, C270). However, those cases are circuit level rulings, and have no precedential value to this case. However, should the Court consider them, McKee would argue that both cases continue to uphold the principle that in criminal cases, rules against the disclosure of privileged material are necessary to maintain a fair trial and preserve the integrity of the process. Both cases also present fact patterns completely dissimilar to the facts of this case. As such, this Court should only consider them for a very limited purpose.

The Amicus finally argue that the Illinois Reporter's Privilege Act would be rendered meaningless if divesture is upheld in this matter. (Amicus br. 14-20). To be sure, it would be unlikely that the Amicus would ever concede that divesture would be

appropriate under any set of circumstances, not just those present here. McKee does concede that while it was regrettable that Hosey published his articles, his actions are protected under the First Amendment. Divesture was granted in Pawlaczyk, yet reporters in Illinois still enjoy their extensive privilege today as they did when the case was decided. In addition, as stated above as it relates to future confidential sources, it is purely speculative to see what impact divesture in this case will have on future applications of the Illinois Reporter's Privilege Act. Furthermore, as stated above, given the trial court's inherent powers and McKee's own rights, the incidental and speculative burdening of the First Amendment does not outweigh the interests which are harmed in this case by denying divesture.

Finally, the Amicus cites to material not part of the record in this case. (Amicus br. pg. 5, Amicus Appendix A-1 to A-9). Referring, using, and arguing such material, which is not part of the record, is wholly improper. It further violates rules placed upon amicus in submitting briefs and deprives other parties of a meaningful opportunity to perfect a record on the issues raised by such material.[5] Such material is the subject of the Motion to Strike Portions of the Amicus Brief which McKee filed contemporaneously with this brief. However, the Court may choose to consider such information, and as such, McKee will address it as best as possible. First, there is no issue before the Court regarding the subsequent denials of FOIA requests after the trial court sealed the file and issued gag-orders. Secondly, there is always an order in place that material furnished as part of discovery shall not be disclosed. Illinois Supreme Court Rule 415(c).The Amicus point out that the leak occurred before a gag-order or a seal was imposed. This implies

[5] A brief of an *amicus curiae* shall follow the form prescribed for the brief of an appellee. Illinois Supreme Court Rule 345(b).

that a gag-order or seal would have been needed to protect McKee's rights or that if the leak took place after such orders were in place, the leak would somehow become improper. There is no such requirement that those steps needed to be taken before the leak occurred. Nor was it naive for McKee to think that such an order was not needed at the start of her case, given the obvious requirement that police reports stay confidential. Finally, and although McKee is not intending to replace role of the courts in this matter, each and everyone one of the denials were proper under 5 ILCS 140/7(a) and 5 ILCS 140/7(d). Each of those FOIA requests were done in the spirit of FOIA - allowing the government a chance to exercise its discretion to exempt material from copying - a spirit that Hosey's source violated when he decided to release the materials surreptitiously

Aside from the press itself, there is no greater champion for the First Amendment than a person facing criminal charges. McKee recognizes the need for criminal reporting and investigative journalism to act as a check on government abuses and unfair practices. The Amicus have eloquently stated the role of the press in light of criminal cases - and this is not in dispute. However, there will be times when the First Amendment collides with those Amendments designed to protect the rights of the criminally accused. The court's role in such a situation is to balance the competing interests as best as possible. However, sometimes, like in this case, the rights of a defendant outweigh those of the public, and as such, divesture must be granted.

8. The State lacks standing to be party in this appeal.

The State has submitted a brief in response to Hosey's brief. Such a response is improper, however. As stated in the contemporaneously filed Motion to Strike the State's Brief and the State as a Party, the State lacks standing to be a party to this case. As such,

the brief should not be considered nor should they be allowed to make arguments in this matter.

The doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit, assuring that only those parties with a real interest in the outcome in the controversy are the parties to the suit. Glisson v. City of Marion, 188 Ill. 2d 211, 221 (1999). "The claimed injury may be actual or threatened, and it must be (1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief." Id.

The request to divest privilege in this case is, in effect, an attempt by McKee investigate her case. The petition, and the relief sought, in a distilled form, is effectively a subpoena to a third-party for evidence, testimony, or documents. The State did not file any responsive pleadings to the divesture application nor made any argument before the trial court on the issue. In fact, the State specifically disclaimed any interest to the divesture proceeding. (C205, Lines 10-16). When the State told the trial court that "[o]bviously, the divesture does not involve us", the State was telling the court that they have no interest in the action between Hosey and McKee. Even following the trial court ruling on the divesture, and just before it found Hosey in contempt, the State said again "[t]he State has no position on the matter with Mr. Hosey". (C297). Like a subpoena to a bank or to an individual in a criminal case, the State does not have standing to object to such a subpoena, since it has no real interest in the outcome of such action. Being a party to a criminal case does not conferring standing the to State either. Furthermore, by trying to become a party to this case, during the appeal, but failing to attempt to intervene or become involved at the trial level, deprives McKee of a meaningful opportunity to create

a full record and oppose or support the State's position as needed. Based on the Glisson standard, the State only claims to be injured by the trial court's ruling - not the fact that the leak took place. The State cannot assert standing merely because it disagrees with the trial court's ruling; they must have been a party to the underlying divesture proceeding, which it was not. The State did not object to the trial court's ruling in a timely manner, file any written pleadings, or make any arguments during the hearing on divesture. The State is not subjected the contempt order and it filed no appeal based on the trial court's ruling. Thus, for the reasons stated above, the Court should disregard the State's position due to a lack of standing.

9. The State has waived any rights to be a party to this appeal.

In addition to the State having no standing in this case, it has waived any rights or claim of error in this manner. Like with the issues of standing, this issue is also raised in McKee's Motion to Strike the State's Brief and the State as a Party, and any argument by the State should be deemed as waived.

"Issues not raised in the trial court are generally considered waived on appeal." People v. Holloway, 86 Ill. 2d 78, 91 (1981). Waiver applies to the State along with the defendant in a criminal case. Id. A principle consideration about waiver is that raising an issue for the first time on appeal is that the opposing party will not be in best position to present meaningful, rebuttal evidence. Id. at 91-92. *See also* People v. Capuzi, 308 Ill. App. 3d 425, 433 (2nd Dist. 1999) (The Court found waiver where the State failed to raise the good-faith exception during a suppression hearing.)

In Holloway, the State did not make an objection to a co-defendant joining in another's motion to suppress regarding the issue of standing to challenge a search.

Holloway. at 91. Nor did it raise an objection in subsequent pleadings or in oral argument. Id. Here, the State specifically told the court that "[o]bviously, the divesture does not involve us". (C205). This is the State explicitly waiving any rights it may have in this matter. The State did not provide any writing pleading regarding divesture, made no arguments during the hearing, did not lodge a timely objection in the days following the court's ruling, and never filed an appeal in this case. Finally, before holding Hosey in contempt, more than thirty days after the trial court granted McKee's motion, the State said again "[t]he State has no position on the matter with Mr. Hosey". If waiver can be found in Holloway, it certainly should be found here, given the stronger facts in support of waiver.

The State may argue that it did raise an objection and thus, has not waived its rights. Prior to the trial court issuing its contempt order, the State made some type of record. (C297-298). However, whatever was raised was far too late to preserve any issues the State may have had. First, even the State referred to these as "comments," not objections. (C297). However, even going past the form of the statements, the State brief discusses issues not raised before the trial court. At no point did the State object to the trial court's ultimate ruling regarding divesture. In fact, they again took no position. (C297). However, the State now argues that the order granting divesture was "improvidently granted." (State's br. at 3). Clearly, the State is trying to take a bite out an apple that it never tried to bite out of in the first place. The State's actions in this case are a textbook definition of waiver. The State failed to preserve any issues at the trial level, and now wishes to get a free-shot at overturning the divesture order. McKee is deprived of any meaningful opportunity to present rebuttal evidence at this point in the

proceedings, which is the reason why wavier exists. As such, the Court should deem that all arguments raised by the State as waived in this matter.

10. The State's arguments do not support the Court overturning the trial court's findings.

The Court may choose to address the State's issues substantively. As such, McKee will address them as if the Court would, but still maintaining that the State waived its rights and lacks standing in this case.

It seems the State does concede that there is an essential public interest in this case. (State's br. at 4). First, a "compelling" public interest is not the standard in a divesture proceeding. Pawlaczyk at 196 ("Proof of a "compelling" interest is not required by the Act. Rather, in granting a motion for divestiture, the circuit court must find that the requested disclosure is "essential to the protection of the public interest involved."). Next, all that is required to divest is the identification of a specific public interest - not that there are other methods available to protect this interest. Voir dire and change of venue are tools available to McKee; however, they are not exclusive tools. Furthermore, to limit this issue only to that of pre-trial publicity is short sighted. It renders the limiting of disclosure of discovery meaningless, usurps the Court's ability to enforce its own orders, and undermines the entirety of the criminal justice system. If a party to a criminal case engages in unnecessary, illegal, or unethical pre-trial publicity, there are various sanctions that can issued, besides changing venue. In a case such as this, when the press receives highly sensitive information from a source involved with the prosecution or defense of the case, greater care must be taken to protect McKee's rights, which means identifying who released that information to the press. One wonders what position the State would take if McKee or her attorney leaked the name of confidential sources or

undercover police officers to the press? Or discussed the State's position in plea negotiations with the public? Or release a victim's medical records or social security information, or information regarding minor victims, such as age or address or name? Clearly, the State does not allow reporters to go into their offices and let them look through their files or memos. It does not allow that to protect the criminally accused. However, the State has taken an untenable position in this matter by allowing the leak to go undiscovered and by letting politics and a lack of a true sense of integrity control, rather than following its justice seeking mandate. Thus, as stated above, divesture is required to protect McKee.

The State also concedes that the Defendant exhausted all available sources. (State's br. at 5). The only issue to be taken with the State's position is that disclosure will absolutely shed much needed light in this case, including protecting McKee's rights and the integrity of the administration of the courts and the criminal justice system. It also worthy to consider that if the State, who has Grand Jury powers, a more intimate relationship with the police, and more resources available to investigate the leak, suggests that exhaustion took place - McKee's position that she exhausted all available sources is well supported

The state finally discusses issues relating to its ability to receive a fair trial and the disputed conversation between two attorneys involved in this matter. (State's br. at 6). Neither of these issues are before the Court for this appeal, as the State did not object to the trial court's ruling in a timely manner or file an appeal. The State stated earlier that divesture is not required to protect McKee's rights - seeking a change of venue and the like is all at this needed. (State's br. at 4-5). The State should seek the same remedies

then, and change venue or engage in vior dire - not oppose a court order for the first time on appeal. Furthermore, as discussed above, it is possible that there were violations of the Grand Jury proceedings in this case. Thus, the State's concerns are not valid.

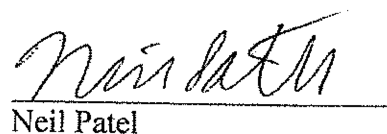
Regarding the disputed conversation, the claim of the State is that Ken Grey did not know if someone from the Joliet Police Department leaked the information and that he was very disappointed that there had been a disclosure. (State's br. at 6). First, this is not true - Mr. Grey blamed the Joliet Police for the leak, as stated above. However, assuming *arguendo*, that his statement is accurate, it acknowledges the possibility that the Joliet Police leaked the information. Again, in a continued lack of a true sense of integrity, the State only did the bare minimum to follow up on that possibility, despite the supposed disappointment. Now that divesture was ordered, the State wants to act - however, it only apparently wants to act to ensure that the truth is not discovered. Such a position is unworthy of merit, and again, contrary to its justice seeking mandate.

CONCLUSION

For the reasons stated above, the trial court's ruling regarding McKee's divesture petition was not against the manifest weight of the evidence. Neither was the trial court's position on the Special Witness Doctrine or its contempt findings. In this case, material was released to the press in violation of the law and principles regarding control of such material. Such a leak harms McKee's rights and the ability of the trial court to enforce its orders. As such, the Court should deny Hosey the relief he is seeking and uphold all orders of the trial court in this matter.

Respectfully submitted,

Chuck Bretz



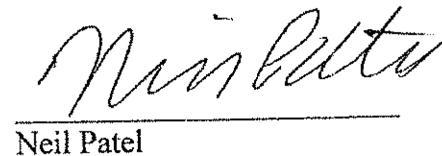
Neil Patel

Chuck Bretz and Neil Patel
Chuck Bretz & Associates, P.C.
Attorneys for Appellee
58 N. Chicago Street, 2nd Floor
Joliet, IL 60432

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(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 49 pages.

Chuck Bretz



Neil Patel

Chuck Bretz and Neil Patel
Chuck Bretz & Associates, P.C.
Attorneys for Appellee
58 N. Chicago Street, 2nd Floor
Joliet, IL 60432