

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel.)	
DAVID CLOHESSY,)	
Relator,)	
v.)	SC _____
THE HON. ANN J. MESLE,)	
DIVISION 7, 16 TH JUDICIAL CIRCUIT,)	
JACKSON COUNTY, MISSOURI)	
Respondent.)	

SUGGESTIONS OF AMICUS CURIAE IN SUPPORT
OF RELATOR'S PETITION FOR WRIT OF PROHIBITION

COMES NOW amicus curiae, Missouri Press Association, by and through its attorney, and in support of the Relator's Petition for Writ of Prohibition states as follows:

POSITION OF THE AMICUS CURIAE AS TO THE RECORD

The Amicus Curiae incorporates herein the facts as outlined in the Relator's Writ of Prohibition and Suggestions in Support, and attached exhibits. While the petition of the Relator sets out numerous issues, the Amicus Curiae is interested in only one issue: It is concerned that the underlying Order requiring the Respondent to disclose certain e-mail messages he may have received will likely result in the disclosure of e-mail messages by reporters and editors of member newspapers of this Amicus, none of which were subject to the underlying Court's Order or related to the acts or possible acts of Plaintiff's attorneys, about which the Defendants are seeking discovery.

Such a potential disclosure of widespread communication with reporters, none of which are involved in the issue about which discovery is sought, will seek only to irrevocably harm the news-gathering process, chill speech by both the news media and potential sources and significantly affect the quality of investigative reporting in the State.

The Court's Nov. 29, 2011, Order requires production of all communication with the press that mentions the Diocese of Kansas City-St. Joseph and any communication that mentions priests currently or formerly associated with the Diocese. This discovery's impact goes far beyond the instant case and the Order which was entered by the Court earlier that was under scrutiny at the time the November 29, 2011, Order was issued.

ARGUMENT OF AMICUS CURIAE IN SUPPORT OF THE PETITION

Supreme Court Rule 56.01 (b)(1) permits discovery "regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any ... documents or other tangible things and identity and location of persons having knowledge of any discoverable matter."

Plaintiff's counsel was under an Order of the underlying Court limiting discussion of the litigation. The November 29, 2011, order is the result of efforts by Defendants to determine if Plaintiff's counsel in any way breached that Order. The Amicus does not argue that the Relator may be required to produce any and all "documents or other tangible things" which might relate to the Plaintiff's counsel.

However, the November 29, 2011, Order goes far beyond that. It asks the Relator to produce each and every e-mail related to the Diocese of Kansas City-St. Joseph and any communication that mentions any priests currently or formerly associated with the Diocese without regard to whether or not that e-mail was related in any way to Plaintiff's counsel. The Amicus has reason to believe that reporters throughout the state may have had communication with the Relator while gathering news. There is at present no evidence to show that any of those communications were directly or indirectly related to the Plaintiff's

counsel. The Relator himself was not under an order not to communicate with others, such as the reporters whose newspapers are members of the Missouri Press Association, nor were the reporters. Whatever communication might be discovered between the Relator and members of the Amicus association at present has no evidentiary foundation showing it is “relevant to the subject matter” or, as Supreme Court Rule 56.01 (b) (1) continues, “reasonably calculated to lead to the discovery of admissible evidence.”

The Amicus recognizes that case law holds that the trial court’s discretion to deny discovery is limited (*State ex rel. Stolfa v. Ely*, 875 S.W.2d 579, Mo. App., 1994) and that absent abuse of discretion, an appellate court should not disturb the trial court’s ruling on discovery matters (*State ex rel. Mitchell Humphrey & Co. v. Provaznik*, 854 S.W.2d 810 (Mo. App., 1993)).

However, the right to discovery is clearly, based upon the specific language in the Supreme Court Rule, not totally unlimited and the Amicus believes that this right to discovery must be balanced against the First Amendment rights of the Amicus’ members.

Freedom of speech and freedom of the press are among the most “fundamental personal rights and liberties.” *Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 450 (1938). Society has a broad interest in the “full and free flow of information to the public.” *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972) (Stewart, J., dissenting). Freedom of the press is, therefore, “indispensable to a free society. *Id.* It is necessary for the “advancement of truth, science, morality, and arts.” *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 717 (1931) (internal citations omitted). Throughout our nation’s history, the press has served as a “mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences.” *Estes v. Texas*, 381 U.S. 532, 539 (1965).

“Furthermore, in the context of our justice system, “[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.” *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

Implicit in the right to a free press is the “right to gather news,” because “[t]he full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated.” *Branzburg*, 408 U.S. at 727 (Stewart, J., dissenting.). Here, the court’s order seeks to discover and intrude upon the newsgathering process. The discovery is a direct and irreparable intrusion into the relationship between journalists and an informational source, Relator’s organization, despite the fact that neither Relator, SNAP nor any media outlets are party to the current litigation.

This Order regarding discovery will intrude upon the free flow information from potential sources. In the case of the Relator and his organization, journalists may work with the organization to develop sources that over time may expose a scandal or a cover-up of known child sexual abuse. Consequently, the impact of the Court’s order will be a chilling effect on the freedom of the press to operate and facilitate dissemination of information to the public. *See State ex. Rel. Classic III, Inc. v. Ely*, 954 S.W.2d 650, 656 (Mo. App., 1997) (internal citations omitted).

The Amicus understands Defendant’s desire to discover whether any evidence exists that would violate the August 2, 2011 court order. That clearly is discoverable matter under Rule 56.01 (b)(1). However, the Amicus believes that allowing discovery of all communication by Relator of any kind to any party, where there was no mandate in the original court Order which was directed to Relator or the organization to which he is

affiliated which restricted his communication with members of the media in particular, is beyond that permitted in Supreme Court Rule 56.01(b)(1), and that allowing this order to stand would constitute a violation of the First Amendment rights of the members of the Amicus to gather news.

It is clear, based upon case law, that the First Amendment protects a reporter in the news-gathering process. That is the reason that many states (but not Missouri at this time) have enacted a shield law. Missouri Press Association wishes it could count this state among that group, but realizes the state legislature has not yet recognized that right.

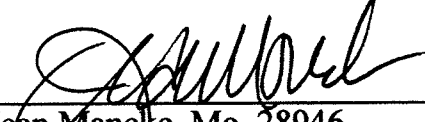
But unlike the legislature, Missouri's courts **have** in the past (see *Missouri, ex rel., Classic III, Inc., v. Ely*, 954 S.W.2d 650 (Mo. App., 1997)), recognized that at some level, there must be some protection for the news-gathering process.

Journalists faced with the possibility of having their routine correspondence brought into on-going litigation involving third parties will be reluctant to engage sources and fully investigate stories. Moreover, this threat of overbroad discovery will affect the willingness of private citizens to engage journalists to investigate and report on particular news-worthy topics. Accordingly, the media's ability to adequately and effectively report on a host of issues will be compromised as a result of the intrusive discovery permitted by the Court.

WHEREFORE, the applicant, Missouri Press Association, as amicus curiae, respectfully prays that this Court grant the Petition for Writ of Prohibition in this matter and for such other and further relief as this court deems just and proper in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

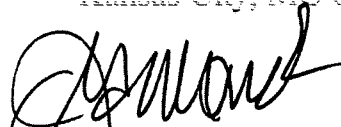
I hereby certify that a copy of the foregoing was mailed this 29th day of December, 2011, to the following by first-class mail, postage prepaid, or served electronically if the attorney is registered in the electronic filing system:

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