

NO. CV 0901654

JESSICA VICKERY

v.

PHIL FITZGERALD

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IN THE DISTRICT COURT OF

LIBERTY COUNTY, TEXAS

75TH DISTRICT COURT

MOTION TO QUASH SUBPOENA
AND FOR PROTECTIVE ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, ALLEN YOUNGBLOOD, Movant, who is *not* a party to this suit, to file his written objections to the subpoena issued by the Defendant, Phil Fitzgerald, in the above styled and numbered cause, compelling Mr. Youngblood's appearance and production of journalistic records at a hearing on October 12, 2009, and to request this Honorable Court to grant his motion to quash said subpoena, issue a protective order, and award costs. In support thereof, Movant would show the Court the following:

I.

Defendant, Phil Fitzgerald, served the attached subpoena, Exhibit "A", on Allen Youngblood, resident of Liberty, Liberty County, Texas, on October 6, 2009, compelling Mr. Youngblood's appearance as well as the production of papers, records, documents and other source material, more particularly described in paragraphs numbered one (1), two (2), and three (3) of the attached subpoena, Exhibit "A", reference to which is hereby made as if fully copied herein.

II.

Allen Youngblood is a journalist as defined by the Texas Civil Practices and Remedies Code section 22.021(2), in accord with House Bill 670 as passed by the 81st Texas Legislature, signed by Texas Governor Rick Perry, and made effective May 13, 2009. Mr. Youngblood is employed by Digital Media Publishers, L.L.C., a Texas company which operates a telecommunications service as defined by Section 1, Chapter 22, Subchapter C of the Texas Civil Practice and Remedies Code.

III.

The subpoena as issued fails to comply with state and federal law. The subpoena specifically fails to meet the requirements of Subchapter C, Chapter 22, of the Texas Civil Practices and Remedies Code, which states that, as a journalist, Mr. Youngblood may not be compelled to testify regarding, or to produce or disclose, any confidential or non-confidential information, document, or item obtained or prepared while acting as a journalist, including the source of any information or document. TEX. CIV. PRAC. & REM. CODE sec. 22.023.

Only the Court may order a journalist to testify regarding, or to produce or disclose, any information, document, or item obtained while acting as a journalist, and then only if the person seeking the information makes a clear and specific showing that (1) all reasonable efforts to obtain the information have been exhausted; (2) the subpoena is not overbroad, unreasonable, or oppressive; (3) reasonable and timely notice was given of the demand for the information; (4) the interest of the party subpoenaing the information outweighs the public interest in gathering and dissemination of news, including the concerns of the journalist; (5) the subpoena or compulsory process is not being used to obtain peripheral, nonessential, or speculative information; and (6) the information, document, or item is

relevant and material to the proper administration of the official proceeding for which the testimony, production, or disclosure is sought and is essential to the maintenance of a claim or defense of the person seeking the testimony, production, or disclosure. TEX. CIV. PRAC. & REM. CODE sec. 22.024.

This subpoena as issued fails to meet any of the statutory requirements as stated above. The subpoena as issued does not provide Mr. Youngblood with ten days' notice before service for the production of documents as required by the Texas Rules of Civil Procedure, Rule 205.2. The subpoena was served on October 6, 2009; the notice was served on October 6, 2009. Mr. Youngblood received no prior requests for discovery.

The subpoena as issued is overbroad, unreasonable, and oppressive. A discovery request must be reasonably tailored to include only relevant matters. *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998). The Supreme Court has identified requests encompassing time periods, products, or activities as overbroad. *See, e.g., In re Graco Children's Prods., Inc.*, 210 S.W.3d 598, 600-01 (Tex. 2006) (request for 20,000 pages of documents relating to defects in products that were not at issue in case was overbroad); *In re CSX Corp.*, 124 S.W.3d 149, 153 (Tex. 2003) (request to identify all safety employees of defendant over 30-year period was overbroad); *In re Am. Optical*, 988 S.W.2d at 713 (request for almost every document relating to asbestos products that defendant produced over 50-year period was overbroad); *K Mart Corp. v. Sanderson*, 937 S.W.2d 429, 431 (Tex. 1996) (request for information about criminal conduct at location for seven years was overbroad). In this case, the subpoena requests production of any and all documents and source material related to Phil Fitzgerald individually, as Liberty County Judge, or in relation to this lawsuit, the majority of which is irrelevant and immaterial to the basis for the underlying suit.

The burden and expense of complying with Defendant's subpoena outweighs the likely benefit of the requested discovery, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake, and the importance of the proposed discovery in resolving those issues. Tex. R. Civ. P. 192.4(b); *see In re Alford Chevrolet-Geo*, 997 S.W.2d 173, 181 (Tex. 1999).

As an elected official, Liberty County Judge Phil Fitzgerald is frequently mentioned in the news and is the subject of frequent public opinion statements. The subpoena as issued does not seek information relevant and material to the underlying suit regarding the breach of fiduciary duty while serving as a trustee of an irrevocable trust. Rather, it requests any and all information that even remotely mentions Phil Fitzgerald by name. The nature of the subpoena as issued suggests that it is being used as a "fishing expedition" to obtain peripheral, nonessential, or speculative information unrelated to the underlying suit. This is not a legitimate use of the compulsory process. *See Emenhiser v. State*, 196 S.W.3d 915 (Tex. App.—Fort Worth 2006).

As the subpoena as issued serves no judicial purpose and is non-compliant with state and federal laws, the subpoena should be quashed.

IV.

A trial court may issue an order protecting a person served with a subpoena from undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional, or property rights. TEX. R. CIV. P. 192.6(b); *see also* TEX. R. CIV. P. 176.6(e). The court has the authority to limit the scope of discovery based on the needs and circumstances of the case. TEX. R. CIV. P. 192 cmt. 7. As a journalist, Mr. Youngblood has a qualified testimonial privilege in a Civil Proceeding from testifying or disclosing any confidential or

non-confidential information, document, or item obtained or prepared while acting as a journalist, including the source of any information, document, or item that are privileged from disclosure. TEX. CIV. PRAC. & REM. CODE sec. 22.023. Furthermore, the information subpoenaed is not material or relevant to the issues before the Court in this case, making the request for information in Defendant's subpoena harassing and oppressive. TEX. R. CIV. P. 192.6(b). Finally, the request would exert undue hardship and expense on Mr. Youngblood, particularly because the request is overbroad involving thousands of documents with no relationship to the underlying suit except for the mention of the Defendant's name.

Mr. Youngblood asks the court for a protective order from further compulsory process of this nature.

V.

Allen Youngblood, by and through his attorney, notifies Phil Fitzgerald that information or material responsive to the subpoena requesting production of the testimony and documents requested are withheld under a claim of privilege. TEX. R. CIV. P. 193.3(a); TEX. CIV. PRAC. & REM. CODE, Chapter 22, Subchapter C.

VI.

In the event this Court orders Mr. Youngblood to comply with the subpoena and produce documents to which objections have been raised regarding the expense of production, and the order is upheld by and through the appellate process, Mr. Youngblood asks the Court to require the Defendant, Phil Fitzgerald, to compensate him for the costs of production and for undue hardship. TEX. R. CIV. P. 176.7. Allen Youngblood estimates the costs of production will be at least \$5,000.00 and will require a minimum of 30 days to complete. *See* Texas Government Code, Chapter 552, Subchapter F.

VII.

It was necessary for Movant to secure the services of H. Gerald Hosemann, a licensed attorney, to preserve and protect his rights. Movant requests that the Defendant, Phil Fitzgerald, be ordered to pay reasonable attorney's fees, expenses, and costs through trial and appeal, and a judgment should be rendered in favor of this attorney and against Defendant and be ordered paid directly to the undersigned attorney, who may enforce the order in the attorney's own name. Petitioners request post-judgment interest as allowed by law.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Movant, Allen Youngblood, respectfully requests the Court to grant his Motion to Quash and for the issuance of a protective order for this hearing, and, after the hearing, to issue a written Order quashing the subpoena as issued by Defendant and an Order protecting Allen Youngblood from any and all requests for privileged journalistic information sought by Defendant, with the exception of that which this Court deems necessary after appropriate due process and compliance with state and federal laws. Movant prays the Court will grant the relief requested in this motion. Movant also prays for attorney's fees, expenses, costs, and interest as requested above.

Respectfully submitted,

By: _____
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Attorney for Movant, Allen Youngblood

CERTIFICATE OF SERVICE

I certify that on October 9, 2009, a true and correct copy of Allen Youngblood's Motion for Quash and for Protection from Subpoena was served by Facsimile to

Barbara J. Norwood, Po Box 759, Dayton, Texas 77535, (936) 258-8029

Steven J. Watkins, 3200 One Houston Center, Houston, Texas 77010, (713) 615-8585

Thomas O. Barton, 600 Congress Avenue, Suite 2100, Austin, Texas 78701, (512) 495-6095

Richard Morrison, 1100 HWY 146, Kemah, Texas 77565, (281) 535-0458

H. Gerald Hosemann