

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED
CIVIL PROCESSING

JOHN C. DEPP, II,

Plaintiff,

v.

AMBER LAURA HEARD,

Defendant.

Civil Action No.: CL-2019-0002911

2022 JUN 17 1:19

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

PLAINTIFF JOHN C. DEPP, II'S OPPOSITION TO EHM PRODUCTIONS, INC. FOR LIMITED PURPOSE OF ASSERTING JOURNALIST'S PRIVILEGE

Plaintiff John C. Depp, II, by and through his undersigned counsel, hereby opposes EHM Productions, Inc.'s (TMZ) Emergency Motion to Intervene.

ARGUMENT

TMZ's motion should be denied for several reasons. First, TMZ's motion is procedurally improper, as TMZ is not a proper intervenor asserting a claim or defense connected to the subject matter of this action. Second, the motion by TMZ is wholly reliant on an attempt to assert privilege that simply does not apply – Morgan Tremaine, the witness TMZ seeks to prevent from testifying, is doing so voluntarily and is not being compelled to disclose any information, much less information that is somehow barred from disclosure. Indeed, the journalist privilege merely prevents (under certain circumstances) the compelled disclosure of a source's identity in discovery, and is facially inapplicable to the situation here. Third, TMZ speculates as to what Morgan Tremaine will testify to, which is relevant, not limited to impeachment, and goes well beyond any information that could conceivably be covered under the privilege. TMZ has cited no authority permitting the offensive use of the privilege to prevent someone else from voluntarily testifying,

and even if the privilege were applicable in this circumstance (which it is not) it would not be a basis to prevent Mr. Tremaine from testifying on a wide variety of matters. The apparent suggestion by TMZ in its motion that a witness can be precluded from testifying at all on this basis is without legal support. The motion should be denied in its entirety.

1. The Journalist's Privilege Does Not Apply

The journalist's privilege applies (when it applies at all) to circumstances in which a witness is being compelled to reveal a source. *See, e.g., Philip Morris Companies, Inc. v. Am. Broad. Companies, Inc.*, 36 Va. Cir. 1 (1994); *In re Roche*, 448 U.S. 1312, 1313 (1980); *Brown v. Commonwealth*, 214 Va. 755, 756 (1974). The privilege does not apply to a situation where, as here, a witness is appearing on a voluntary basis to testify. TMZ does not cite any authority for its novel suggestion that a journalistic enterprise is entitled to prevent a completely different party from testifying about information that might lead to the discovery of a source. In fact, each of the cases cited relate to a discovery issue compelling discovery about confidential sources. *See id.*; *see also LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1137 (4th Cir. 1986). Mr. Tremaine is a voluntary witness, and we are not seeking documents, but rather trial testimony. Accordingly, the various authorities cited by TMZ are inapplicable on their face.

Moreover, the limited scope of the newsman's privilege would extend only to the confidentiality of a source as reflected in each of the cases TMZ relied on. That would not be a complete bar to Mr. Tremaine's testimony, who has information beyond any confidential sources, about which he is entitled to testify.

2. Mr. Tremaine Can Testify Regarding Numerous Matters

TMZ apparently seeks to prevent Mr. Tremaine from testifying at all, but the journalist's privilege, when it applies at all, is limited in scope to the specific disclosure of a journalist's source.

There are many matters about which Mr. Tremaine can testify that do not disclose source information – such as the timing, impact, and nature of TMZ’s press coverage – and are facially legitimate avenues of inquiry. In any event, TMZ’s argument is premature, as TMZ’s assertions about what Mr. Tremaine is prepared to testify about amount to pure speculation. TMZ surmises in its motion that Mr. Tremaine is being called solely for impeachment purposes. However, there are a number of other purposes for Mr. Tremaine’s testimony, including that he is an independent witness familiar with the press coverage related to Ms. Heard’s allegations of domestic abuse by Mr. Depp and that Ms. Heard manipulated the press surrounding the abuse allegations. TMZ cannot unequivocally bar Mr. Tremaine’s entire testimony based on a *discovery* rule aimed at preventing *compelled* disclosure of confidential sources.

3. Intervention is Not Appropriate

TMZ’s motion is procedurally improper. Intervention is only appropriate with leave of court where a third party seeks to “file a pleading to intervene as a plaintiff or defendant to assert any claim or defense germane to the subject matter of the proceeding.” Va. Sup. Ct. R. 3:14. TMZ is not asking to file a pleading; it can properly categorize itself as neither plaintiff nor defendant; and it seeks to assert no claim or defense germane to the subject matter of this action. Finally, even if it were applicable (which is not the case), the testimony intended is directly relevant and would outweigh any qualified privilege. “[A]n intervenor must be asserting an interest that is part of the subject matter of the litigation.” *Hudson v. Jarrett*, 269 Va. 24, 32 (2005). Here, TMZ seeks to protect potential information solicited from a third-party witness, which is in no way a matter before this court. *Commonwealth v. Guill*, 89 Va. Cir. 323 (2014) (denying a motion to intervene where the intervenor filed it “to protect a property right, a matter not before the Court . . .”). The outcome of this trial will not affect TMZ, and thus, it does not have a sufficient interest in the

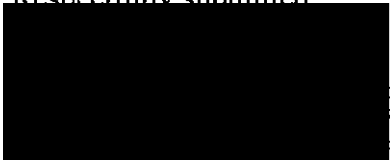
subject matter of this suit to intervene. *See Tavss Fletcher Maiden & Reed, PC v. Bank Nat'l Trust Co.*, 2013 WL 5849140 (October 13, 2013) (granting leave to intervene where the intervenor's liability would be affected by the outcome of the litigation).

Furthermore, TMZ lacks standing to object to testimony by a third party in this action, since TMZ is not being asked or compelled to testify. TMZ's reliance on *Philip Morris Companies*, for the proposition that the privilege cannot be circumvented by seeking confidential source information from an employee is inapposite. 36 Va. Cir. at 1. For one thing, as noted in that case, there is "no testimonial privilege, akin to that enjoyed under the Fifth Amendment, which would allow a reporter to refuse to appear before a grand jury and answer questions." *Id.* at 7. In *Philip Morris*, the party issued a third-party subpoena for records to trace confidential sources. This is unrelated to the issue here, which is related to witness testimony, not records.

CONCLUSION

The Motion should be denied.

Respectfully submitted



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Dated: May 25, 2022

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of May 2022, I caused copies of the foregoing to be served on the following:

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