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Constitutional Law - Witnesses - North Dakota's Shield Statute Limits the Newsgatherer's Statutory Privilege If Nondisclosure Would Cause a Miscarriage of Justice

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CASE COMMENTS

CONSTITUTIONAL LAW — WITNESSES — NORTH DAKOTA'S "SHIELD" STATUTE LIMITS THE NEWSGATHERER'S STATUTORY PRIVILEGE IF NONDISCLOSURE WOULD CAUSE A MISCARRIAGE OF JUSTICE

This decision[1] arose pursuant to two civil actions[2] brought to determine the liability for an automobile-motorcycle accident in the city of Grand Forks.[3] Following the accident a photographer from the Grand Forks Herald took one or more photographs of the scene of the mishap.[4] The Grand Forks Police Department did not take any photographs of the accident site.[5] The parties disputed the testimony regarding the relative positions of the vehicles involved in the accident.[6] To resolve this issue, respondent's attorney obtained a subpoena duces tecum ordering the chief photographer for the Grand Forks Herald to appear at a district court hearing and bring any and all photographs and negatives of the accident in his possession.[7] The Grand Forks Herald then filed a motion to quash the subpoena.[8] At the hearing on the motion to quash, the

1. Grand Forks Herald v. District Court, 322 N.W.2d 850 (N.D. 1982).

2. *Id.* at 851. The two underlying cases were Grunenwald v. Leng, No. 35698 (N.D. Dist. Ct. filed Apr. 28, 1982), and Lian v. Leng, No. 35732 (N.D. Dist. Ct. filed May 13, 1982).

3. 322 N.W.2d at 851. The accident occurred on October 21, 1981, on South Washington Street in Grand Forks at approximately 5:30 p.m. Brief of Respondent at 1, Grand Forks Herald v. District Court, 322 N.W.2d 850 (N.D. 1982).

4. 322 N.W.2d at 851. The actual number of photographs taken by the newspaper photographer is not known. *Id.*

5. 322 N.W.2d at 856. A police officer with the Grand Forks Police Department stated that officers are not required to take photographs of accident sites. To do so is at the discretion of the individual officer at the scene. If serious personal injuries or a large amount of property damage is involved, the police department usually takes photographs. When an accident involves a fatality, the officer must take photographs of the accident site. The police officer must be able to justify the request for photographs to his superior. Interview with Grand Forks police officer who prefers to remain anonymous (Sept. 24, 1982).

6. Brief of Respondent at 3, Grand Forks Herald v. District Court, 322 N.W.2d 850 (N.D. 1982). The testimony of the two parties involved in the accident and that of the investigating police officer about the location of the vehicles at the time of the impact conflicted. Brief of Respondent at 3.

7. Brief of Petitioners at 1, Grand Forks Herald v. District Court, 322 N.W.2d 850 (N.D. 1982).

8. 322 N.W.2d at 851.

district court ordered the newspaper to produce the photographs.[9] The Grand Forks Herald did not comply and petitioned the North Dakota Supreme Court to issue a supervisory writ directing the district court to vacate its order compelling disclosure of the photographs.[10] The newspaper contended that to force it to release the photographs would violate the first amendment to the United States Constitution[11] and section 31-01-06.2 of the North Dakota Century Code.[12] The respondent claimed that to deny access to the photographs, which she maintained contained crucial and possibly determinative evidence,[13] would thwart justice by preventing her from getting a full and fair trial based on the merits.[14] The North Dakota Supreme Court *held* that the district court did not abuse its discretion in requiring the Grand Forks Herald to disclose its photographs.[15] *Grand Forks Herald v. District Court,* 322 N.W.2d 850 (N.D. 1982).

Freedom of the press is one of the basic rights included in the first amendment to the United States Constitution.[16] Although the rights enumerated in the first amendment have played an integral part in the American constitutional scheme, it was not until 1924 that the United States Supreme Court held these rights binding upon the states[17] through the due process clause of the fourteenth

9. *Id.*

10. *Id.* at 852. The hearing on the motion to quash was held on June 19, 1982, in Grand Forks County District Court before District Court Judge A. C. Bakken. Brief of Petitioners at 2, Grand Forks Herald v. District Court, 322 N.W.2d 850 (N.D. 1982).

11. *See* U.S. CONST. amend. I. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

12. 322 N.W.2d at 853. North Dakota's "shield statute" provides:

> No person shall be required in any proceeding or hearing to disclose any information or the source of any information procured or obtained while the person was engaged in gathering, writing, photographing, or editing news and was employed by or acting for any organization engaged in publishing or broadcasting news, unless directed by an order of a district court of this state which, after hearing, finds that the failure of disclosure of such evidence will cause a miscarriage of justice.

N.D. CENT. CODE § 31-01-06.2 (1976).

13. Brief of Respondent at 10-11, Grand Forks Herald v. District Court, 322 N.W.2d 850 (N.D. 1982). The respondent argued that juries give great weight to photographic evidence. Thus, photographs would be of greater value to the jury in determining liability than mere oral testimony. Brief of Respondent at 10-11.

14. *Id.* at 21. The respondent asserted that the court should deny petitioner's request for a supervisory writ and affirm the order of the district court compelling disclosure. *Id.*

15. Grand Forks Herald v. District Court, 322 N.W.2d 850, 857 (N.D. 1982).

16. *See* U.S. CONST. amend. I. For the text of the first amendment, see *supra* note 11.

17. Gitlow v. New York, 268 U.S. 652 (1924). In this landmark decision the Court stated:

> For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

Id. at 666.

amendment.[18] These rights, regarded as fundamental,[19] are not absolute.[20] Since reaching the conclusion that first amendment rights are not absolute, courts have clarified this position in a number of decisions.[21] In *Garland v. Torre*[22] the Court of Appeals for the Second Circuit explained that newsgatherers do not have a privilege to withhold information and thus can be forced to disclose such information.[23] The *Garland* court laid down several guidelines for determining when to require a newsgatherer to disclose information.[24] The court stated that courts could not use judicial processes to force wholesale disclosure of a newsgatherer's confidential sources, and the information sought must go to the heart of the claim.[25]

The leading case dealing with the newsgatherer's claimed first amendment privilege is *Branzburg v. Hayes*.[26] In *Branzburg* the United States Supreme Court held that requiring newsmen to appear before grand juries did not abridge their freedoms of speech and press guaranteed by the first amendment.[27] The Court reiterated the common law view that newsmen do not have a privilege to refuse to testify before a grand jury regarding confidential information.[28] The Court emphasized that the obligation of a citizen to testify before a grand jury or trial and give what information he possesses eclipsed the first amendment interest advanced by the newsgatherers.[29] The Court expressed dissatisfaction with the newsgatherers' argument that forced

18. *See* U.S. CONST. amend. XIV, § 1. This section provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." *Id.*

19. San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 33-34 (1973) (fundamental rights defined as those "explicitly or implicitly guaranteed by the Constitution").

20. Near v. Minnesota, 283 U.S. 697, 708 (1931) ("Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse.").

21. *See, e.g.,* Near v. Minnesota, 283 U.S. 697 (1931) freedoms of speech and of the press are not absolute); Garland v. Torre, 259 F.2d 545 (2d Cir.) (first amendment rights are not absolute, and a compelling interest justifies some impairment of these rights), *cert. denied,* 358 U.S. 910 (1958).

22. 259 F.2d 545 (2d Cir.) (libel action), *cert. denied,* 358 U.S. 910 (1958).

23. 259 F.2d at 550. The *Garland* court stated that "freedom of the press, precious and vital though it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom." *Id.* at 548. The interest served was the fair administration of justice by the state through its court system. *Id.* at 549.

24. *Id.* at 549-50.

25. *Id.* Among the other criteria that the court considered were situations in which the identity of the news source was of dubious relevance or the information sought was not material to the plaintiff's claim. *Id.*

26. 408 U.S. 665 (1972).

27. Branzburg v. Hayes, 408 U.S. 665 (1972). This decision was a consolidation of three cases in which the Supreme Court granted certiorari. The cases below were Branzburg v. Pound, 461 S.W.2d 345 (Ky. Ct. App. 1971); *In Re* Pappas, 358 Mass. 604, 266 N.E.2d 297 (1971); and Caldwell v. United States, 311 F. Supp. 358 (N.D. Cal.), *rev'd,* 434 F.2d 1081 (9th Cir. 1970).

28. 408 U.S. at 685.

29. *Id.* at 686. The *Branzburg* Court stated that there was no "reason to hold that these reporters, any more than other citizens, should be excused from furnishing information that may help the grand jury in arriving at its initial determination." *Id.* at 702.

disclosure would hamper the flow of news and impinge upon their ability to perform their informational function.[30] The Court, however, took the newsman's plight into account when it asserted that the state must show a compelling interest to warrant even an implicit burden on protected first amendment rights.[31] After stating that a compelling state interest in the fair administration of justice could override the newsgatherer's testimonial and source privilege, the Court left the door open to Congress and the state legislatures to change the balance statutorily if they deemed it necessary.[32]

This invitation to the states led to the passage of "shield statutes"[33] in many states. An example of such a statute is the Pennsylvania law,[34] which the Court of Appeals for the Third

30. *Id.* at 697. The Court reasoned that judicial control of the grand jury system and the availability of the motion to quash would sufficiently protect the constitutional rights of the newsgatherer. *Id.* at 708.

31. *Id.* at 700. The investigation of crime by the grand jury and the resulting security of citizens and property were the compelling interests that the Court balanced against the newsgatherer's first amendment rights when it held that the latter must give way. *Id.*

32. *Id.* at 706. The Court stated:

> At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newman's privilege, either qualified or absolute.

Id.

33. *See In re* Farber, 394 A.2d 330 (N.J.), *cert. denied,* 439 U.S. 997 (1978). The New Jersey Supreme Court defined "shield law" as "the term . . . commonly and widely applied to statutes granting newsmen and other media representatives the privilege of declining to reveal confidential sources of information." 394 A.2d at 335 n.2.

See also Letter from Al Austin to Howard Freed (Jan. 10, 1973) (discussing the pending North Dakota shield legislation). Al Austin was a professor of journalism at the University of North Dakota. In his letter he urged Senator Freed, Chairman of the Senate Judiciary Committee, to enact the shield legislation. He stated that in light of the *Branzburg* decision, newsmen needed greater statutory protection. *Id.*

North Dakota is not alone in its adoption of a shield statute. Other states' shield statutes are as follows: ALA. CODE § 12-21-142 (1975); ALASKA STAT. §§ 09.25.150-.220 (1973); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1982); ARK. STAT. ANN. § 43-917 (1977); CAL. EVID. CODE § 1070 (West Supp. 1982); DEL CODE ANN. tit. 10, §§ 4320-4326 (1975); ILL. ANN. STAT. ch. 51, §§ 111-119 (Smith-Hurd Supp. 1982-1983); IND. CODE ANN. § 34-3-5-1 (Burns Supp. 1982); KY. REV. STAT. § 421.100 (1972); LA. REV. STAT. ANN. §§ 45.1451-.1454 (West Supp. 1982); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1980); MICH. COMP. LAWS ANN.§ 767.5a (1982); MINN. STAT. ANN. §§ 595.021-.025 (West Supp. 1982); MONT. CODE ANN. §§ 26-1-901 to 903 (1981); NEB. REV. STAT. § 20-144-47 (1977); NEV. REV. STAT. § 49.275 (1981);N.J. STAT. ANN. §§ 2A:84A-21 to 21.9 (West Supp. 1982-1983); N.M. STAT. ANN. § 38-6-7 (Supp. 1981) (declared unconstitutional in Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976)); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1976 & Supp. 1981)1982); OHIO REV. CODE ANN. § 2739.04 (Page 1981); OKLA. STAT. ANN. tit. 12, § 2506 (West 1980); OR. REV. STAT. §§ 44.510-.540 (1981); 42 PA. CONS. STAT. ANN. § 5942 (Purdon 1982); R. I. GEN. LAWS §§ 9-19.1-.3 (Supp. 1981); TENN. CODE ANN. § 24-1-208 (1980).

34. *See* 42 PA. CONS. STAT. ANN. § 5942(a) (Purdon 1982). The Pennsylvania shield statute provides:

> No person engaged on, connected with, or employed by any newspaper of general

Circuit interpreted in *Riley v. City of Chester.*[35] The court strongly emphasized the importance of freedom of the press, but stated that there existed countervailing interests sufficient to overcome the newsgatherer's privilege to refuse to reveal the source of his information.[36] In interpreting the Pennsylvania statute the court adopted a balancing approach.[37] The court emphasized that the information sought must not be available from any other source and must go to the heart of the issue.[38] If a party could show these factors, his right to force disclosure would take precedence over the newsgatherer's privilege.[39]

Following *Branzburg,* courts have shown great deference to statutorily enacted shield laws.[40] Courts generally hold that this area is within the province of the legislature, and the judicial branch should respect the legislature's determination of public policy.[41]

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circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

Id.

35. 612 F.2d 708 (3d Cir. 1979). The *Riley* case was filed pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983. Riley v. City of Chester, 612 F.2d 708, 710 (3d Cir. 1979). *See* 28 U.S.C. § 1343 (1976); 42 U.S.C. § 1983 (1976). Riley was a policeman working for the city of Chester, Pennsylvania. He claimed that the defendant city violated his constitutional right to conduct his campaign for mayor. He complained that employees of the city prejudiced his campaign by personal surveillance, investigating his performance as a police officer, and then leaking this information to the press. 612 F.2d at 710.

36. 612 F.2d at 715. The court stated that it would examine each situation on a case by case basis. It adopted the position put forward by Justice Powell in *Branzburg,* that courts should weigh the factors involved in each case to determine the proper balance between freedom of the press and the duty of all citizens to give whatever information they possess at trial. *Id.* at 716 (citing Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J., concurring)).

37. *Riley,* 612 F.2d at 716.

38. *Id.* at 717.

39. *Id.* The *Riley* court approved of language used by other courts, such as the Court of Appeals for the Tenth Circuit in *Silkwood v. Kerr-McGee Corp. Id.* at 716-17 (referring to Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977)). The *Silkwood* court considered four criteria in balancing the interests involved: "(1) Whether the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful. (2) Whether the information goes to the heart of the matter. (3) Whether the information is of certain relevance. (4) The type of controversy." Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977).

40. 612 F.2d at 715. The *Riley* court recognized that a strong public policy element in Pennsylvania supported the protection of newsmen and newsgatherers. The ultimate beneficiary of this strong public policy would be the public at large. *Id.*

41. *E.g.,* State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (1943). The New Jersey Supreme Court upheld the state's shield statute. The court reasoned that the shield statute could not be contrary to public policy because the legislature, whose function was to determine public policy, had passed this legislation. *Id.* at ____, 30 A.2d at 426. Although the *Donovan* decision occurred prior to *Branzburg,* the *Branzburg* Court used language similar to *Donovan* when the Court justified its invitation to the state legislature to pass newsgatherer protection legislation if it deemed it necessary. *See Branzburg,* 408 U.S. at 706.

But see Farr v. Superior Court, 22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (Ct. App. 1971) (shield statute unconstitutional as applied to reporter who violated court order compelling disclosure), *cert. denied,* 409 U.S. 1011 (1972); Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976) (declaring New Mexico's shield statute unconstitutional), *cert. denied,* 436 U.S. 906 (1978). In *Ammerman* the New Mexico Supreme Court held that the shield statute was actually a rule

Prior to reaching the primary issue in *Grand Forks Herald,* the North Dakota Supreme Court addressed whether it should exercise its original jurisdiction.[42] The North Dakota Constitution specifically provides that the supreme court shall have appellate and original jurisdiction and the authority to issue such original and remedial writs as may be necessary.[43] In *Spence v. North Dakota District Court*[44] the supreme court stated that its authority to issue original writs was discretionary, and the party seeking its issuance could not assert it as a matter of right.[45] The court also stated that it will decide for itself, on an ad hoc basis, whether to invoke its original jurisdiction.[46] Another restraining factor on the usage of original jurisdiction is that the rights of the public must be directly affected.[47] The court has explained the instances in which it will exercise this discretionary power and issue a supervisory writ to the court below.[48] In *Ingalls v. Bakken*[49] the court stated that the action

of evidence. In holding the statute unconstitutional, the court reasoned that it was the province of the courts, rather than that of the legislature, to promulgate rules of evidence. *Id.* at ____, 551 P.2d at 1359. *See also* Annot., 99 A.L.R. 3D 88-89 (1980) (discussing constitutionality of shield statutes).

Although the North Dakota Supreme Court did not pass judgment on this issue in the *Grand Forks Herald* case, it recognized the issue and held in reserve the entire issue of whether the state legislature had exceeded its authority in passing such legislation. *Grand Forks Herald,* 322 N.W.2d at 853 n.3. The court stated:

> Because it was not raised as an issue, we do not decide the authority of the Legislature, as opposed to the authority of this Court, to regulate the admission of evidence in a judicial proceeding. Section 3 of Article VI of the North Dakota Constitution grants to the Supreme Court the authority "to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state; . . ." Many of the same privileges found in Chapter 31-01, N.D.C.C., are found in Article V, N.D.R.Ev. The substance of Section 31-01-06.2 is not found in any of the North Dakota Rules of Evidence. However, Rule 501 thereof provides: "Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of this State, no person has a privilege" to refuse to be a witness, refuse to disclose any matter, etc.

Id.

42. 322 N.W.2d at 852. Since the petitioner requested the court to issue a supervisory writ vacating the order of the district court, the court first addressed whether it had jurisdiction to issue such a writ. *Id.*

43. N.D. CONST. art. VI, § 2. This section provides in part: "The supreme court shall be the highest court in the state. It shall have appellate jurisdiction, and shall also have original jurisdiction with authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its jurisdiction." *Id.*

44. 292 N.W.2d 53 (N.D. 1980). In *Spence* the petitioners asked the court to invoke its original jurisdiction and issue a supervisory writ directing the lower court to compel answers to certain interrogatories. The court held that this involved a private or personal interest, as opposed to an important public interest, and that petitioners had not exhausted other remedies available to them. Thus, the court declined to issue the writ. Spence v. North Dakota Dist. Court, 292 N.W.2d 53, 57 (N.D. 1980).

45. *Id.*

46. *Id.* Because each case depends on the specific facts involved, the court said that it would have to weigh the facts on a case by case basis. *Id.*

47. *Id.* The *Spence* court reasoned that the sovereignty of the state or the liberties of the people must be at issue, and the court cannot invoke jurisdiction to vindicate mere private interests. Thus, only when a matter of public concern is at issue will the court exercise its original jurisdiction. In addition, the court stated that the state interest must be of primary importance and not merely tangential. *Id.*

48. *Id.*

49. 167 N.W.2d 516 (N.D. 1969).

of the trial court that is complained of must result in "grave or serious prejudice" before the court will exercise its discretionary power to issue a supervisory writ.[50] Also, the party seeking this extraordinary remedy must have no other adequate remedy available to him, or the court will deny the application for the writ.[51]

In deciding to exercise its discretionary power and invoke its original jurisdiction in *Grand Forks Herald,* the court considered four factors.[52] These factors were the involvement of a strong public interest, a challenge to the first amendment guarantee of freedom of the press, the adjudication of an issue of first impression in North Dakota, and the nonappealability of the district court order.[53]

Once invoking its original jurisdiction, the court next addressed the primary issue; whether North Dakota's shield statute[54] protected the Grand Forks Herald from having to surrender its photographs.[55] In arguing that the statutory protection did not extend to the Grand Forks Herald, the respondent reasoned that the statute only applied to confidential sources.[56] The court, however, maintained that the statute applied not only to confidential sources, but to all sources and any information obtained by the newsgatherer.[57] The court stated, nevertheless, that the confidentiality of the information or its source was a factor that the district court may consider in determining whether nondisclosure would lead to a miscarriage of justice.[58] The court

50. Ingalls v. Bakken, 167 N.W.2d 516, 518 (N.D. 1969) (procedural case in which the court discussed the instances in which it would issue supervisory writs).

51. *Id.*

52. 322 N.W.2d at 852.

53. *Id.* Since the discovery proceeding is interlocutory, the district court order is not appealable. *Id.* In addition, the Grand Forks Herald would not have had standing to appeal a final adjudication of the underlying case because it was not a party to that action. Thus, the only method by which the court could hear the newspaper's argument would be through a grant of original jurisdiction. *Id.*

54. For the text of the North Dakota shield statute, see *supra* note 12.

55. 322 N.W.2d at 853-56.

56. *Id.* at 854. In any event the court expressly found that the photographs of a public street, one of which the newspaper later published, were not confidential. *Id.* at 856.

At least one jurisdiction, however, has applied a confidential source requirement. *See* Andrews v. Andreoli, 92 Misc. 2d 410, ____, 400 N.Y.S.2d 442, 447 (Sup. Ct. 1977) (information must be confidential before a reporter can withhold the information from a special grand jury proceeding); People v. DuPree, 88 Misc. 2d 791, ____, 388 N.Y.S.2d 1000, 1003 (Sup. Ct. 1976) (photographs of a murder scene taken by a newspaper photographer were not confidential and, thus, not protected by the state's shield law).

The North Dakota Supreme Court could find nothing ambiguous in the shield statute. Thus, it interpreted the statute literally. 322 N.W.2d at 854. In a concurring opinion Justice Pederson stated that the statute was ambiguous. He said that "[t]he legislature should either require an *in camera* disclosure whenever the shield is claimed, or eliminate the requirement that the judge make a finding." *Id.* at 858 (Pederson, J., concurring).

57. 322 N.W.2d at 854.

58. *Id.* The parties agreed that abuse of discretion is the proper standard for the shield statute. *Id.* Using this standard, the court stated "that a trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner," and that "an abuse of discretion by the trial court is never assumed but must be affirmatively established." *Id.*

indicated that the statute applied to all proceedings whether civil or criminal.[59] The court, however, included the type of proceeding as another factor that the judge may consider when balancing the interests involved.[60]

The Grand Forks Herald contended that the respondent must exhaust all other possible sources of information before the court could force it to release information pursuant to the shield statute.[61] Scrutinizing the legislative intent and the final wording of the statute, the court found that the statute imposed only the requirement that the newsgatherer release information if the failure to disclose would result in a miscarriage of justice.[62] Thus, the court expressly found that to force disclosure the respondent need not have exhausted all other possible sources of information.[63] Even though North Dakota's shield law does not include the "no other source" requirement, the district court may weigh this factor in determining whether to force disclosure.[64] If there are other sources available to the party seeking disclosure, it is unlikely that the district court would force disclosure.[65] Another factor that the district court should consider is the factual situation peculiar to the case.[66] In light of these criteria, the court said that its decision

59. *Id.* at 854. *But see* Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975). The *Loadholtz* court, in a civil proceeding, held that to require a reporter to divulge documents assembled in the course of employment as a reporter would violate the first and fourteenth amendments to the United States Constitution. *Id.* at 1301.

60. 322 N.W.2d at 854-55.

61. *Id.* at 855.

62. *Id.* The original version of the shield legislation stated that the district court could require disclosure only if it expressly found the following:

> 1. The existence of probable cause to believe that the respondent or his source has evidence which is relevant and material to an issue of proper concern to the petitioner, and
> 2. Disclosure by the respondent is the only method by which such evidence, or evidence of similar effect, can be obtained; . . .

S. 2077, 43d N.D. Leg. Sess. (1973). The legislature later deleted this language from the bill. JOURNAL OF THE SENATE, 43d N.D. Leg. Sess. 560 (1973).

63. 322 N.W.2d at 855. It seems that many decisions require the party seeking disclosure to exhaust all possible alternative sources or show a compelling interest. *See, e.g.*, Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981) (appellants must show that they have exhausted other possible sources of information); Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975) (plaintiff must show a compelling interest or at least that the information is not available from any other source).

64. 322 N.W.2d at 855.

65. *Id.* The newspaper argued that Leng had not exhausted all the alternative sources of information available to her. The court recognized that the photographs would provide much better evidence than the faulty memories of the human participants. Since Leng established that no other photographs of the accident scene existed, the court concluded that she carried her burden and made an adequate showing that the newspaper should release the photographs. *Id.* at 855-56.

Justice Sand disagreed with this finding of the court. He reasoned that the statute protected only information or sources of information, not photographs taken of an accident scene. If the statute would have applied to the photographs, however, the Grand Forks Herald would not have to release them because the respondent did not carry her burden of showing that failure to grant access to the photographs would result in a miscarriage of justice. *Id.* at 859 (Sand, J., concurring specially and dissenting).

66. *Id.* at 857. The Grand Forks Herald feared that precedent would lead attorneys on discovery

would not chill first amendment rights in the State of North Dakota.[67]

This decision does not destroy first amendment freedom of the press in North Dakota. Rather, it is a careful balance between this important freedom and the fair and uniform administration of justice. Newsmen are not above the law and must comply with the rule that the courts are entitled to every man's evidence.[68] This is essential if the courts are to carry out their function of administering justice. The *Grand Forks Herald* decision should reassure the press that there will be no wholesale forced disclosures or probing into issues that are not relevant to the case.[69] In this initial interpretation of North Dakota's shield statute, the court laid down specific parameters to guide the district courts. Factors the district court may consider include the confidential nature of the information, the type of proceedings involved, and the availability of the information from other sources.[70] Above all, the determinative factor will be the specific factual situation in each case.[71]

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excursions through their files. *Id.* The court, however stated:

> Our decision cannot be construed, as the Herald apparently fears, as a precedent which will permit fishing expeditions into a newsgatherer's files nor as a precedent which will permit a newsgather to be required to submit to discovery procedures in a case in which the newsperson is not a party, in the remote possibility that the person may have some information which would be beneficial to a party in a legal action.

Id.

67. *Id.*

68. 8 WIGMORE, EVIDENCE § 2192, at 70 (McNaughton rev. ed. 1961). Wigmore states:

> For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to everyman's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.

Id.

69. 322 N.W.2d at 857.

70. *Id.* at 854-55.

71. *Id.* at 857.

ADDENDUM

In the interim period between the North Dakota Supreme Court's decision in *St. Paul Mercury Insurance C. v. Andrews,* 321 N.W.2d 483 (N.D. 1982), and the printing of the following Case Comment, the 48th Legislative Assembly addressed the insurance stacking issues presented in *Andrews.* The Assembly passed House Bill 1195, which created a new section to chapter 26-41 of the North Dakota Century Code. House Bill 1195 also amended and reenacted section 26-05-42 of the North Dakota Century Code, which addresses uninsured motorist coverage. House Bill 1195 prohibits stacking of uninsured motorist coverages and no-fault benefits within North Dakota. The legislative action thus modifies the holding of *Andrews* and reverses that part of the decision that allowed stacking of uninsured motorist coverages.