UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

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DUKE UNIVERSITY, CIVIL ACTION

Movant Docket No: 2:12-348-DBH

-versus-

ROBERT DAVID JOHNSON,

Appellant

_____

Transcript of Proceedings

Pursuant to notice, the above-entitled matter came on for **Oral Argument** held before **THE HONORABLE D. BROCK HORNBY,** United States District Court Judge, in the United States District Court, Edward T. Gignoux Courthouse, 156 Federal Street, Portland, Maine, on the 23rd day of January 2013 at 3:08 P.M. as follows:

Appearances:

For the Appellant: Patrick Strawbridge, Esquire

For the Movant: Thomas Hamilton Segars, Esquire
David A. Goldman, Esquire
Russell Pierce, Esquire

For Amicus Curiae: Sigmund D. Schutz, Esquire

Lori D. Dunbar, RMR, CRR
Official Court Reporter

(Prepared from manual stenography and computer aided transcription)

(Open court)

THE COURT: Good afternoon.

MR. STRAWBRIDGE: Good afternoon, Your Honor.

MR. SEGARS: Good afternoon, Your Honor.

THE COURT: This is Civil No. 12-348, case of Dr. Robert Johnson and Duke University, and the matter is on this afternoon for oral argument on the appellant's objection to the underlying magistrate judge decision. And, counsel, I have received and read all of the briefs that have been filed in this matter, including the brief for amicus curiae, Mr. Schutz. And I've read the material cases, I haven't read every case yet, but I will as we proceed. And I'm ready to hear oral argument, and I'll hear first of all from Mr. Strawbridge, who is representing Dr. Johnson.

MR. STRAWBRIDGE: Thank you, Your Honor. May it please the Court, I am Patrick Strawbridge appearing today on behalf of Dr. Johnson, who is with me at counsel table. I'm happy to answer any questions that the Court has.

THE COURT: Well, let me start with one technical question. You're arguing for a de novo review.

MR. STRAWBRIDGE: That's absolutely correct.

THE COURT: And I understand the arguments

and, as we lawyers and judges know, the statute in question does not use the word dispositive but the rule does and the cases do. But what I'm more interested in is this. As I understand it, if Dr. Johnson were living in North Carolina and the subpoena had issued there, there would not be de novo review in the district court down there under your argument. And my question is, why should the standard of review be different simply because he happens to live in another district when a magistrate judge makes a decision? And do I have your position correct?

MR. STRAWBRIDGE: I will concede that -- well, put it this way. I'm not a hundred percent prepared to concede that that would be the result in North Carolina. But our position certainly is that the cases -- the mandatory case law under the First Circuit precedent and precedent from other district courts here or at least from magistrate rulings here is that de novo review is what's proper here. And whether that is an accident of jurisdiction, I don't think it's quite an accident, you've gone into another jurisdiction in order to enforce a subpoena against a party, and if the desire --

THE COURT: A nonparty.

MR. STRAWBRIDGE: I'm sorry, to enforce a

subpoena against a nonparty. And the desire in this case is to ensure that that nonparty receives the appropriate review. Unlike a case where the magistrate judge might have sort of plenary authority over all matters of discovery, this is the only issues that -- is the only issue that needs to be resolved in the case. It is somewhat exceptional because it's a third party and because it's out of the jurisdiction, and I think the statute and the cases speak for themselves.

THE COURT: Let's explore that just a little bit. If it were a third party in the district where the case is being tried, a magistrate judge could decide the issue. But it would not be considered dispositive, would it? It's simply a discovery matter and would then get the more relaxed standard of review? As you know, there's a California case that argues that and the other case that seemed to support you.

MR. STRAWBRIDGE: That's right, including the cases from the First Circuit.

THE COURT: From the district courts in the First Circuit.

MR. STRAWBRIDGE: Well, and also there's a First Circuit case on this.

THE COURT: Well, there's Cusumano; is that what you're referring to?

MR. STRAWBRIDGE: No, we cited a case, I believe it's In Re (Mr. S.) Grand Jury Subpoena, which is a First Circuit case on this question, stands for the proposition that an action initiated solely for the purposes of subpoena enforcement does get de novo review. And let me tell you why I think there is a logical difference if we were in North Carolina. If we were in North Carolina, we would be in front of a judge who is much more familiar with what the underlying claims and issues in the case were, would have much more experience with what the parties are doing in discovery with respect to one another, and therefore presumably would have that level of familiarity, in which case it might make more sense to defer to some of the decisions they've made in terms of balancing that out with all of the other issues that they're hearing. That's certainly not the case here, not that courts aren't capable of understanding those issues, but I think that even Judge Rich in his prior oral argument expressed some discomfort with having to wade into issues that really were related to North Carolina litigation.

THE COURT: Let me ask you another question, which is also perhaps a little bit technical. One of the arguments that you make about the scope of

discovery is that it was temporarily narrowed solely by virtue of the interlocutory appeal. Now, does the Evans versus Chalmers Fourth Circuit decision change that? As I understand it, the Fourth Circuit has now ruled on that interlocutory appeal as throwing out a bunch of the claims but not all of them. Where does that leave us?

MR. STRAWBRIDGE: That essentially I believe leaves us in the same posture as we were before the case was reported up to the Fourth Circuit. I'll certainly defer to North Carolina counsel. My understanding is not much has happened at the district court level since the Fourth Circuit handed down its decision, and in fact I had at least read media reports that suggested there may be Supreme Court review sought of the Fourth Circuit's decision. I'm not sure what's going to happen in either --

THE COURT: But your concern was that if all of those claims proceeded that discovery would broaden and would be even more burdensome on your client's interests, if I understood it correctly; is that right?

MR. STRAWBRIDGE: Our concern was that the narrowness that was emphasized by the magistrate judge below was not nearly as narrow as it seemed because of the potential for additional discovery to take place

after the fact. Whether or not that's still the case, we certainly believe that the discovery being sought here continues to be inconsistent with the rules required by Cusumano and the First Amendment generally.

THE COURT: And one other question from me and then I'll let you speak without my interrupting you. I take it that -- actually I think it's true on both sides -- you don't draw any distinction between an academic journalist, a blogger, for purposes of this argument, this case, they're all the same?

MR. STRAWBRIDGE: We do not draw that distinction because in this case Dr. Johnson fits all three criteria. He is a professor, he actually was initially involved in this case as a blogger, but the discovery that's being sought at this point frankly is exclusively limited to discovery that relates to his function as an author of a book, which is as traditional as journalism gets. It has not really been a contested issue at any point in this proceeding that, regardless of which hat he's wearing, the substantive standard test that should apply is the same. And Mr. Segars can correct me if that's changed, but I think that that's not the contested issue here.

THE COURT: Go ahead.

MR. STRAWBRIDGE: The point I wanted to make

right off the bat is that this is more than a simple, ordinary discovery dispute. What we have here is an attempt by Duke focused on one specific journalist to obtain notes, e-mails, and depose him under oath regarding his sources and his reporting on a case of supreme public importance, that issuing third-party subpoenas to nonparty reporters, such as the one at issue here, raises obvious First Amendment concerns. It is a serious threat to independence and news-gathering activities if nonparty reporters can be summoned to turn over their private correspondence and submitted to depositions, especially in cases where, like this one, the reporter continues to cover the matter.

THE COURT: You say their correspondence. It's not his correspondence, it's correspondence to him; is that right?

MR. STRAWBRIDGE: It's correspondence between him and the parties in this case and their attorneys.

THE COURT: Seeking correspondence from him to them?

MR. STRAWBRIDGE: I believe the -- they are seeking all correspondence between the two parties and their attorneys in this case, and that's an additional point that I wanted to make is the breadth of the

request here not only goes to actual statements from some of the plaintiffs in this matter that they may or may not have made to Dr. Johnson but also statements that their attorneys may or may not have made to Dr. Johnson, and it covers a period before the civil litigation that's at issue here.

THE COURT: What's the difference between whether it's a lawyer saying it or the plaintiffs saying it?

MR. STRAWBRIDGE: We think it certainly goes to the relevance inquiry, and I'll be happy to get into that in just a second, but statements by an attorney to a nonparty are of even less arguable relevance than statements by a party and a reporter.

And the point that I was making at the end was that in this case the conversations being sought are conversations that occurred prior to the initiation of the civil litigation that's at issue here. So this has ramifications really for any civil or criminal justice reporting cases.

The First Circuit has explicitly recognized the threat and imposed a heightened balancing test. I'm happy to walk through the prongs of the analysis. We've already covered the fact that the review in this case is de novo, and so I think it's fine to just get

right into the test.

And the initial burden in this case is on Duke to demonstrate the relevance and need of the information that they are seeking. Those are independent requirements, and I want to talk a little bit about what each of them are and what the record in this case shows.

On relevance we quoted the language from Bruno & Stillman, which I think is quite clear that it is not a general Rule 26 broad connotation of something that might reasonably lead to discoverable evidence. It has to actually be relevant to main issues in the case. The language that Bruno & Stillman uses is relevant in an important sense or more than remotely relevant. Certainly a number of the other cases that we cite talk about relevance going to the heart of the case. And that's not really that much different than what happens in any third-party subpoena. Courts are generally more protective of third parties and require more than -- a greater showing of relevance than it would normally show to a party opponent. And Cusumano recognized that reporters -- that that -- those concerns get special weight in this analysis.

And I think that the relevance, the arguments for relevance that the -- Duke has made in this case simply

don't meet the Cusumano standard. They don't demonstrate relevance in an important sense. They're generally speculative. They have not demonstrated that Dr. Johnson in fact is in possession of any communications that go to the heart of an issue. And let me give you an example of -- I think that contrasts with what we have here.

If you had a TV station that sat down with a taped interview with somebody who is accused of a crime and talked about the accusations for 10, 15 minutes, half an hour, excerpts of that run on the later news, the case goes to trial and the defendant comes back and says I need that tape. We discussed information about where I was the night in question, about my alibi on that tape. I don't have a copy of the tape. And we know that we discussed topics A, B, and C. Well, then you would have a showing that the -- in this case the nonparty reporter would be in possession of relevant material. I know we talked about A, B, and C, it's not disputed that we talked about A, B, and C.

We don't have any type of showing of relevant possession on -- in the case of Dr. Johnson here. We have speculation that he might have had exchanges with the plaintiffs about the four narrow topics that are actually in play in the litigation. But I think the

evidence that suggests that they haven't met their burden is they have received a number of e-mails between Dr. Johnson and the plaintiffs that were produced by the parties in this action, and they haven't brought any of those e-mails to the attention of the Court or to us and said this shows that there are other conversations that we need to see.

They have brought a couple of example e-mails involving correspondence between the plaintiffs and other authors that again they were able to obtain without subpoenaing those authors, because Dr. Johnson is the only journalist in this case who has been subpoenaed. Lone exception might be Mike Pressler, who was also the coach of the lacrosse team, so the fact that he wrote a book, he was in a very different position. He was a fact witness; he attended these meetings; he was on the ground. Dr. Johnson was not on the ground, was not a fact witness, and in fact didn't even start reporting on the events of this case until August of 2006, which is several months after all of the events in question. It's not contemporaneous, despite what Duke has argued in this case.

THE COURT: So on this -- on this argument you're really saying I don't even get to the balancing. You're saying that the -- Duke fails to meet the

initial showing that would even put a burden on your client.

MR. STRAWBRIDGE: That's correct. And my real reference to the record in this case is they submitted some deposition excerpts that they say establish that Dr. Johnson is in possession or is likely to be in possession of relevant materials. If you actually look at the record and the questions that were asked in those depositions, the excerpts that they submitted, they are very broad, they're simply questions, did you have e-mail with Dr. Johnson, I may have, or we discussed Miss Mangum's accusations against us. Well, Miss Mangum's accusations against us is a very broad topic and frankly has nothing to do with the actions of certain Duke administrators and what they did and what they were told. So we simply don't think that they have made any kind of showing that Dr. Johnson is in possession of material that goes to the specific claims that are at issue.

If they had asked in those depositions, well, did you talk to Dr. Johnson about the meeting that you had with Dean Wasiolek, and the person had responded, oh, yes, I remember we talked about that meeting but -- well, have you produced that document? Oh, I'm not able to produce that document because I didn't save my

e-mail. That overlaps into the need question, the available -- the alternative sources, but on the question of relevance we don't think they meet their burden on the record that they've shown, so we think the analysis could end right there.

The -- and I think that the magistrate judge sort of accepted Duke's argument on this case without the sufficient level of scrutiny that Cusumano requires. The relevance analysis boiled down to he wrote about the events in question so presumably he has relevant material. You know, Dr. Johnson has published a book. The book, you know, is several hundred pages long. It contains very little discussion of the topics that are at issue here. It's a much broader quest, and if there was anything that was highly relevant to the issues you would think that amongst the dozens of e-mails that they did obtain between Dr. Johnson and the plaintiffs they might have found one that they were able to bring to this Court's attention as evidence that there were additional communications they had not been able to obtain from the plaintiffs.

We do not have any allegation in this case that the plaintiffs didn't have access to their e-mail, that e-mail was lost or destroyed, that they withheld anything that can only be obtained from Dr. Johnson.

They have been able to go to the plaintiffs and obtain their e-mails. But it's standing in different shoes when you go to a journalist and try to get the e-mails that he possesses, implicates his independent rights.

Let me talk about alternative sources because I think the two inquiries do overlap. There's no record at all that Dr. Johnson is in possession of information that can't be obtained elsewhere. The point -- to the point that they do speculate that he might be in possession of information such as information about what the students knew or what the substance of the students' meetings were with various people at Duke, they have been able to subpoena and depose every single one of the plaintiffs in their matter and ask them point blank, what did you know, when did you know it, what happened at this meeting. So they've been able to get that information directly through the use of depositions. And the Cusumano case and Bextra both indicate that the availability of depositions of the people who are purported to have made the statements is a viable alternative source. That alternative source has been plumbed here. They have not brought back any record of a specific gap or specific information that ties to the remaining issues. So we simply don't think that the -- they can make that point.

When we go to the other side of the Cusumano analysis, which is looking at the interest with respect to Dr. Johnson, as we read it -- and Attorney Segars can correct me if I'm incorrect on this -- Cusumano is the applicable analysis. Cusumano dealt with a situation that was very similar to this with respect to interviews with authors of books and subjects who were promised confidentiality with respect to their unpublished exchanges. We think it's very much on all fours with what the analysis is here. We put in an affidavit as to the expectations of confidentiality that attach to e-mails sent to Dr. Johnson that were not for publication and with respect to the communications he had regarding interviews with the book and so --

THE COURT: But you're not really relying on the confidentiality of the plaintiffs, are you, of the plaintiffs in the lawsuit? You're relying on Dr. Johnson's interest as a researcher, journalist, whatever?

MR. STRAWBRIDGE: We are relying on Dr. Johnson's interest in ensuring that the promises of confidentiality he makes to his sources will be observed by him. Whether or not the plaintiffs elect to produce documents themselves or whether or not they

decide to intervene or not intervene in this case, we don't think that's the relevant analysis. The relevant analysis is was the material confidential at the time it was passed to Dr. Johnson. That's the analysis as it's applied in Cusumano. Cusumano was a case where it was the researchers themselves who were resisting the subpoena, not the plaintiffs. And that's the case here.

We think that the decision -- the decision by Judge Rich was in error on this point, that it seemed to presume -- it seemed to confuse Dr. Johnson with the plaintiffs in terms of their identical interests, and essentially that there could be no chilling effect on Dr. Johnson, on news gathering generally, because plaintiffs ought to know that anything they say is subject to discovery. We think that that gets the Cusumano analysis incorrect, that the analysis has to be with respect to how it's going to affect Dr. Johnson's reporting, not how it affects the specific plaintiffs' decision to cooperate in any individual case or to turn over documents.

I'd like to reiterate again that at the time of these conversations, the documents that are at issue, that Duke is seeking any of the communications that took place, it would have been before the civil

litigation at issue here was initiated. So it's not a situation where the litigation is ongoing and then there are some sort of statements by the plaintiff that are made. Without conceding that that would make a difference, I think it's significant that the rule as it comes down from Duke and from the decision from Judge Rich is essentially if you talk -- if a reporter talks to a plaintiff or their attorney and that person -- a person or their attorney and that person somewhere down the road decides to file a lawsuit that relates to the subject upon which they spoke to you about, it's fair game on the reporter's materials, even if the plaintiffs have the documents and have produced what they have and there's no evidence that the reporter's in unique possession. I think that that's significant.

I think the notion that there is any -- that there is not a First Amendment issue here, that there is no chilling effect, is belied by the submission that was made by the amici in this case. Their arguments stand, we join in them entirely, but I think that it really demonstrates that there are real press rights here.

The suggestion that reporters' conversations with attorneys about the substance of the case, a reporter's conversations with parties won't be chilled or a

reporter's ability to get that sort of information won't be chilled if the rule is once you're a plaintiff in a lawsuit any prior conversation you've had is fair game. I think it just doesn't pass the common sense test, and I think we're very strong on that point.

There's another aspect of the case I just want to be sure to emphasize, and that is under Duke's own rule as they propose they would be justified in subpoenaing not only Dr. Johnson but his coauthor, Stuart Taylor, the author of several other books that were written on this case, the producers of *60 Minutes* and *Dateline* and a number of television shows, reporters at both the local press in North Carolina and reporters in national media outlets. That's not to suggest that this subpoena would be any less objectionable if it went out to all the media organizations. I think it's to highlight the fact that it's no less objectionable that they have focused their fire on Dr. Johnson himself.

It's a curious focus. The examples they brought to this case involve plaintiff's communications with Dr. Johnson's co-author, Stuart Taylor, but they have not subpoenaed Stuart Taylor. They have not subpoenaed Don Yaeger, who was the essential author of the book that he co-wrote with Mike Pressler. They have not subpoenaed authors of other books. They have not even

subpoenaed the *Duke Chronicle*, which is the campus newspaper that had the first interview with the lacrosse players who were involved in this accusation. There's a reason why they weren't willing to go across campus and subpoena the reporters there, but they were happy to come up to Maine and serve now six subpoenas on Dr. Johnson. He's already appeared for one deposition. We have the record in that case, and I think, as we established in our briefing, the questions went far afield from the allegedly limited topics to which would have arguably been appropriate.

THE COURT: That was a different case, right?

MR. STRAWBRIDGE: Well, it was a different case; it was the same attorneys and it was also Duke University. And there were questions asked during that deposition about lacrosse players, so I think if you look at the record of that questioning it did go far beyond the two specific blog posts. Duke I believe in their response says --

THE COURT: You're asking me to infer that there's some kind of ill will from Duke that should infect my decision on this subpoena question.

MR. STRAWBRIDGE: I'm not asking it to infect your decision. I think it's part of the record that needs to be taken into account. The chilling effect in

this case is not theoretical; it's actual and it's happening on the ground.

THE COURT: Go ahead.

MR. STRAWBRIDGE: That concludes the prepared remarks that I have, but I'm happy to take any questions you have now or after.

THE COURT: Thank you very much, Mr. Strawbridge.

Mr. Segars, I'll hear from you for Duke.

MR. SEGARS: Good afternoon, Your Honor. Thank you for the opportunity to speak. May it please the Court, I'm Tom Segars from North Carolina. If the Court has any questions, I'd be happy to address them before I get into what I prepared to discuss.

THE COURT: Well, I do have two questions. One is this, and this may be a rhetorical question, but Duke University obviously has a lot of researchers and academics of its own who write books, and whatever you're seeking here may come back to affect Duke. So I take it this is the institutional posture of Duke University in terms of the academic freedom interests of its researchers and faculty members; is that right?

MR. SEGARS: Your Honor, I think Duke University would be happy with the rule that it's asking this Court to impose on the facts of this case.

THE COURT: Second question is really, and you can address this during your argument, it's the relevance issue that your opponent referred to and what really you will gain here beyond impeachment. I can certainly understand why you think that there may be statements by some of the plaintiffs in correspondence or e-mail or statements to Dr. Johnson that might be impeaching, but beyond that I'm interested in what you think is the utility of the discovery you're seeking. But go ahead and address that in your remarks.

MR. SEGARS: I'll be happy to address it now, Your Honor, if that's okay.

THE COURT: Sure.

MR. SEGARS: To the question of relevance, if the Court looks at the subpoenas and then further as they've been narrowed by Judge Rich, the documents that we are seeking are relevant by definition. We have taken pains in the subpoena to limit the subject matter of the communication to facts about these claims at issue. And they're somewhat complicated claims, I'd be happy to go into them if the Court would like, but they're relatively fact intensive, claims that have to do with what happened at certain meetings, who said what, what people knew at certain meetings, what people knew when they made communications. These are fraud

and constructive fraud claims where knowledge and reliance are critical.

THE COURT: But you have had the opportunity to depose and take discovery from all of the participants who are parties to the litigation, so at this point aren't you fishing?

MR. SEGARS: No, Your Honor, I don't believe we're fishing. What we're asking for are the statements of these plaintiffs on those topics which I would say are not only relevant, they are admissible in their own right for the truth of the matter asserted. These are parties opponent to Duke. This would be evidence in its own right.

I would note for the Court, there's a pretty good decision on this that actually Dr. Johnson cites from the Third Circuit, the Cuthbertson case. In Cuthbertson the Court actually affirmed an order compelling disclosure of the verbatim and substantially verbatim statements of government witnesses. The Court observed this: By their very nature these statements are not obtainable from any other source. They are unique bits of evidence that are frozen at a particular place and time. Even if the defendants attempted to interview all of the government witnesses and the witnesses cooperated with them, the defendants would

not obtain the particular statements that may be useful for impeachment purposes at trial.

And, of course, we're not seeking to use them only for impeachment purposes. These would be statements that would be admissible in their own right, as I said. I hope that addresses the Court's question about what we would hope --

THE COURT: I take it what you're saying is that, although you've taken the depositions, that there may be things that people forgot or didn't refer to.

MR. SEGARS: That's correct, Your Honor. The events -- the underlying events of this case occurred six and now almost seven years ago, but six years prior to the time we deposed these witnesses. Understandably some witnesses didn't remember things. The communications that we would seek with Dr. Johnson, we have used the term contemporaneous. By comparison they are roughly contemporaneous. These were in the weeks and months following the underlying events. So, yes, we think that there would be value to us having those statements, and the precedent relied on by Dr. Johnson confirms as much.

Another point, I think that Dr. Johnson has conflated the relevance analysis. As a threshold point I would say this, relevance in an important sense

language, we take issue with that. The Cusumano test which the First Circuit articulated doesn't use that language. It says the movant must make a prima facie showing that his claim of need and relevance is not frivolous. And it also uses the language more than remotely relevant. Where does the important sense language come from? It does come from Bruno & Stillman, but it comes from Bruno & Stillman's recitation of what the district court did in that case. Bruno & Stillman recognized that it followed a 1958 Second Circuit case for which that was part of the test. And other circuits have different tests. Some say the tests should not only be relevant, it has to be relevant to a central issue. Ninth Circuit does that, for example. The First Circuit hasn't done that. And in Bruno & Stillman the First Circuit even cautioned that this type of test demands flexibility and avoids -- I'm sorry, and defies formula.

So I think it's fair to say that's not the test here. But, again, even if that were the test, these are relevant. Communications about the underlying facts, I don't know how you can get more relevant. I think Dr. Johnson's argument conflates relevance with probative value, to suggest that I somehow have to -- to make this prima facie showing, I have to say, here's

how this piece of evidence is going to fit in my defense theory. I don't believe the First Circuit has ever said that, and I think we've satisfied our relevancy showing.

If I may, I would also suggest that -- let me take a step back. So in the analysis it's my burden to show relevance and need, and I believe it's Dr. Johnson's burden to show confidentiality and a basis for withholding these documents, and then the Court is left to weigh these.

The last thing I'd say on this need point is that I -- I think our showing of relevance and need can almost be completely established by the two letters that were attached to Dr. Johnson's motion to quash, letters from the plaintiffs' counsel in the underlying cases that confirm that we asked them for these documents, and they produced everything they had. They didn't object on relevance grounds. They produced what they had. We've exhausted those other avenues. And I think in that regard we're distinguishable from cases like Cusumano. By the way, the Cusumano Court noted that the subpoenaing party had not exhausted alternative avenues but still said it had met the need showing, it just discounted that need showing.

In any case, moving to the confidentiality part of

the analysis, in this case Dr. Johnson has not made any particularized showing that the documents at issue are confidential, although these subpoenas were served seven months ago and, despite repeated requests, we have never received a privilege log from Dr. Johnson outlining what exactly he's withholding on these grounds. I think it's a fair point after we have narrowed our subpoenas in the meet and confer process with Dr. Johnson's counsel to know, are we here about a dispute over zero e-mails, over two e-mails, over 500 e-mails. I think that's a fair question to ask. And I think --

THE COURT: He's saying that very burden is part of what he's seeking to defend by way of his First Amendment argument, that for him to go back and catalog all the e-mails and do what you're asking for, that impinges, I guess, on research and journalism.

MR. SEGARS: I understand that argument, Your Honor. To that argument I would respond, first of all, that the First Circuit has never said that. To the contrary, in the In Re Special Proceedings case that Dr. Johnson cites, the First Circuit actually downgrades this issue and talks about how it's not clear whether this is a First Amendment protected interest, it certainly raises First Amendment concerns,

or merely a prudential interest.

The second point I'd make is the Branzburg decision from 1972, the United States Supreme Court clearly held that journalists do not enjoy some special immunity from laws of general applicability.

THE COURT: But that was in a criminal context; was it not?

MR. SEGARS: That's correct, Your Honor, but I would argue that that distinction shouldn't matter when the question is does this law of general applicability, Federal Rule of Civil Procedure 45, does it apply equally to journalists. And the answer I believe is yes, there are other courts in other jurisdictions, you know, upon these exact postures who have said, yes, a journalist needs to log those. But the log is part of the rule. I'd argue that some particularized showing is part of the Cusumano showing that's necessary here.

What we have from Dr. Johnson, I would invite the Court to look closely at the affidavit that's in the record. That affidavit does not speak at all to the particular communications that are the subject of this subpoena. It does not speak at all to the particular communicants. It says what Dr. Johnson's practices were.

Now, Mr. Strawbridge argued that Dr. Johnson wants

to protect this promises of confidentiality to his sources. I don't believe we have evidence in the record that any of these plaintiffs were promised confidentiality on these occasions. And I don't believe Dr. Johnson can say that as a general matter because we know that they weren't. For example, there are several statements about these claims from the plaintiffs that appear in Dr. Johnson's book. Clearly there was no expectation of confidentiality when he published what Dan Flannery said, for example. Similarly, the source notes for this book, which are publicly available on the Internet, list over a hundred points where ten different plaintiffs are cited as the source. Clearly on those instances there wasn't confidentiality. Candidly, we think Dr. Johnson needs to do more.

Mr. Strawbridge made the point that -- or he made the assertion that these subpoenas would not seek communications outside of Dr. Johnson's role as a journalist. I don't think the subpoenas are narrowed in that sense. We're seeking communications, period. Some of those may arise in the context of his journalistic work; some may arise in the context of work that is not protected in that First Amendment way.

We've attached to our motion an example of a

letter we received from another blogger who we subpoenaed, a gentleman named Jason Trumpbour who withheld communications between himself, Dr. Johnson, and Robert Ekstrand, one of the attorneys for the plaintiffs, on the grounds of attorney work product. Clearly whatever communication that was was not a communication made in the source of his journalistic work. Maybe it's protected for some other reason, but if he's creating work product with Mr. Ekstrand, that's not a typical journalist role. And to the contrary we believe there's good reason why there wouldn't be an expectation of confidentiality here. These are plaintiffs in a civil suit.

Mr. Strawbridge asked the Court to look at the timing of when these communications were made and how that would be relevant to the plaintiff's expectation of confidentiality. I would just note that Exhibit L to our original motion to compel is a letter from the Ekstrand & Ekstrand law firm to these attorneys which talks about their work with Dr. Johnson, working on editing his book for the very purpose of memorializing the events that underlie their claims. That same letter refers to the anticipation of civil litigation against Duke. These are plaintiffs who had hired attorneys, who were represented by attorneys, planning

to sue Duke in civil court for monetary damages. And they were talking with Dr. Johnson and others for the purpose of creating a record of what happened.

Let me turn quickly -- and I'm sorry I've taken as long as I have -- to the effect of this type of rule we're asking for on the free flow of communication which Cusumano asked the Court to look at. Given the specific facts of this case and the narrow scope of documents that we're seeking, I don't believe there's a credible argument that you would have a chilling effect. What a ruling from this Court that we're asking for would mean is that plaintiffs, who have hired attorneys and who are planning civil litigation against someone and who go talk to a reporter in part for the purpose of memorializing that record, should expect that their communications would be subject to discovery in the lawsuit. I don't think that's a controversial proposition.

Dr. Johnson takes issue with the way Judge Rich characterizes it as waiver or not. The bottom line is, what would a future potential plaintiff think when they're talking to a reporter. On those circumstances I think they should expect that this would be compelled.

THE COURT: I understand the argument to be

slightly different than that. I don't think there's any claim that the plaintiffs cannot waive their own rights or should not perhaps expect that they can be explored, but what does this do to future academic researchers, and future journalists as they decide to publish a book or decide to write something else? Do they know they're thereby opening themselves to considerable expense and time involvement in responding to lawsuit discovery?

MR. SEGARS: That's a good question, Your Honor. I think that the rule we're seeking would tell those researchers academicians, journalists that, A, I need to be clear about the confidentiality I promised to my sources, and B, if I'm ever subpoenaed I need to make a record of that confidentiality with respect to the communications that I'm intending to withhold.

THE COURT: But it also says if I write a book I'd better expect to spend a lot of time dealing with lawyers in terms of producing all of the research work that I did and distract me from the next book I want to write because I'm responding to what lawyers want for an earlier lawsuit, right?

MR. SEGARS: That's a fair question, Your Honor. On the facts of this case where the subpoenaing party has literally gone out and deposed 41 plaintiffs,

we've subpoenaed the attorneys, we've tried to get what we could, and I hear what Mr. Strawbridge says, that I am unable to point to a particular document that Dr. Johnson has that I don't. Nevertheless, we asked these plaintiffs, did you communicate by e-mail with Dr. Johnson about these claims, yes. Yet we received no documents from them. And they certify that their production is complete. On those circumstances when a subpoenaing party has gone to the lengths that we have gone to, I think that's a different analysis. And I think an order that took that into account would strike a fair balance.

I'd also say that the concerns that were raised by Dr. Johnson and the amicus are legitimate concerns. They're recognized by the First Circuit already, and the First Circuit has a framework for dealing with this. That framework doesn't create an absolute rule; it creates a balancing test. We just suggest that we're on one side of that balancing test.

I would like to just very quickly address the arguments at the end of Mr. Strawbridge's comments, the idea that we have somehow singled out Dr. Johnson, the idea that a previous deposition of Dr. Johnson -- words abusive and harassing have been used in the briefing. I would like to just say for the record, there was

nothing abusive or harassing in the earlier deposition of Dr. Johnson. And if the Court has any questions about that, I would invite an inquiry into that, I would like to discuss that deposition and what happened. Mr. Weiss, the attorney who took the deposition, is here. That is a case where the plaintiff's attorney, Mr. Ekstrand, the same attorney I mentioned earlier, represented a woman and claimed that Dr. Johnson's book was the evidence of a crucial statement made by a Duke witness. We recently obtained summary judgment in that case, and the district judge asked, do you have any evidence. I've -- it's written in a book. Sir, that's hearsay. There's no other evidence. That's why we deposed Dr. Johnson, and it was noted in the summary judgment opinion. So there's nothing abusive or harassing there.

And to the singling out point, I would say, first of all, this is -- certainly I understand if someone is motivated by ill will and serving a subpoena, that should be something the Court should take into account. I accept that proposition. But that's not the case here. We have subpoenaed other authors, Mr. Pressler, Mr. Trumpbour. We have also investigated with other journalists, commentators, you know, people who have written about the case.

I'd also point out that this argument rests on a false premise. The premise is that there are hundreds of thousands of people who wrote on this case. There were hundreds of thousands of people who wrote about three students who were falsely indicted by a corrupt prosecutor. That was the Duke lacrosse case that the world knows and considers when they talk about who reported on this. The universe of people who wrote about the facts and circumstances underlying this civil case is much, much narrower. And as Dr. Johnson's briefs explain themselves, he's one of the preeminent sources of information on this. It's no wonder that we would subpoena him for this type of information, and it's certainly not done to harass or single out.

For those reasons, we think the balance tips in our favor. We think Judge Rich's decision was correctly decided. We think it should be affirmed. Unless the Court has further questions, that's all I have.

THE COURT: Thank you very much, Mr. Segars.

MR. SEGARS: Thank you, Judge Hornby.

THE COURT: Any brief rebuttal?

MR. STRAWBRIDGE: A few points, and I will try to keep it brief.

Stuart Taylor wrote about civil litigation and all

of the events in question, and he did not receive a subpoena. Don Yaeger wrote about the underlying events in question, and he did not receive a subpoena. There was another book, *Rush to Judgment*, the author's name escapes me at the podium, that author did not receive a subpoena. Numerous authors wrote about the actual events that are allegedly at issue in this case, and Dr. Johnson's the only one who received a subpoena. The fact that they would not subpoena his coauthor, who happened to work for the *National Journal*, happened to be what I would consider more of a mainstream news source and isn't covering the case, I think actually speaks volumes about what goals might be achieved here and the real chilling effect that's presented here.

I'm happy to refer the Court to the sections of the deposition to the Rouse matter that we cited in our brief. If you can find anything in the questions that we highlighted that go to what his sources were for the specific post that was at issue, feel free to have my guess, but that went far abounds -- I'm not here to -- I'm certainly not accusing anyone of unethical treatment, but I do consider the deposition to have been improper and to have gone beyond the bounds. If Dr. Johnson had been represented at the time of that deposition, those questions could have been cut off.

But they were not and the record speaks for itself on that.

And with respect to Cuthbertson and some of the other cases that were cited, I think the language that Attorney Segars quoted makes Dr. Johnson's case for him because the whole point there was that there was evidence that the information could not be obtained from any other source. In this case the plaintiffs have produced numerous communications that they had with Dr. Johnson. There's been no evidence of the existence of any communications that they don't have. I really encourage the Court to look at the deposition excerpts that actually appear in their filing and see whether those deposition excerpts are sufficient to actually establish the likelihood that Dr. Johnson has communications on the specific issues at question. You'll see they're highly generalized and, in fact, looking at the base numbers of the list that we were provided, there's a suggestion that I think all four of the excerpts -- all four of the plaintiffs whose deposition excerpts they submitted actually did produce some documents involving Dr. Johnson.

Those are the main points that I wanted to make. This case really comes down to whether or not they have met their burden. They've had the opportunity to

depose; they're unable to point to any real evidence other than supposition that Dr. Johnson must have something that might be useful to them.

One last point I will make, and I think the Court picked up on this, this really is -- what they're seeking substantively to use this for is for impeachment. And setting aside the question of technical admissibility, Rule 801(d) and everything else, the only way this information would be useful to them if it somehow contradicts the account that was given to them directly when they were questioning all of these parties under oath, not to mention it contradicts the numerous published accounts, including the accounts in Dr. Johnson and Dr. Taylor's book.

We think that the subpoena doesn't meet the burden that's set out by Cusumano for relevance in an important sense. That language is in Bruno & Stillman, it's been reaffirmed, we cite the First Circuit cases in our brief, and we certainly don't think that they can distinguish this case in any meaningful way from Cusumano.

THE COURT: Thank you, Mr. Strawbridge, and thank you both, counsel. Your arguments were helpful, your briefs were excellent, as was Mr. Schutz's brief for the amicus. I know this is important to both

sides, and I will therefore take the time to issue a written opinion. I'll take the matter under advisement. Pleasure to have you all here. Thank you, Court will stand in recess.

(Time noted: 3:56 P.M.)

C E R T I F I C A T I O N

I, Lori D. Dunbar, Registered Merit Reporter, Certified Realtime Reporter, and Official Court Reporter for the United States District Court, District of Maine, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated: March 5, 2013

/s/ Lori D. Dunbar

Official Court Reporter