IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SCRIPPS HOWARD BROADCASTING COMPANY and ABBIE BOUDREAU, Petitioners, v. THE HONORABLE BARRY C. SCHNEIDER, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County Of MARICOPA, Respondent Judge, JUAN CARLOS FRANCO FLORES; BARTOLO FRANCO MOLINA; VIRGINIA FLORES DURAN and COOPER TIRE AND RUBBER COMPANY, Real Parties in Interest.	Court of Appeals Division One 1 CA-SA 06-0081 Maricopa County Superior Court No. CV2002-017367 DEPARTMENT D **DECISION ORDER**

This special action came on for hearing before Judges Lawrence F. Winthrop, G. Murray Snow and Patricia A. Orozco, and raises the issue of whether the trial court abused its discretion when it entered an order preventing Scripps Howard Broadcasting Company, dba KNXV-TV, and Ms. Abbie Boudreau (hereinafter "petitioners") from further broadcasting or discussing the contents of three Cooper Tire and Rubber Company documents they allegedly obtained from a confidential source. Central to the trial court's ruling was the existence, force and

effect of a pre-existing "confidentiality agreement" voluntarily entered by petitioners relative to "trade secret" or otherwise confidential documents produced during this litigation and to be utilized in some fashion at the trial. For the following reasons, we accept jurisdiction and grant in part the relief requested by petitioners.

We accept special action jurisdiction because whether the entry of an order to enforce a confidentiality agreement constitutes an impermissible prior restraint in violation of the First Amendment is an issue of statewide interest or importance and is likely to arise again. *Mendez v. Robertson,* 202 Ariz. 128, 129, ¶ 1, 42 P.3d 14, 15 (App. 2002); *State ex rel. Romley v. Fields,* 201 Ariz. 321, 323, ¶ 4, 35 P.3d 82, 84 (App. 2001); *Vo v. Superior Court,* 172 Ariz. 195, 198, 836 P.2d 408, 411 (App. 1992).

Petitioners argue that the trial court abused its discretion and violated their First Amendment rights when it enjoined them from further broadcasting or disseminating the three documents they purportedly received from a confidential source outside of the litigation. Petitioners essentially concede that the documents they seek to republish are contained in that group of documents subject to the confidentiality order, but they assert that extending the reach of the confidentiality agreement to "independently obtained" documents is an

unconstitutional prior restraint that impermissibly "freezes" their freedom of speech. In the alternative, petitioners assert that their previous broadcast making reference to the documents is now in the "public domain" and that any harm to Cooper Tire caused by publication or republication of the broadcast can be adequately redressed by civil damages and/or contempt sanctions.

Prior restraints constitute an "immediate and irreversible sanction" that "freezes" speech. *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976). Because they are designed to stop speech before it happens, "prior restraints . . . are the most serious and the least tolerable infringement on First Amendment rights." *Id.* Prior restraints are presumed invalid and the proponent carries a heavy burden of justification for such a restraint. *Org. for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971). Generally, "the press may not be prohibited from 'truthfully publishing information released to the public in official court records'" where members of the press are present at the hearing with the full knowledge of all parties involved and without objection. *Okla. Publ'g Co. v. Dist. Ct. in and for Okla. County,* 430 U.S. 308, 310 (1977) (additional citation omitted); *see also Nat'l Polymer Prods., Inc. v. Borg-Warner Corp.,* 641 F.2d 418, 422 (6th Cir. 1981).

At the same time, it is also well established that a party may contract away certain constitutional rights, including First

Amendment rights to free speech. *Snepp v. U.S.*, 444 U.S. 507, 510 n.3 (1980); *Charter Comm., Inc. v. Santa Cruz*, 304 F.3d 927, 935 & n.9 (9th Cir. 2002); *Nat'l Polymer Prods.*, 641 F.2d at 423; *State v. Bocharski*, 200 Ariz. 50, 61, ¶ 56, 22 P.3d 43, 54 (2001); *Webb v. State ex rel. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, 558, ¶ 9, 48 P.3d 505, 508 (App. 2002). Thus, a confidentiality agreement voluntarily entered into is generally not considered "unenforceable as a prior restraint on protected speech." *Snepp*, 444 U.S. at 510 n.3.

In this case, the litigants questioned and objected to petitioners' reporter, Ms. Boudreau, in the courtroom during the trial. In direct response to inquiry from the court, Ms. Boudreau voluntarily agreed to be bound by a confidentiality agreement already in place to protect documents containing Cooper Tire's trade secrets from public disclosure. She also acknowledged that the court may extend the order and prevent dissemination of those materials following the conclusion of the trial. The legitimacy or enforceability of this agreement is not an issue raised in this special action. Further, as supported by the preceding case authority, the confidentiality agreement voluntarily entered by Ms. Boudreau is not a prior restraint in violation of the First Amendment. *Id.; see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-34 (1984).

However, the confidentiality agreement only applies to protected documents and information obtained through the trial process. It does not apply to materials obtained through an independent source outside of the litigation. Thus, the resolution of this special action turns on the source of the three documents obtained by petitioners. Cooper Tire claims that the documents presumptively came from the litigation because at least two of the three documents were marked as trial exhibits. While Petitioners will not specifically identify the third document, they do not contest that all of the subject documents were part of the confidential document production in this case, and thus subject to the limited effect of the confidentiality order. However, petitioners claim, via Ms. Boudreau's affidavit, that they received these documents independent of the litigation through an otherwise unidentified "confidential source."

The trial court had the right to enforce its own order by inquiring into the source of the documents at issue. *See Nat'l Polymer Prods.*, 641 F.2d at 424. This responsibility cannot be delegated to the special master, nor can it simply be lumped into the existing post-trial process whereby the special master is reviewing the documents designated as confidential during pre-trial proceedings to determine whether such designation may now be removed. Concerns about protecting the confidentiality

of the alleged independent source, *see* Arizona Revised Statutes ("A.R.S.") section 12-2237 (2003)[1], can be accommodated by the trial court conducting an *in camera* review of the underlying facts as to how the subject documents were obtained. If the court concludes that the documents came from a source outside of the litigation, then the confidentiality agreement does not apply to those documents and petitioners cannot, absent compelling circumstances, be prevented from further broadcasting and disseminating them to the public. *Seattle Times Co.*, 467 U.S. at 34. If, on the other hand, the court determines that the source of the documents is actually this state court litigation, then the documents are subject to the

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[1] Section 12-2237 provides:

> A person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station, shall not be compelled to testify or disclose in a legal proceeding or trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere, the source of information procured or obtained by him for publication in a newspaper or for broadcasting over a radio or television station with which he was associated or by which he is employed.

The trial court denied Cooper Tire's request that petitioners be ordered to reveal the identity of the alleged confidential source. That denial is not at issue in this special action. *But see Slade v. Schneider*, 212 Ariz. 176, 129 P.3d 465 (App. 2006).

confidentiality agreement and its Order of March 13, 2006 may stand.

We further note that the burden lies with petitioners to show that the documents were received from a source outside of the trial process. Simply relying on an unsubstantiated representation in an otherwise cryptic affidavit is insufficient to meet such burden. The media may not use A.R.S. § 12-2237 as both a sword and a shield. Cooper Tire has a legitimate interest in maintaining the confidentiality of trade secrets and the enforcement of a voluntarily-entered confidentiality agreement. In addition, the trial court has a legitimate interest in maintaining and enforcing its previously entered orders, including the instant one by which petitioners voluntarily agreed to be bound.

Finally, petitioners rely on *New York Times Co. v. Sullivan,* 403 U.S. 713 (1971), and its progeny to support their unfettered right to rebroadcast the documents and/or information contained therein irrespective of the potential violation of the confidentiality order. Since the broadcasted materials are now in the public domain, petitioners reason, the First Amendment protects republication; how petitioners obtained the information ultimately disseminated in the broadcast, through wrongful or illegal conduct by petitioners or others, is simply not relevant.

Our courts certainly recognize and follow the mandate of the *New York Times* case. Accordingly, if petitioners merely published information they received from others, any prohibition on petitioners republishing the information would constitute an impermissible prior restraint, notwithstanding the fact that petitioners' source may have illegally or improperly obtained the information. Here, however, the fact that petitioners agreed to abide by the confidentiality order takes this case outside of the parameters of the *New York Times* case. A protective or confidentiality order would mean nothing if a media outlet who had agreed to its terms could, by breaking the agreement, nullify its effectiveness. We therefore hold that petitioners do not have the right to rebroadcast the material pending resolution by the trial court of the issue as to how the subject documents were obtained by petitioners.

Should petitioners refuse to provide further factual information sufficient to allow the trial court to make an informed determination as to whether the source of the three documents in question was independent of this litigation, the trial court could then reasonably conclude that the documents came from the litigation and are still subject to the existing and enforceable confidentiality order.

Dated: June 13, 2006

Lawrence F. Winthrop

LAWRENCE F. WINTHROP, Judge

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Maricopa County Superior Court
CV2002-017367

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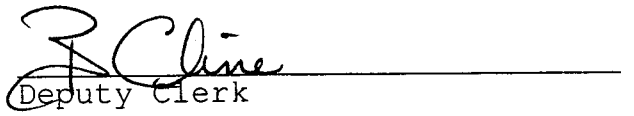

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