

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO

John FRESHWATER, et al.,	)	
<i>Plaintiff</i>	)	
	)	2:09 C 464
v.	)	
	)	
MOUNT VERNON CITY SCHOOL	)	Judge FROST
DISTRICT BOARD OF	)	
EDUCATION , et al.,	)	
<i>Defendant</i>	)	

**NON-PARTY WITNESS DAVE DAUBENMIRE’S MOTION TO QUASH SUBPOENA**

**Facts**

Defendants in this case have subpoenaed non-party witness Dave Daubenmire. They have asked that he submit 26 vague categories of exhibits, as well as make himself available for a deposition, pursuant to Federal Rule of Civil Procedure 45(c). Defendant has asked for “any and all documents, tape recordings, audio recordings, or objects, inclusive of all electronically stored information and metadata, that reflect, evidence, or otherwise concern.” 26 categories. Because the subpoenas place an undue burden on a fully cooperative non-party witness, the subpoena should be quashed, or, in the alternative, the defendant should compensate non-party witness Daubenmire for his time, including attorney’s fees.

**Reasoning**

FRCP 45(c) states that “a party or attorney responsible for issuing and serving subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the

subpoena,”<sup>1</sup> and that when the subpoena should be quashed when it “subjects a person to an undue burden.”<sup>2</sup> The 1991 advisory committee notes make it clear that these provisions are meant to protect non-parties during their “involuntary assistance to the court.”<sup>3</sup> Although the rule’s language is clear, at what point a burden becomes “undue” is the question for this honorable court. The court may consider: (i) whether subpoena was issued primarily for purposes of harassment, (ii) whether there are other viable means to obtain same evidence, and (iii) extent to which information sought is relevant, nonprivileged, and crucial to moving party's case.<sup>4</sup> For the reasons set forth below, the defendant has made a request that clearly places an undue burden on a non-party witness, has not shown any need whatsoever for the evidence, much less a crucial need, and the witness should not be forced to incur significant time and financial expense to respond to the overly broad, harassing, and inconsequential subpoena. It is the belief of non-party witness Daubenmire that he was served these subpoenas solely for the purpose of harassment. He is a friend of the Plaintiff, and the Defendant wishes to harass him because of this. He has appeared willingly, and without council, at a deposition at the Defendant’s request, and was fully cooperative. Now he is not only being called back for a deposition (and the Defendant has not shown why it could not have asked these questions the first time), but is being asked to provide an overly broad and exhaustive list of documents that have nothing to do with the resolution of this case. The only possible purposes of these subpoenas are harassment of non-party witness Daubenmire, or a fishing expedition by the Defendant that the non-party witness Daubenmire should not have to fund.

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<sup>1</sup> Federal Rule of Civil Procedure (“FRCP”) 45(c)(1).

<sup>2</sup> FRCP 45(c)(3)(iv)

<sup>3</sup> 1991 Advisory Committee Notes regarding rule 45, subdivision (c).

<sup>4</sup> *Bogosian v. Woloohojian Realty Corp.* 323 F.3d 55, 66-67 (1st Cir. 2003), *See also Pamida, Inc. v. E.S. Originals, Inc.*, 281 F.3d 726, 729-30 (8th Cir.2002); *Gould, Inc. v. Mitsui Mining & Smelting Co., Ltd.*, 825 F.2d 676, 680 n. 2 (2d Cir.1987).

Treating each requesting individually, it becomes obvious that the subpoena places and undue burden on non-party witness Daubenmire. This motion in no way verifies the existence of any materials requested by the Defendant, and merely speaks in the hypothetical, as non-party witness Daubenmire will have to incur significant expense in order to determine what, if any documents exist.

1, 2, 13, and 14. Information/documents relating to John Freshwater and Nancy Freshwater. Non-party witness Daubenmire and Plaintiff Freshwater and his wife have been friends for a period of time that predates any litigation. Many documents/correspondences relating to the Freshwater's have nothing to do with the case, yet the Defendant has not narrowed its request to documents/correspondences relating to any topic. Non-party witness Daubenmire should not have to review multiple years worth of e-mail's, notes, recordings, etc., in order to determine when he communicated with the Freshwaters. In addition, non-party witness Daubenmire is a minister ordained by the state of Ohio. Some of the information conveyed with the Freshwaters possibly falls into the clergy privilege. Non-party witness Daubenmire would need to meet with an attorney to review all correspondences/documents regarding the Freshwaters, in order not to expose himself to liability for violating the sacred clergyman privilege, and to not shatter his reputation for trustworthiness is dispensing spiritual advise. Additionally, if the Defendant wants these documents, he should ask the Plaintiff. The Plaintiff would have access to the same e-mails, recordings, etc as non-party witness Daubenmire. If for some reason the Plaintiff does not have access to these documents, and certifies that he does not, then and only then should the non-party witness undertake the task of locating documents. Both the sender and receiver will have a copy of e-mails, and Plaintiff does not have the volume of e-mails to sort through as non-party witness Daubenmire does, as non-party witness Daubenmire

hosts a radio show, coaches football, travels for speeches, and does other activities in which he either gives out his e-mail, or directs people to his website, which contains his e-mail. He will have far more e-mails than the Plaintiff to sort through. Also, since non-party witness Daubenmire spoke publicly about the Plaintiff, a key word search of his e-mail will not be easy or efficient. Many other people may have contacted non-party witness Daubenmire to offer support/criticisms regarding the Plaintiff, and to sort through all of these to determine relevancy will be tedious and time consuming, and this assumes the e-mails/documents have not been deleted, in which case more time consuming recovery techniques should be used.

3, 15. Information/documents regarding R. Kelly Hamilton. R. Kelly Hamilton is the Plaintiff's lawyer. If the Defendant desires information about non-privileged correspondence/documents with Mr. Hamilton, they should ask Mr. Hamilton for those documents. There is no justifiable reason to subpoena a non-party witness regarding documents/correspondences with the Plaintiff's attorney. Mr. Hamilton should know what documents exist (or be able to locate them) better than Mr. Daubenmire, and Mr. Hamilton is in a much better position to object to handing over the documents for any legitimate reason (because he is an attorney and Mr. Daubemire is not, and because Mr. Hamilton knows far more about the case). This appears to be an attempt to circumvent the Plaintiff's attorney, and the Court should not be fooled.

4. John Freshwater's employment at the Mount Vernon City School District Board of Education. This request is especially harassing. The Plaintiff and especially the Defendant have all documents relating to Plaintiff's employment. Non-party witness Daubenmire has had no way of obtaining anything regarding Mr. Freshwater's employment that did not originate with the Plaintiff or Defendant.

5. John Freshwater's April 16, 2008 press conference on the Mount Vernon Public Square. Again, this demonstrates the harassing nature of the request. This conference was attended by several media outlets, who keep archives in the regular course of their business. Defendant should contact the media, and not the defendant, to view everything that occurred at that conference.

6. John Freshwater's termination hearing. Again, this is nothing but harassment. How the Defendant thinks non-party witness has documents regarding their own termination hearing that the Defendant does not have is unexplainable.

7-9. Appearances by John Freshwater, R. Kelly Hamilton, and Don Matolyak on Pass the Salt Radio. While defendant concedes that this information is easier obtained by him than the Plaintiff or Defendant, it still places an undue burden on the defendant. By itself this is not an undue request, but when combined with 10, 11, and 12, the burden is great.

10,11,12. Appearances on Pass the Salt radio or websites by anyone discussing John Freshwater, Nancy Freshwater, or any other items discussing John Freshwater. Non-party witness Daubenmire has hosted this radio show weekly for over 9 years, and the Freshwater controversy has been going on for over two years. It would be incredibly time consuming for non-party witness Daubenmire to review multiple year's worth of radio shows, website articles, and other documents to determine each and every time the Freshwater's were mentioned. This would involve several hundred hours of listening to radio shows and reviewing written content. Non-party witness Daubenmire concedes that these programs are public and open to anyone, but to expect non-party witness Daubenmire to spend this much time reviewing everything he has publish as a part of Pass the Salt for a number of years is an undue burden and harassing. If

Defendant wishes to find out when the Freshwater's were discussed, they can review it themselves.

16. Correspondence with Don Matolyak. Like non-party witness Daubenmire, Mr. Matolyak is also a member of the clergy. These correspondences, if any, may involve privileged communication, and both non-party witness Daubenmire and Mr. Matolyak may need to review the content of any correspondence with counsel to protect and preserve any privileges, costing time and money. Without some demonstration of need on the part of the Defendant, two non-party witnesses should not have to incur these expenses. Before either Mr. Daubenmire or Mr. Matolyak attempt to retrieve correspondences, the Defendant should demonstrate what they expect/hope to find, instead of trying to harass two non-party witnesses into funding a fishing expedition for them.

17,18. Phone records regarding John Freshwater, Nancy Freshwater, R. Kelly Hamilton, or Don Matolyak from December 1, 2007. The Defendant at least had the decency to limit this request by time, but they are asking the wrong people. The Freshwater's are the parties in this case and Mr. Hamilton is an attorney in the case. Their phone records will show any correspondence with non-party witness Daubenmire. Any burden Mr. Daubenmire incurs with this request is undue since the request can easily be filled by parties in this case.

19,20. Press releases, statements, or remarks, whether published or not regarding John or Nancy Freshwater. Mr. Daubenmire's opinions regarding this case are irrelevant in its final disposition, and any published remarks are easily available to anyone who has basic knowledge of search engines. It would also be incredibly difficult for Mr. Daubenmire to determine who published what statements. The Defendant needs to refine this request for it to have any relevancy to the issue in this case.

21. Postings on social networks by non-party witness Daubenmire, including Myspace, Facebook, twitter, or blogs. Mr. Daubenmire's blog can be access on his website, [www.ptsalt.com](http://www.ptsalt.com). Mr. Daubenmire has a Facebook account that is public. Defendant can easily search both of these websites for all postings if he is "freinded" on the site. Mr. Daubenmire accepts all non-harassing friend requests, and the Defendant or its agent can review the websites on their own upon requests to be "friended."

22. All published statements by non-party witness Daubenmire regarding John or Nancy Freshwater. This in no way can be construed as anything but harassing. Mr. Daubenmire is not a publisher, nor does he control or even know who published statements he made. It is ridiculous and harassing to expect him to review every publication in the world to determine what he was attributed to saying regarding the Freshwaters. The Defendant is every bit of capable of searching archives as Mr. Daubenmire, as Mr. Daubenmire has no information regarding this request that the Defendant doesn't. The blatant disregard for Mr. Daubenmire's time and effort in this request is galling and should not be ignored.

23. Any syllabi, test materials and teaching notes about any course Mr. Daubenmire taught at Mount Vernon Nazarene University ("MVNU") within the past ten years. This is yet another blatant harassment request. Mr. Daubenmire's classes had nothing to do with Mr. Freshwater, and the request does limit the request at all. Mr. Daubenmire sees no relevancy to what he taught to this case. The request includes documents for everything he did at a private Christian college in the past ten years; well before the events in this case arose. This is a blatant attempt to make Mr. Daubenmire spend a lot of time gathering materials, in the hope of embarrassing him. Mr. Daubenmire does not see how this is at all relevant other to try to criticize his teaching, which is irrelevant to the current proceedings. If they are problems with

Mr. Daubenmires' MVNU classes, then that is relevant only to the people at MVNU, and not the Defendant.

24. The book(s) titled *Finding Common Ground* that Mr. Daubenmire used when teaching at MNVU. Mr. Daubenmire would direct the defense to Amazon, Borders, or any other bookstore to obtain this book. There is no need to obtain Mr. Daubenmire's personal copy. The Defendant may claim to be interested in his personal notes that might possibly be in the books, but as these likely have nothing to do with Mr. Freshwater (the request is not limited), the only purpose can be to attempt to embarrass and harass Mr. Daubenmire regarding his teaching at MVNU.

25. Documents submitted by John Freshwater in the *Religion in the Classroom* class that Mr. Daubenmire taught at MVNU. Again, there is no reason not to ask the Plaintiff for this. If the Plaintiff gave Mr. Daubenmire the documents, then he will have them as much as Mr. Daubenmire does. Also, whatever Mr. Daubenmire/Mr. Freshwater did at MVNU is not relevant to this case. At issue in this case is Mr. Freshwater's employment at Mount Vernon High School. What he did at a private Christian College is not relevant to this case, as the Defendant had no ability to restrain what Mr. Freshwater taught when he was not under their control. Mr. Freshwater's actions, not his beliefs are relevant to this case.

26. All electronic versions, including metadata, of the speech Mr. Daubenmire wrote for John Freshwater to give on April 16, 2008, at the Mount Vernon Square in Mount Vernon, Ohio. This is also harassing. While the speech itself could be turned over, what Mr. Daubenmire wrote prior to the speech being given to Mr. Freshwater are his private thoughts. Essentially, the Defendant is asking for a non-party witness's private thoughts. Mr. Daubenmire may have written several drafts for Mr. Freshwater. What he thought about writing at one point, yet

decided against writing, either for prudence, grammar, or any other reason is private. Mr. Freshwater is the party in this case. Mr. Freshwater may have adopted the speech as his own when he read it, but he did not see any prior drafts. Mr. Daubenmire's private thoughts are in no way relevant to this case, and neither Mr. Daubenmire nor Mr. Freshwater should be held accountable for speech that they neither made nor ratified. Thinking a thought, but not actually saying it is a hallmark of intelligent debate, and if Mr. Daubenmire put something in a draft that he wished not to say, and took it out, he should be rewarded, not condemned and embarrassed at the Defendant hopes to do.

After reviewing the subpoena, it is clear that the only purpose of the subpoena was to harass, embarrass, and incur expenses for a non-party witness, simply because he is a friend of one of the parties. The subpoena should be quashed in its entirety, and attorneys fees awarded to Mr. Daubenmire from the Defendant for the expense of obtaining counsel to respond to this harassing subpoena. However, if the Court deems this remedy too extreme, it should compensate Mr. Daubenmire for his time, both in terms of payment to him, and in attorney fees, as well as demanding that the Defendant demonstrate some sort of need before anything is turned over.

Respectfully Submitted,

/s/ Roger L. Weaver

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I hereby certify that a copy of this Motion was served on the following participant electronically through the court's ECF System at the e-mail address registered with the court:

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Respectfully Submitted,

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