

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JAMES BRADY and)
SABARA BRADY, h/w) CIVIL ACTION NUMBER
)
Plaintiffs) 06C-01-366 JOH
)
v.)
)
GERALD SUH, M.D., CRAIG)
MARTINE, R.N., FAMILY EAR)
NOSE & THROAT PHYSICIANS)
P.A., and CHRISTIANA CARE)
HEALTH SYSTEM, INC.,)
)
Defendants)
)

Submitted: June 2, 2009

Decided: July 8, 2009

MEMORANDUM OPINION

*Upon Motion of Defendants' Christiana Care Health Services and
Craig Martine's Motion to Compel - DENIED*

Appearances:

Dennis D. Ferri, Esquire, of Morris James LLP, Wilmington, Delaware, attorney
for Defendant Christiana Care Health System, Inc. and Craig Martine, R.N.

Judy O. Hodas, Esquire, of the Department of Justice, Wilmington, Delaware.

HERLIHY, Judge

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This once was a medical negligence case. Defendant Craig Martine is a nurse employed by Christiana Health Care Services ("CCHS"). They have moved to compel the Delaware Department of Justice ("DDOJ") to produce taped statements from a non-party witness, Gary Noble ("Mr. Noble") that were obtained by the Delaware State Police (DSP) through criminal investigations in which Mr. Noble was the complaining witness. They seek these statements to impeach him. The defendants above are currently being sued in a medical malpractice action by plaintiff James Brady ("Brady"). Brady alleges the defendants (and defendant Gerald Suh) failed to monitor him following the removal of his breathing tube (extubation). As a result, Brady has suffered permanent and irreversible brain damage.

Just prior to the trial date on January 26, 2009, Mr. Noble voluntarily and unexpectedly offered information to the plaintiffs alleging Martine, rather than remaining at Brady's bedside, left it following extubation for a cigarette break. Because Mr. Noble's statements injected a new and different theory of potential liability that caught counsel for all parties by surprise, discovery was extended and the trial was postponed. This revelation also raised the specter of a punitive damages claim, which has since been withdrawn. During this extension of time, Mr. Noble was deposed. He revealed facts contradicting earlier statements he

had made in the criminal investigations and openly admitted those statements may have been inaccurate, if not untrue. Based on what he said at his deposition about his statements to the DSP and now claims is the truth, defendants CCHS and Martine have moved to compel the release of the DSP tapes within the custody of the DDOJ, for use at trial.

Factual Background

Mr. Noble's ties with Martine are complicated. For an unknown period of time, Martine had been living with Mr. Noble and Cheryl Perry-Noble ("Mrs. Noble") at their house and, allegedly, the three had an open relationship with each other.¹ In early October 2008, Martine moved out of the Noble's residence. Following Martine's departure, Mr. Noble's and Mrs. Noble's relationship began to deteriorate, to the point that Mrs. Noble incurred criminal charges from two separate events involving alleged physical domestic disputes with Mr. Noble.

The first alleged incident occurred on October 10, 2008. According to an affidavit of probable cause, Mr. and Mrs. Noble got into an altercation. Following the dispute, Mrs. Noble brandished a gun and fired it three times, causing Mr. Noble to flee and report to police. Two of the gun shots fired by Mrs. Noble hit Mr. Noble's car, one puncturing a tire and the other striking the

¹Affidavit of probable cause for arrest warrant against Mrs. Noble in which Martine is the alleged victim of offensive touching and malicious mischief. Court of Common Pleas DNC #0810012149. The offenses are alleged to have occurred on October 5, 2008. They are pending trial in the New Castle County Court of Common Pleas.

driver's side door. As a result of this incident, Mrs. Noble was charged with attempted murder in the first degree and possession of a firearm during the commission of a felony.

A second altercation occurred several months later between March 13, 2009 and March 15, 2009. During these domestic disputes, it is alleged Mrs. Noble threw various objects at Mr. Noble, bit him, assaulted him, and tried to push him down a staircase. Mr. Noble was interviewed by the police after this event. He stated that she smashed his computer and camera in the driveway. Mrs. Noble was charged with terroristic threatening, assault in the third degree, reckless endangering in the second degree, criminal misconduct resulting in damage to property over \$1,500, and noncompliance with a condition of bond (a no-contact order issued after Mrs. Noble's arrest for attempted murder).

Mr. Noble gave statements to police about both incidents; however, he has now stated in his deposition for this case that the descriptions he gave the police concerning the incidents with his wife are inaccurate or wrong.² At his deposition, Mr. Noble stated he exaggerated his account of the events out of anger. Mr. Noble received a no contact order against his wife on May 5, 2009.

CCHS and Martine sought to depose Mrs. Noble; however, Mrs. Noble has exercised her Fifth Amendment rights and declined to speak about the

²Mr. Noble's Deposition, April 21, 2009, 71-73.

incidents. Her trial on the attempted murder and weapons charge is set for July 21, 2009.

Parties' Contentions

Defendants CCHS and Martine contend that the privilege to withhold the prosecutor's case file from civil discovery is not absolute, but qualified. Defendants claim Mr. Noble is a material witness for the plaintiffs because his statements place Martine outside of the room where he should have been monitoring Brady. Citing the importance of Mr. Noble's potential testimony about Martine's whereabouts during a key moment in Brady's care, they argue the DSP tapes are needed for trial preparation in order to cross examine Mr. Noble should he be called as a witness. And they argue the tapes need not be made public until trial, if even then. Further, they assert D.R.E. 608(b) would allow their use of extrinsic evidence at trial to cross examine a witness concerning the witness' character for truthfulness or untruthfulness. ³

Defendants also claim the DDOJ has failed to give any reasons why disclosure of Mr. Noble's statements will hinder their criminal cases against Mrs. Noble.

The DDOJ asserts that it has an absolute privilege to keep the prosecutor's case file from civil trial discovery. It contends that disclosing statements used by the State in a public prosecution is prejudicial to the public interest. The DDOJ further asserts that impeaching a witness' credibility does

³See generally, *Harper v. State*, 970 A.2d 199, 201 (Del. 2008).

not qualify as "substantial need" and the defendants have not proven a substantial need. In particular, Mr. Noble's statements are unrelated to the medical malpractice proceeding: he already admitted that his statements to police were untruthful when deposed for the civil trial; and any other information the defendants seek can be easily obtained through traditional methods of discovery.

Applicable Standard

A motion to compel production of documents is discretionary, and the party seeking production must affirmatively show that good cause exists for production.⁴ Whether "good cause" exists should be determined by the facts and circumstances, on a case by case basis.⁵

Discussion

There are two issues to be decided. The first question is whether the DDOJ has an absolute privilege to withhold the prosecutor's case file from civil discovery. The second consideration is whether CCHS and Martine have met the requisite burden of proof to show they may be deprived of material evidence if they do not receive the DSP tapes from the DDOJ. Both of these questions must be answered in the negative.

The DDOJ argues it is entitled to shield its case file from civil discovery because it possesses an absolute privilege. However, the Court finds the DDOJ has overstated its position; in part because the statements were not made to a

⁴ *Papen v. Suburban Propane Gas Corp.*, 229 A.2d 567, 571 (Del. Super. 1967).

⁵ *Id.*; See also, *Layton v. Lee*, 196 A.2d 578 (Del. Super 1963).

prosecutor but to the police. While the Attorney General has a privilege over the materials it collects for criminal investigations, the privilege is not absolute, but qualified.⁶ Instead, when a party makes a discovery request for material within the custody of the DDOJ a court must engage in a balancing test that weighs the interest of the State against the interest of the party seeking additional discovery.⁷

This Court has consistently held the State has a strong interest in protecting the confidentiality of communications it receives during criminal investigations.⁸ The privilege has been traditionally upheld because disclosure of such materials “would be prejudicial to the public interest” and the State’s ability to conduct productive criminal investigation.⁹ Accordingly, a reviewing court should maintain a strong presumption that the privilege of the State will apply.¹⁰

As non-privileged parties, CCHS and Martine carry the burden of overcoming the State’s privilege.¹¹ The party seeking discovery must make showing of a substantial need for the materials in order to advance its case.¹²

⁶ *Williams v. Alexander*, 1999 WL 743082, at *1 (Del. Super. Jun. 29, 1999).

⁷ *Id.* at *2.

⁸ *Id.*; *Beckett v. Trice*, 1994 WL 319171 at *3 (Del. Super. Jun. 6, 1994); *Lepkowski v. Handsberry*, 1986 WL 8173 (Del. Super. Jul. 23, 1986); *See also, Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F.Supp. 708, 714 (E.D. Pa., 1968).

⁹ *State v. Brown*, 36 A. 458, 463 (Del. Oyer & Term 1896).

¹⁰ *See, e.g., Guy v. Judicial Nominating Commission*, 659 A.2d 777, 785 (Del. Super. 1995).

¹¹ *Beckett*, 1994 WL 319171 at *3.

¹² *Id.*

Furthermore, CCHS and Martine must show "the evidence, if material, cannot be obtained from any other source."¹³

The Court notes the testimony proffered by Mr. Noble is critically important for establishing potential liability in this case.¹⁴ Mr. Noble's testimony, if believed by a jury, would tend to show that Martine breached his duty to monitor Brady at bedside following his surgery. Additionally, the Court is equally aware of the importance of cross examination as the main device in trial practice to test a witness' recollection of events and, most importantly in this case, the witness' credibility.¹⁵

However, the Court need not make a definitive ruling on whether the DSP tapes of Mr. Noble would be material for CCHS and Martine because the defendants have not made a sufficient showing that the information on the tapes cannot be obtained in less intrusive manner. This is because there are affidavits of probable cause for the arrest warrants in each of the two sets of criminal charges pending against Mrs. Noble. These documents are public records available for inspection. While Mr. Noble is not quoted by the police, (i.e. there is no use of quotation marks) it is obvious the source of the information is Mr. Noble. The officer in the attempted murder case notes his observations of

¹³ *Id.* at *4.

¹⁴ Compare, *Beckett* (a non-material witness).

¹⁵ *Cunningham v. McDonald*, 689 A.2d 1190, 1195 (Del. 1997).

apparent bullet-caused damage to Mr. Noble's vehicle, basically to buttress what Mr. Noble said about the events when he spoke to police.

A summary comparison of what he said to the police on two occasions to what he testified about at his deposition demonstrates the defendants' need for the tapes is ameliorated and their ability to go to another source is manifest. As to the attempted murder incident:

Deposition: When driving away he stated he did not see anything and could not say she fired at the car.¹⁶

Arrest Warrant Affidavit: Wife shot .45 weapon at him; hit driver's side door as he drove away; was fleeing after she pointed gun at him; really thinks Mrs. Noble was trying to shoot him.¹⁷

As to assault third degree and criminal mischief incident:

Deposition: Camera and computer (property subject of criminal mischief charge) already damaged; Mrs. Noble did not try to punch, kick, knee or throw anything at him; did not try to push him down steps.¹⁸

Arrest Warrant Affidavit: Trooper saw PC smashed in pieces in driveway; wife smashed a Nikon D70

¹⁶Mr. Noble's Deposition, April 21, 2009, 71.

¹⁷Affidavit of Probable Cause, Superior Court case #0810022740.

¹⁸Mr. Noble's Deposition, April 21, 2009, 73-76.

camera; threw a glass jar at him (trooper saw broken glass jar); punched, kicked, kneed him, and threatened to push him down the stairs.¹⁹

Further, and perhaps more importantly, Mrs. Noble's trial on the attempted murder and weapons charges will occur prior to this trial, assuming the State proceeds with the charges. Mr. Noble will have to testify and any inconsistencies will be brought out. Even if the trial does not occur, CCHS and Martine still have not met their burden of showing they cannot obtain what they need through other means.

Given the availability of these records and the strong presumption of the applicability of the DDOJ's privilege, the Court finds CCHS and Martine have not made a sufficient showing of substantial need for the actual DSP tapes.

Conclusion

For the reasons stated herein, CCHS's motion to compel the audio tapes of Mr. Noble's interview with the Delaware State Police is **DENIED**.

¹⁹ Arrest Warrant Affidavit, Superior Court case #090311392.

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