Cassell v. Monroe, 5:10-CT-3023-BO (NCEDC)

CHARLES MICHAEL CASSELL, III. Plaintiff,

v.

OFFICER MONROE, et al., Defendants.

No. 5:10-CT-3023-BO

United States District Court, E.D. North Carolina, Filed Western Division.

June 15, 2011

ORDER

TRRENCE W. BOYLE, District Judge.

On March 1, 2010, Charles Michael Cassell, III ("plaintiff') filed a civil rights suit in this district, Cassell v. Monroe, et al., No. 5:10-CT-3023-BO (hereinafter "Cassell # 1"). On June 10, 2010, the clerk's office received a filing, docketed it as a separate civil rights suit, and opened a second case, Casselll v. Monroe, 5:10-CT-3094-BO (hereinafter "Cassell # 2"). It was a clerical mistake to open Cassell # 2, and under Rule 60(a) the Clerk voided and vacated Cassell # 2 in its entirety and incorporate the filings in Cassell # 2 into Cassell # 1 in chronological order.

The action, while difficult to understand as well as voluminous, arises from the alleged beating of plaintiff by defendant Officer Monroe on January 22, 2008, and February 22, 2008. Plaintifffurther alleges deliberate indifference to his medical care and intentional interference with his mail.

Now before the court are several motions which are as follows: "Amendment for Damages also Extraordinary Motions and/or Whatever This Court Deems Fit" (D.E. # 22), "Amendment for Damages & Clarification & Multi Purpose Motion for Counsel, Private Investigator, Order for All, Including Legal Materials to be Supplied the Plaintiff [sic]" (D.E. # 23), "Plaintiffs Motion for Partial Discovery & Issuance Compelling Discovery" (D.E. # 34), "Amendment for Damages & Clarification & Multi Purpose Motion for Counsel, Private Investigator, Order for All, Including Legal Materials to be Supplied the Plaintiff [sic]" (D.E. # 35)

In that the motions seek discovery, they are DENIED. The motions fail to comply with Local Rule 7.1(c) of the Local Rules of Practice and Procedure, which states that "[c]ounsel must... certify that there has been a good faith effort to resolve discovery disputes prior to the filing of any discovery motions." Cassell's motions also fail to comply with Local Civil Rule 7.1 (d), E.D.N.C., which requires that his motion be accompanied by a supporting memorandum. Further, it is likely defendants will serve him with the relevant prison and medical records when they serve their dispositive motions. If, after pursuing the proper avenues to obtain the information as well as receiving the records within defendants filings, Cassell seeks additional relevant information, he may properly re-submit his motion to compel for the court's consideration. Cassell's motions for discovery are denied.

In that the motions seek to add a monetary award of damages to the complaint, the court ALLOWS the request.

In that the motions seek appointment of counsel, the motions are DENIED. There is no constitutional right to counsel in civil cases. Under the *in forma pauperis* statute, 28 U.S.C. § 1915(e)(1), a court may request an attorney to represent an indigent litigant. However, under the statute, a court cannot force an attorney to accept an appointment. Court intervention to procure representation is typically reserved for cases presenting "exceptional circumstances," determined by examining the claims and the litigant's abilities. Presently, this court finds that no exception circumstances exist.

Also before the court is the "Notice to Counsel ofFailure to Make Service within 120 Days" and response thereto. (D.E. # 44 and # 45) The Marshal's attempts to serve P.A. Williams, Officer Blow, Officer Conner, Officer Gragainis, P.A. Leggett, Officer Monroe, and J. Winebarger were returned unexecuted. (D.E. # 25, 26, 33) An incarcerated *pro se* plaintiff, proceeding *in forma pauperis,* is entitled to rely on the Marshal for service ofsummons and complaint. *Puett v. Blanford. 912 F.2d 270*, 275 (9th Cir. 1990). Typically, the plaintiff must provide the necessary information and documentation to effect service. *Id.* In this case, plaintiff does not appear to know defendants' full names or addresses, nor does he have the means by which to ascertain this information.

It is likely the Attorney General has access to the necessary information. To facilitate this matter on the merits, the Attorney General is ORDERED to provide the court with the full names and last known addresses of P.A. Williams, Officer Blow, Officer Conner, Officer Gragainis, P.A. Leggett, Officer Momoe, and J. Winebarger. If the party defendant is no longer employed by the Department of Correction, the requested information shall be provided under seal and will be disclosed only to the relevant court personnel, the United States Marshal, and any of the Marshal's deputies or employees engaged in providing service ofprocess. The information shall be provided within 14 days of the filing day of this order.

Accordingly, the motions for discovery and appointment ofcounsel are DENIED (D.E. # 22, 23,34, and 35) are DENIED. Plaintiff's motion to amend to seek monetary damages is ALLOWED (same). Lastly, the Attorney General is ORDERED to provide the information explained and set out in the preceding paragraph within 14 days of the filing of this order.

SO ORDERED.

CLASSIE REELS CURLEY, Plaintiff,

v.

ADAMS CREEK ASSOCIATES, BILLIE DEAN BROWN, and GEORGE H. ELLINWOOD, Defendants.

No. 4:08-CV-21-H.

United States District Court, E.D. North Carolina, Eastern Division.

October 15, 2010.

ORDER

DAVID W. DANIEL, Magistrate Judge.

This matter is before the Court on Plaintiff's motion to stay [DE-70] and motion to amend the motion to stay [DE-73]. Defendants filed a response to the motion to stay [DE-71] and though they have not filed a response to the motion to amend, the time for responding has passed. Thus, both matters are presently ripe for review.

STATEMENT OF THE CASE

Plaintiff Classie Reels Curley ("Plaintiff") filed her original complaint in this action to quiet title and for declaratory judgment on February 8,2008 [DE-]]; an amended complaint was filed on April 16, 2009 [DE-23] incorporating an adverse possession claim. Defendants Adams Creek Associates, Billie Dean Brown, and George H. Ellinwood (collectively "Defendants") filed a Motion for Summary Judgment [DE-30] on June 12,2009, which was granted by an order of Senior Judge Howard [DE-65] on March 29, 2010. On April 23, 2010, Plaintiff filed a Notice of Appeal [DE-67], and on May 27, 2010 filed a Motion to Stay [DE-70] pending that appeal. Defendants filed a Memorandum in Opposition to Plaintiffs Motion to Stay [DE-71] on June 7, 2010. Subsequently, Plaintiffs filed a Motion to Amend their Motion to Stay [DE-73] on June 24,2010 and a Memorandum in Support of their Motion to Stay [DE-76] on June 28, 2010.

Plaintiffs motion to stay sought "an order staying execution of, or any proceedings to enforce the judgment entered against [her]," pending the final disposition of her appeal.[1] Pl.'s Mot. to Stay at 1 [DE-70]. Plaintiff asserts that Melvin Davis ("Davis") and Licurtis Reels ("Reels"), the persons presently residing on the real property situated on Adams Creek in Carteret County that is the subject of this action ("the Waterfront Property" or "the Property"), are residing there at the behest of Plaintiff and with her permission. She further asserts that removal of Davis and Reels from their homes and the subsequent destruction of those homes would cause both a severe diminution in the value of the Property as well as a severe hardship to Plaintiff herself. *Id.*

In their memorandum in opposition, Defendants argue that: (1) Plaintiffs motion to stay violated Local Civil Rule 7.1 (d), having not been accompanied by either a supporting memorandum or any type of verification; (2) Plaintiff is not substantially likely to prevail on the merits of her appeal; (3) Plaintiff has not shown that she will suffer irreparable harm if the stay is not granted; (4) Defendants *will* suffer substantial harm if the stay is granted; and (5) a stay would not promote the public interest. Def.'s Mem. in Opp'n at 3-8 [DE-71].

Apparently in response to Defendants' first argument, Plaintiffs subsequent motion to amend modified the motion to stay by adding a verification sheet sworn to by Plaintiff. In addition, shortly after the filing of the motion to amend, Plaintiff filed a memorandum in support of the original motion to stay. In this memorandum, Plaintiff argues specifically that: (1) she is entitled to exhaust her appeal rights and, until such time as they have been exhausted, the status quo of the Property must be maintained; (2) the District Court is prevented from taking any action that would alter the status of the case as it rests before the Court of Appeals subsequent to her notice of filing of appeal, because jurisdiction over all matters from which the appeal is taken has been transferred to Court of Appeals; (3) there is a substantial likelihood that she will prevail on the merits, despite the fact that summary judgment was entered in favor of Defendants; and (4) "[t]he public interest is served when North Carolina citizens are given equal protection under the law." Pl.'s Mem. in Supp. at 1-5 [DE-76].

STANDARD OF REVIEW

Federal Rule of Appellate Procedure 8(a) provides that a party wishing to request a stay of a district court judgment in the Court of Appeals first must request the stay in district court. Fed. R. App. P. 8(a)(1)(A). In district court, Federal Rule of Civil Procedure 62 provides for several methods of requesting a stay. For example, a party requesting a stay under Rule 62(d) is entitled to a stay as a matter of right upon posting ofa supersedeas bond. Fed.R.Civ.P. 62(d). However, a party requesting a stay under Rule 62(c) is *not* entitled to a stay as a matter of right; rather, Rule 62(c) allows a district court, *within its discretion,* to stay the execution of a judgment pending appeal. Fed.R.Civ.P. 62(c). "In determining whether to grant a stay [under Rule 62(c)], the court must balance: (1) whether the stay applicant has made a strong showing that [s]he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the

proceeding; and (4) where the public interest lies.'" *Richardson v. North Carolina*, No. 5:07-HC-2099-FL, 2008 WL 2397309 at *1 (E.D.N.C. Jun. 12, 2008) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). With respect to these four factors, the party requesting the stay bears the burden of persuasion. *Id* (citing *Long v. Robinson*, 432 F.2d 977,979 (4th Cir. 1970)).

DISCUSSION

A. Plaintifrs Motion to Amend the Motion to Stay

Plaintiff has requested to amend her motion to stay by adding a verification sheet, ostensibly in response to Defendants' contention that the motion was improperly filed without verification. The Court notes that Plaintiff has improperly requested leave to amend her motion to stay under Federal Rule of Civil Procedure 15(a), which covers only the amendment of pleadings. However, in the interest of completing the record before it in its ruling on the motion to stay, the Court will grant Plaintiff's motion to amend.

B. Plaintifrs Motion to Stay

1. District Court's authority to grant or deny motion to stay

As a preliminary matter, Plaintiff repeatedly argues that this Court has no authority to grant or deny a stay in this case, jurisdiction over all matters having been transferred to the Court of Appeals. Plaintiff's reliance on cases such as *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) for the proposition that a district court may not take any action after the filing of a notice of appeal is misplaced. Neither *Griggs* nor any of the other cases Plaintiff cites had anything whatsoever to do with the District Court's authority to rule on a motion to stay. In fact, Federal Rule of Appellate Procedure 8(a) itself provides that a party wishing to request a stay of a district court judgment in the Court of Appeals *first must request the stay in district court.* Fed. R. App. P. 8(a)(1)(A). Accordingly, this Court has the authority to grant or deny Plaintiffs motion to stay in this case. If unsatisfied with this Court's ultimate findings, Plaintiff is free to appeal this Court's decision to the Court of Appeals, as provided for in Rule 8(a)(2)(A)(ii).

2. District Court's discretion to grant or deny motion to stay

Also as a preliminary matter, Plaintiff argues that this Court must grant her request for a stay as a matter of right. This is not the case, and Plaintiffs reliance on *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theaters, Inc.*, 87 S.Ct. 1, 17 L.E. 2d 37 (1966) (mem.), for such a proposition is in error. *American Mfrs.* dealt with a motion to stay under Federal Rule of Civil Procedure 62(d). Motions to stay requested under Rule 62(d) are, in fact, granted as a matter of right; however, this is so because such motions are backed by the movant's posting of a supersedeas bond. *See e.g. Southeast Booksellers' Ass'n v. McMaster*, 233 F.R.D 456, 457-59 (D.S.C. 2006); *Kirby v. Gen. Elec. Co.*, 210 F.R.D. 180, 193-94 (W.D.N.C. 2000). When no such bond is posted, whether to grant a motion to stay is within the discretion of the court, as provided for by Federai Rule of Civil Procedure 62(c). Fed.R.Civ.P. 62(c) ("the court *may* suspend, modify, restore, or grant an injunction") (emphasis added); *see also Richardson*, 2008 WL 2397309 at *1. Here, Plaintiff did not specify under which subsection of Rule 62 she was requesting relief. However, because she has not posted a supersedeas bond or any other form of security, the Court treats her motion as one under Rule 62(c) and, accordingly, will grant or deny her motion at its discretion.

3. Compliance with Local Civil Rule 7.1(d)

Local Civil Rule 7.1 (d) states that "all motions made other than in a hearing or trial shall be filed with an accompanying supporting memorandum in the manner prescribed by Local Civil Rule 7.2(a). Where appropriate, motions shall be accompanied by affidavits or other supporting documents." Local Civil Rule 7.1(d). Here, as Defendants point out, Plaintiff failed to file either a supporting memorandum or appropriate verification with her motion to stay.

As to the first defect, though Plaintiff did in fact fail to file a supporting memorandum *with* her motion to stay, she did later file one with the Court. So as to make its determination on the motion to stay with the benefit of all of Plaintiff's arguments, the Court will assume, without deciding, that Plaintiff's tardy filing of a supporting memorandum was sufficient to cure the defect under Local Civil Rule 7.1 (d). As to the second defect, because the Court has decided to grant Plaintiff's motion to amend, the motion to stay's lack of appropriate verification under Local Civil Rule 7.1(d) is no longer an issue. *See* Section A, *supra.* Accordingly, the Court finds that, for purposes of its ruling on the motion to stay, Plaintiff's motion complied appropriately with Local Civil Rule 7.1 (d).

4. Analysis of the *Hilton* factors

As discussed more fully in Section B(2), *supra*, in determining whether Plaintiff's motion to stay should be granted, the Court is entitled to exercise its discretion. "In exercising this discretion, the court should consider the traditional stay factors' while recognizing that these factors contemplate individualized judgments,' and thus, the formula cannot be reduced to a set of rigid rules.'" *McAllister v. Hunter*, No. 5:07-CV-64, 2010 WL 56021 at *1 (Jan. 4, 2010 W.D.N.C.) (quoting *Hilton*, 481 U.S. at 777). The four traditional stay factors (commonly referred to as the *"Hilton* factors") are (1) the movant's likelihood of success on the merits; (2) the existence of irreparable injury to the movant absent a stay; (3) the

possibility of substantial injury to the other parties if a stay is issued; and (4) a consideration of where the public interest lies. Thus, the Court will consider these four *Hilton* factors in turn, while bearing in mind that other considerations may come into play.

i. Plaintiff's likelihood of success on the merits

The first *Hilton* factor is "whether the stay applicant has made a strong showing that [s]he is likely to succeed on the merits." *Hilton*, 481 U.S. at 776. Defendants argue that Plaintiff is not substantially likely to prevail on the merits of her appeal because her appeal-and in fact, her entire federal action-is merely an attempt to seek review of a prior state court decision by a federal court. Citing to this Court's order entering summary judgment in their favor, Defendants assert that the *Rooker-Feldman* doctrine applies because, "[t]o grant Plaintiff the relief she seeks would require review and reversal of the Torrens Act proceeding and the resulting Decree of Registration,' including the determination that plaintiff was not properly served." Defs.' Mem. in Opp'n at 5 (citing Order Granting Summ. J. at 11). Plaintiffs only response appears to be that there is a substantial likelihood she will prevail on appeal because there are "material facts" which should have enabled her to avoid a motion for summary judgment in the first place. Pl.'s Mem. in Supp. at 4. Additionally, she points out that success on a motion for summary judgment is not final and a loss is not necessarily fatal. *Id.* However, Plaintiff does not elaborate on the specifics of these "material facts" or offer any further argument as to why she might prevail on appeal.

The Court finds that the prior order by this Court granting summary judgment in favor of Defendants, though not fatal as Plaintiff correctly points out, weighs heavily in favor of Defendants' likelihood of success on appeal. In addition, even if there are "material facts" that might entitle Plaintiff to relief on appeal, she, as the party requesting the stay, has not fulfilled her burden of persuasion in presenting those facts to the Court. Accordingly, the Court finds that Plaintiff has not made a "strong showing that [s]he is likely to succeed on the merits."

ii. Injury to Plaintiff if motion to stay is denied

The second *Hilton* factor is "whether the applicant will be irreparably injured absent a stay." *Hilton*, 481 U.S. at 776. Defendants argue that Plaintiff does not live on the Waterfront Property herself and has no contractual arrangements with those persons that do, Davis and Reels. Defs.' Mem. in Opp'n at 6-7. Thus, Defendants believe that she has not shown that she, as opposed to Davis and Reels, will suffer any irreparable injury if Davis and Reels are forced to vacate so that the Property can be developed. In addition, Defendants point out that removing the houses and clearing the land would arguably, if anything, enhance the value of the Property. *Id.* Plaintiff contends that Davis and Reels are "presently living in those homes at the behest of Plaintiff' and "with her permission." Pl.'s Mot. to Stay at 1. Therefore, she claims, "[a]ny action that would require the removal of these persons from their homes and the subsequent destruction of said homes would cause a severe diminution in the value of the Property," and any clearing or preparing of the property for new construction would cause a "severe hardship to Plaintiff' should she prevail on appeal. *Id.*

The Court finds that, besides her unsupported assertion that removing Davis and Reels and their homes would cause a severe diminution in value of the Property and "severe hardship" to her, Plaintiff has not offered any evidence that she will be harmed by Defendants' attempts to develop the property. In fact, it seems to the Court that any "hardship" that would ensue would be to Davis and Reels, as Plaintiff would not be forced to move herself or lose any income or benefit that the Court is aware of. The injury Plaintiff seems to be suggesting-a personal objection to having Davis and Reels disturbed in their gratis use of "her" property-is not irreparable. Furthermore, the Court is inclined to agree with Defendants that, even assuming *arguendo* that Plaintiff might succeed on appeal, any efforts undertaken by Defendants to prepare the Property for development would in fact enhance the value of the Property. Thus, since Plaintiff has not shown that she *personally* will suffer any irreparable injury if Davis and Reels are forced to vacate, she, as the party requesting the stay, has not fulfilled her burden of persuasion in presenting those facts to the Court. Accordingly, the Court finds that Plaintiff has not shown that she will be "irreparably injured absent a stay."

iii. Harm to Defendants if stay is issued

The third *Hilton* factor is "whether issuance of the stay will substantially injure the other parties interested in the proceeding." *Hilton*, 481 U.S. at 776. Defendants argue that, if the motion to stay is granted, they will be prevented from developing property that has been repeatedly deemed to be theirs, first in the state courts and most recently by this Court's order granting summary judgment. Defs.' Mem. in Opp'n at 7. They also contend that any further delay preventing them from developing the Property exacerbates and adds to the damage already done over the course of more than twenty years. *Id.* Plaintiff does not respond to these contentions or otherwise address this factor in her motion or accompanying memorandum.

The Court finds Defendants' grievances to be well-founded. Having recently prevailed on their motion for summary judgment, further clearing their title to the land, Defendants understandably wish to develop the Property as soon as possible. Though any additional delay that Defendants face if forced to wait until Plaintiff has exhausted her appeals to develop the Property may be

slight compared to what they have already endured, it is additional unwarranted delay nonetheless. Accordingly, the Court finds that Defendants have offered an explanation as to why "issuance of the stay will substantially injure the other parties interested in the proceeding" and Plaintiff has done nothing to disprove such a finding.

iv. Public interest

The final *Hilton* factor is a consideration of "where the public interest lies." *Hilton, 481* U.S. at 776. Defendants argue that a stay would provide Davis and Reels with "further license to violate existing court orders." Defs.' Mem. in Opp'n at 8. In support of this statement, they point to this Court's order granting summary judgment and the opinion of the North Carolina Court of Appeals in the 2007 trespass action involving Davis and Reels' right to be on the Property. *Id.* at 2 (citing *Adams Creek v. Davis,* 186 N.C.App. 512 (N.c. Ct. App. 2007)). In response, Plaintiff contends only that "[t]he public interest is served when North Carolina citizens are given equal protection under the law." Pl.'s Mem. in Supp. at 4.

The Court finds that the public's interest in preventing trespass and violation of court orders outweighs what Plaintiff characterizes as a denial of "equal protection." Accordingly, the Court finds that "the public interest lies" with denial of Plaintiffs motion to stay.

None of the four *Hilton* factors weigh in favor of granting Plaintiffs motion and, in addition, the Court finds that there are no other factors unique to this case that would weigh in favor of granting Plaintiffs motion to stay. Accordingly, the Court finds that Plaintiffs motion to stay should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs motion to amend the motion to stay [DE-72] is GRANTED. However, the Court finds no good cause to further delay enforcement of the judgment in this case and thus, Plaintiffs motion to stay [DE-70] is DENIED.

IT IS SO ORDERED.

Notes:

[1] On March 29, 2010 Senior Judge Howard entered an order disposing of all three of Plaintiffs claims for relief. Though the matter was before the Court on Defendants' motion for summary judgment, the order granted Defendants' earlier motion to dismiss as to Plaintiffs first two claims-to quiet title and for declaratory judgment- for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. The order then granted summary judgment for Defendants as to Plaintiffs third claim of adverse possession. Order Granting Summ. J. at 11-13 [DE-65]. The practical result for Defendants was an additional affirmation of their uncolored ownership interest in the Property and their resulting freedom to do with it what they wished.

NATIONWIDE MUT. INS. CO. v. McMAHON

365 F.Supp.2d 671 (2005)

NATIONWIDE MUTUAL INSURANCE COMPANY, Plaintiff,

v.

James L. McMAHON, Michael McMahon, and State Farm Automobile Insurance Co., Defendants.

No. 5:04-CV-263-H(2).

United States District Court, E.D. North Carolina, Western Division.

April 13, 2005.

Susan K. Burkhart, Cranfill, Sumner & Hartzog, Raleigh, NC, for plaintiff.

James L. McMahon, Pro Se, Jamestown, NC, Paul D. Coates, Pinto, Coates, Kyre & Brown, Greensboro, NC, John T. Honeycutt, Yates McLamb & Weyher, Raleigh, NC, for defendants.

ORDER

HOWARD, District Judge.

This matter is before the court on the parties' cross motions for summary judgment. Proper responses and replies have been filed, and these motions are ripe for adjudication. Also before the court is defendant

[365 F.Supp.2d 672]

James McMahon's motion to change venue. Although the time for plaintiff to respond to this motion has not run, the court does not need a response from plaintiff in order to adjudicate this motion.

STATEMENT OF THE CASE

Plaintiff Nationwide Mutual Insurance Company ("Nationwide") filed this action for declaratory judgment on April 16, 2004, against James McMahon ("James"), Michael McMahon ("Michael"), and State Farm Mutual Automobile Insurance Company ("State Farm"). Nationwide issued a homeowner's policy to James, policy number 61 32 MP 423 307, effective from October 18, 2002, to October 18, 2003 (the "policy") (See Appendix A to plaintiff's complaint). State Farm provided uninsured/underinsured motorist coverage to Michael, policy number 6266-C25-33P which would apply if there were no liability coverage on the automobile that was involved in the incident.

In August 2003, an incident occurred in which Michael was injured attempting to start a vehicle owned by James on the insured property. Michael asserted a negligence claim against his father, James, who in turn demanded that Nationwide, under the homeowner's policy, indemnify him for any damages.

In this action, Nationwide seeks a declaration regarding the parties' legal rights and responsibilities under the homeowner's policy. Nationwide asserts that the homeowner's policy does not provide coverage for any property damage or bodily injury that may have occurred as a

result of the August 2003 incident. Nationwide argues that State Farm should afford such coverage pursuant to the uninsured motorist coverage.

Defendant James McMahon filed his answer on May 6, 2004, and indicated that the accident occurred when he and Michael were attempting to start James' 1986 Ford LTD in order to move it to a different location. On May 28, 2004, defendant Michael McMahon filed his answer, also admitting that his injuries were a result of attempts to start the vehicle in order to move it.

Defendant Michael McMahon filed a counterclaim against Nationwide seeking a declaratory judgment that it must provide coverage for his injuries under James' homeowner's policy. Michael also filed a cross-claim against State Farm, alleging it must provide coverage pursuant to his uninsured motorist coverage. State Farm's answer to Nationwide's complaint, filed June 4, 2004, admitted that State Farm would be obligated to provide coverage for the damages under the uninsured motorist coverage in the absence of other coverage. State Farm also filed a cross-claim and counterclaim seeking a declaratory judgment that State Farm is not obligated to provide any such coverage.

STATEMENT OF THE FACTS

James McMahon and his wife, Wanda, live at the insured property on Joy Drive in Jamestown, North Carolina. The vehicle at issue is a 1986 Ford LTD owned by the McMahons. Mrs. McMahon drove this car prior to her retirement. The McMahons also owned two other vehicles, a 1994 pick-up truck, and a 1973 Bronco, which James kept for winter use. James testified at his deposition that the LTD was operable and had no mechanical problems at the time Wanda stopped driving it to work. After she stopped driving it to work, the McMahons parked it in their yard.

At the time of the incident, August 2003, the LTD was parked in the yard parallel to the McMahon's house. It had been parked in this spot for seven to nine months. The LTD had passed inspection

[365 F.Supp.2d 673]

in April 2002; however, it was not insured at the time of the accident because James had canceled the insurance in October 2002 approximately eleven months prior to the incident.

James periodically started the LTD. On the day prior to the incident at issue, James attempted to start the LTD. He intended to start the car and drive it to another location on the property. He testified it had been about four to six months since the last time he started the LTD. He poured some gasoline into the carburetor and turned the ignition. The motor turned over, but the car did not start. About that time, his wife called him inside for lunch, and James did not attempt to start the car again that day.

The next day, August 23, 2003, the McMahon's son, defendant Michael McMahon, was visiting his parents in order to help his dad pressure wash a camper. The camper had been sitting in the front yard along side the LTD for so long it had turned black. The Ford LTD has also turned black, and the grass underneath the car had died. Michael washed the camper and then helped his father move the camper to another part of the property.

After finishing with the camper, James asked his son Michael to help him start the LTD in order to move it to another part of the property so he could seed that part of the lawn. He intended to move it to a field where he kept items he used, such as farm equipment, plows, cultivators, and a mechanical wood-splitter. He testified that he did not intend to use the car any more.

In order to start the LTD, James poured two to three gallons of gasoline into the gas tank of the LTD. He then poured approximately one inch of gasoline into a tin container and handed it to Michael. James instructed Michael to prime the carburetor of the LTD by pouring the gasoline into it. While Michael was still under the hood of the car, James attempted to start the LTD by turning the ignition. The motor turned over; then he heard a loud "whoosh" and saw fire shoot out from under the hood of the car. When James got out of the car, he saw Michael lying on the ground, injured and burned from the fire.

COURT'S DISCUSSION

I. Motion to Change Venue

On March 21, 2005, James McMahon wrote a letter to the undersigned, asking that this case be moved to the Middle District of North Carolina due to defendant's age and disability. What defendant James McMahon requests is a change in venue; therefore, this letter shall be treated as a motion to change venue. No response has been received regarding Mr. McMahon's motion; however, none is needed by this court. Mr. McMahon failed to follow the local rules of this court. He has not supported his motion with a memorandum detailing the legal reasons supporting his motion, as required by Local Rule 7.1. Mr. McMahon's motion must fail. Although Mr. McMahon is a *pro se* party, he still must follow the rules of this court. Therefore, defendant James McMahon's motion to change venue is denied.

II. Standard of Review for Summary Judgment

Summary judgment is appropriate pursuant to Fed.R.Civ.P. 56 when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.,*477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex*

*Corp. v. Catrett,*477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Once the moving party has met its burden, the non-moving party may not rest on the allegations or denials in its pleading, *see Anderson,* 477 U.S. at 248, 106 S.Ct. 2505, but "must come forward with `specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,*475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting Fed.R.Civ.P. 56(e)). As this court has stated, summary judgment is not a vehicle for the court to resolve disputed factual issues. *Faircloth v. United States,*837 F.Supp. 123, 125 (E.D.N.C.1993). Instead, a trial court reviewing a claim at the summary judgment stage should determine whether a genuine issue exists for trial. *Anderson,* 477 U.S. at 249, 106 S.Ct. 2505.

In making this determination, the court must view the inferences drawn from the underlying facts in the light most favorable to the non-moving party. *United States v. Diebold, Inc.,*369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962) (per curiam). Only disputes between the parties over facts that might affect the outcome of the case properly preclude the entry of summary judgment. *Anderson,* 477 U.S. at 247-48, 106 S.Ct. 2505. Accordingly, the court must examine "both the materiality and the genuineness of the alleged fact issues" in ruling on this motion. *Faircloth,* 837 F.Supp. at 125.

III. Application of State Law

This case involves the interpretation and application of an insurance policy. As such, this court is required to follow state law. *See, e.g., Wake County Hosp. System, Inc. v. National Cas. Co.,*804 F.Supp. 768, 773 (E.D.N.C.1992). This case involves the meaning of certain words in

the insurance policy. Specifically, the dispositive issue in this case is whether the accident fits within the homeowner's policy exclusion for liability arising out of the "ownership, maintenance, use, loading or unloading of motor vehicles .... owned or operated by or rent or loaned to an insured," and whether the exception to the exclusion for a "vehicle or conveyance not subject to motor vehicle registration which is ... [i]n dead storage on an insured location" applies to bring the accident within the coverage of the policy.

Under North Carolina law,

[i]t is the insured that has the burden of bringing himself within the insuring language of the policy. Once it has been determined that the insuring language embraces the particular claim or injury, the burden then shifts to the insurance company to prove a policy exclusion excepts the particular injury from coverage.

Nationwide Mutual Fire Ins. Co. v. Allen, 68 N.C. App. 184, 188, 314 S.E.2d 552 (1984).

The North Carolina Supreme Court, in *Maddox v. Insurance Co.,* provides the following guidance for interpreting exclusions and exceptions in insurance contracts:

In interpreting the relevant provisions of the insurance policy at issue, we are guided by the general rule that in the construction of insurance contracts, any ambiguity in the meaning of a particular provision will be resolved in favor of the insured and against the insurance company. Exclusions from and exceptions to undertakings by the company are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy. The various clauses are to be harmoniously construed, if possible, and every provision given effect. An ambiguity exists where, in the opinion of the court, the language of the policy is fairly and reasonably

[365 F.Supp.2d 675]

susceptible to either of the constructions asserted by the parties.

Maddox, 303 N.C. 648, 650, 280 S.E.2d 907 (1981).

IV. Analysis

Here, there are no factual disputes as to the events surrounding the incident in question, making this case a prime candidate for resolution upon summary judgment. The issue, a legal question, turns on the interpretation of certain terms of the policy. There is no dispute that the policy generally covers personal liability and medical payments to others for covered occurrences. However, Nationwide argues that the automobile exclusion of the policy applies and bars coverage. The exclusion provides, in pertinent part:

Section II-Exclusions

1. Coverage E-Personal Liability and Coverage F-Medical Payments to Others do not apply to bodily injury or property damage:

(f) Arising out of:

(1) the ownership, maintenance, use, loading or unloading of motor vehicles ... owned or operated by or rented or loaned to an insured;

This exclusion does not apply to:

(4) A vehicle or conveyance not subject to motor vehicle registration which is:

(c) in **dead storage** on an insured location.

Policy, page H1 (emphasis added).

Defendants argue that the exclusion does not apply because the LTD was in "dead storage" at the time of the incident. There are a number of cases in jurisdictions across the county which have examined language similar to the language at issue here, under circumstances of varying similarity to those in the instant case. Only one North Carolina appellate case has applied the relevant policy language at issue here. Defendants argue that this case is controlling. Plaintiff argues that this case is distinguishable on its facts from the instant matter before the court.

In *Nationwide Mut. Fire Ins. Co. v. Allen,* the North Carolina Court of Appeals held the automobile exclusion inapplicable to property damage sustained in a fire caused by the insured's use of combustible materials while working on a motorcycle in his apartment. *Id.,* 68 N.C. App. 184, 314 S.E.2d 552, *disc. review denied,*311 N.C. 761, 321 S.E.2d 142 (1984).

In *Allen,* Mr. Allen was the owner of a Honda motorcycle that had been stored on the patio of his apartment for approximately six months. It was inoperable. One rainy day, he moved the motorcycle into the living room, for the purpose of charging the battery, checking the timing and inspecting the motorcycle to determine what repairs may be necessary. He did not intend to perform the repairs that same day.

Mr. Allen put plastic down over the carpet and covered the plastic with newspaper. Before moving the motorcycle inside, he had drained some of the gasoline, but was unable to empty the main tank or remove any gasoline from the reserve tank. Once inside, he drained the oil into a plastic milk carton which he placed on the newspaper-covered plastic. He also removed the battery and began charging it as well as removed a portion of the gas tank to examine the magneto.

Mr. Allen placed a bare light bulb in a socket on the fork of the front wheel to inspect the timing. He then went across the room to turn off the television. While at the television, he heard a loud crash. When he turned around, he saw that the motorcycle had toppled over onto the coffee table and flames were coming from

[365 F.Supp.2d 676]

underneath the motorcycle near the magneto.

Under these facts, the court held:

It was Mr. Allen's handling of combustible materials (newspapers, plastic floor covering, gasoline, oil) in the immediate vicinity of ignition sources (an operating electrical battery trickle charger and an open light bulb as a timing light left upon a metal frame of the motorcycle) which created a risk covered by Nationwide-Fire's policy against personal liability and caused the fire. Mr. Allen obtained coverage to protect himself against this type of accident and to pay for property damage to others for which he might be liable.

We hold that the property damage which occurred did not arise out of either the ownership or the maintenance of the Honda motorcycle. We also hold that, as of the date of the fire, the motorcycle was not subject to motor vehicle registration and that it had been kept in dead storage for approximately six months on the residence premises.

Id. at 189, 314 S.E.2d 552.

Regarding the construction of the clauses in the policy, the court stated "exclusionary clauses in a policy are construed narrowly against the insurer. We recognize that the word `maintenance' may have a different meaning under different circumstances, and "'whenever

possible, the courts will apply an interpretation which gives, but never takes away, coverage.'"" *Id.* at 190, 314 S.E.2d 552, *quoting State Farm Mutual Automobile Insurance Co. v. Partridge,*10 Cal.3d 94, 102, 109 Cal.Rptr. 811, 514 P.2d 123 (1973), *quoting* Marcus, *Overlapping Liability Insurance* 16 Def. L.J. 549, 559 (1967).

Defendants argue that under *Allen,* the Nationwide policy applies to the instant case. They state that, as in *Allen,* the use of combustible material, gasoline, around an open ignition source, the vehicle engine, was the cause of the fire. Therefore, pursuant to *Allen,* and because the policy is ambiguous as to the word "maintenance," the fire did not result from the ownership, maintenance, or use of the vehicle, therefore barring the application of the automobile exclusion to the instant case. In addition, defendants state the *Allen* case is the only reported North Carolina case addressing the meaning of "dead storage" within the context of an automobile exclusion in a policy.

Plaintiff Nationwide disagrees. Nationwide argues that the case is distinguishable in that at the time of the accident in *Allen,* the insured was not undertaking or intending to undertake any efforts to make the motorcycle operable. He was merely assessing what future repairs might be needed to make the motorcycle operable. In addition, at the moment of the accident, the insured was not performing any work on the motorcycle, but rather had walked across the room to turn off the television.

Plaintiff contrasts the facts in *Allen* to the facts here, in that at the moment of the fire, Michael was under the hood priming the carburetor while his father James turned the vehicle's ignition. These acts were undertaken to start the vehicle so it could be driven to another location on the property. These acts were the direct and only cause of the fire. Plaintiff asserts that these differences are highlighted by cases from other jurisdictions addressing similar facts. Plaintiff contends that these cases establish a "clear majority approach" to the interpretation of this policy language in the specific context of an attempt to start a vehicle through the priming of a carburetor. *See, e.g., Holliman v. MFA Mutual Ins. Co.,*289 Ark. 276, 711 S.W.2d 159 (1986) (Arkansas Supreme Court held that when a vehicle is being maintained, it is not in dead storage. In this case, fire occurred when insured's brother poured

gasoline into carburetor while insured turned the ignition.); *David v. Tanksley,*218 F.3d 928 (8th Cir.2000); (Eighth Circuit relied on *Holliman,* applying the rule that "mutual exclusivity of maintenance and dead storage" as well as that "pouring of gasoline into a car's carburetor in an attempt to start the vehicle constitutes `maintenance.'") *North Star Mutual Ins. Co. v. Carlson,*442 N.W.2d 848 (1989) (Court of Appeals of Minnesota held that where carburetor was primed with gasoline resulting in explosion, the motor vehicle was undergoing maintenance and was not in dead storage); *Hollis v. St. Paul Fire & Marine Ins. Co.,*203 Ga.App. 252, 416 S.E.2d 827 (1992) (Court of Appeals of Georgia held that where a car had remained in driveway for approximately two years and was titled but not tagged or insured, neighbor priming carburetor by pouring gasoline inside the carburetor while insured turned the ignition constituted maintenance under the policy, excluding the incident from coverage.)

This court agrees with Nationwide that the instant case is distinguishable from *Allen.* Additionally, the court finds that the terms "maintenance" and "dead storage" contained in the policy are not ambiguous. This court holds that under the specific facts of this case, this vehicle was not in dead storage, inasmuch as defendants James and Michael were attempting to start the vehicle to drive it to another location. A car undergoing maintenance, such as priming the carburetor to start the vehicle, in order to drive the vehicle cannot be in dead storage. The instant facts are distinguishable from the facts in *Allen,* inasmuch as the insured in *Allen* was not attempting to start the motorcycle or drive the motorcycle anywhere.

The automobile exclusion contained in the policy applies (and is not excepted by the "dead storage" exception); therefore, coverage under the Nationwide policy is barred by the application of the automobile exclusion.

CONCLUSION

For the foregoing reasons, defendant James McMahon's motion to change venue is denied. Plaintiff Nationwide's motion for summary judgment is granted. Defendant Michael McMahon and defendant State Farm's motions for summary judgment are denied. The clerk is directed to close this case.

Sager v. Standard Insurance Company, 5:08-CV-628-D. (NCEDC)

DANIEL L. SAGER, Plaintiff,

v.

STANDARD INSURANCE COMPANY, Defendant.

No. 5:08-CV-628-D.

United States District Court, E.D. North Carolina, Western Division

July 10, 2010

ORDER

DAVID W. DANIEL, District Judge.

This matter is before the Court on Plaintiffs Motion to Compel Discovery and Motion for Hearing. [DE-22 & 27.] Defendant has responded [DE-25], and this matter is ripe for review.

After careful consideration, the Court concludes that Plaintiffs motion is fatally defective and that these deficiencies are not merely technical: (I) Plaintiff failed to file a supporting memorandum of law, as required by Local Civil Rule 7.1(d); (2) The motion is not signed by local counsel, as required by Local Civil Rule 83.1 (d); and (3) The motion was filed after the close of fact discovery and no motion to extend the fact discovery deadline has been filed. *See* April 13, 2010 Order (establishing fact discovery deadline of March 31,2010) [DE-21].

Plaintiff claims Defendant breached its contract with Plaintiff by failing to pay him disability benefits. Plaintiff seeks documents related to the "bonus, performance and compensation" of Defendant's employees, which Plaintiff asserts is relevant to show bias and incentive to deny claims. Pl.'s Mot. ¶ 9. Defendant contests Plaintiffs assertion that the type of information sought is relevant and has cited case law contrary to Plaintiffs position, while Plaintiff has failed to file a memorandum of law or to cite any case law in support of its position that the documents sought are relevant. One party's failure to file a memorandum of law hinders the Opposing party's ability to adequately respond and prevents the court from properly adjudicating the motion.

It is also significant that the motion appears to be untimely, as it was filed after the close of fact discovery. *See PCS Phosphate Co., Inc. v. Norfolk Southern Corp.*, 238 F.R.D. 555, 558 (E.D.N.C. 2006) ("Generally, absent a specific directive in the scheduling order, motions to compel discovery filed prior to the discovery deadline have been held timely.") By letter of February 25, 2010, Defendant's counsel informed Plaintiffs counsel that Defendant did not believe further supplementation of its discovery responses was necessary. Def.'s Resp. Ex. A [DE-26]. After some further discussion between counsel for the parties, Plaintiffs counsel, via email letter on March 22, 2010, asked Defendant to produce certain documents in response to its previous discovery requests. Pl.'s Mot. Ex. D. Despite Defendant's failure to respond, Plaintiff did not promptly file his motion to compel or ask the Court to extend fact discovery. Instead, Plaintiff waited three weeks after the close of fact discovery to file the instant motion. Plaintiff has provided no reason for his delay

in the filing of this motion and has failed to show good cause for the Court to essentially amend its Scheduling Order to reopen fact discovery. *See* Fed.R.Civ.P. 16 (b)(4) ("A schedule may be modified only for good cause and with the judge's consent.").

Based on Plaintiffs failure to comply with the Local Rules of this Court and with the Court's Scheduling Order, the motion to compel [DE-22] is DENIED. Plaintiffs motion for hearing [DE-27] is DENIED, as the Court finds, in its discretion pursuant to Local Civil Rule 7.1(i), that a hearing would not aid the Court in the determination of this motion.

Harris v. Smithfield Packing Co., Inc., 4:09-CV-41-H. (NCEDC)

JAMES HARRIS, on behalf of himself and all others similarly situated, Plaintiffs,

v.

SMITHFIELD PACKING COMPANY, INC., Defendant.

No. 4:09-CV-41-H.

United States District Court, E.D. North Carolina, Eastern Division.

November 24, 2010.

ORDER

JAMES E. GATES, Magistrate Judge.

This case comes before the court on the unopposed motion (D.E. 47) by plaintiffs James Harris, et al. ("plaintiffs") to have permanently sealed several documents filed in this case. The motion was not supported by a memorandum, in violation of Local Civil Rule 7.1(d), E.D.N.C. For the reasons set forth below, the court will deny the motion without prejudice.

DISCUSSION

The Fourth Circuit has directed that before sealing publicly filed documents the court must first determine if the source of the public's right to access the documents is derived from the common law or the First Amendment. *Stone v. Univ. of Md.*, 855 F.2d 178, 180 (4th Cir. 1988). The common law presumption in favor of access attaches to all judicial records and documents, whereas First Amendment protection is extended only to certain judicial records and documents, for example, those filed in connection with a summary judgment motion. *Id.* Here, the documents sought to be sealed have been filed in connection with a motion for class certification, and not in support of any motions that seek dispositive relief, and therefore the right of access at issue arises under the common law. *See Covington v. Semones*, 2007 WL 1170644, at *2 (W.D. Va. 17 April 2007) ("In this instance, as the exhibits at issue were filed in connection with a non-dispositive motion, it is clear there is no First Amendment right of access.").

The presumption of access under the common law is not absolute and its scope is a matter left to the discretion of the district court. *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004). The presumption "can be rebutted if countervailing interests heavily outweigh the public interests in access,' and [t]he party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption.'" *Id.* (quoting *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)). "Some of the factors to be weighed in the common law balancing test include whether the records are sought for improper purposes, such as promoting public scandals or unfairly gaining a business advantage; whether release would enhance the public's understanding of an important historical event; and whether the public has already had access to the information contained in the records.'" *Id.* (quoting *In re Knight Publ. Co.*, 743 F.2d 231, 235 (4th Cir. 1984)). In addition, the public

must be given notice of a request to seal and a reasonable opportunity to challenge it. *Knight Publishing Co.*, 743 F.2d at 235. Finally, the court is obligated to consider less drastic alternatives to sealing, and where a court decides to seal documents, it must "state the reasons for its decision to seal supported by specific findings and the reasons for rejecting alternatives to sealing in order to provide an adequate record for review." *Id.*

In their motion, plaintiffs have not provided sufficient argument to support sealing. Nor have they adequately demonstrated to the court that there are no alternatives to sealing each of the documents in their entirety, such as redaction of the purportedly confidential information. Consequently, the court concludes that plaintiffs have failed to adequately support their motion to seal.

CONCLUSION

For the foregoing reasons, the motion to seal (D.E. 47) is DENIED WITHOUT PREJUDICE to its being re-filed. Any such renewed motion shall be supported by a memorandum stating with specificity and citation to applicable legal authorities the basis upon which the movant contends the presumption of access has been overcome and upon which less drastic alternatives than the relief proposed are not adequate. Such renewed motion shall be filed no later than 13 December 2010. The Clerk is DIRECTED to maintain the proposed sealed documents (D.E.46-1 to -17) under temporary seal until such time as the court has ruled on any renewed motion to seal with respect to those documents. If no renewed motion to seal is filed by 13 December 2010 with respect to any of the proposed sealed documents, the Clerk is DIRECTED to unseal such documents.

SO ORDERED.

Mitchell v. Smithfield Packing Company, 4:08-CV-182-H. (NCEDC)

ANGELINA MITCHELL, et al., Plaintiffs,

v.

SMITHFIELD PACKING COMPANY, INC., Defendant.

No. 4:08-CV-182-H.

United States District Court, E.D. North Carolina, Eastern Division.

November 24, 2010.

ORDER

JAMES E. GATES, Magistrate Judge.

This case comes before the court on the unopposed motions (D.E. 77, 78) by plaintiffs Angelina Mitchell, et al. ("plaintiffs") to have permanently sealed several documents filed in this case. Neither motion was supported by a memorandum, in violation of Local Civil Rule 7.1(d), E.D.N.C. For the reasons set forth below, the court will deny both motions without prejudice.

DISCUSSION

The Fourth Circuit has directed that before sealing publicly filed documents the court must first determine if the source of the public's right to access the documents is derived from the common law or the First Amendment. *Stone v. Univ. of Md,* 855 F.2d 178, 180 (4th Cir. 1988). The common law presumption in favor of access attaches to all judicial records and documents, whereas First Amendment protection is extended only to certain judicial records and documents, for example, those filed in connection with a summary judgment motion. *Id.* Here, the documents sought to be sealed have been filed in connection with a motion for class certification, and not in support of any motions that seek dispositive relief, and therefore the right of access at issue arises under the common law. *See Covington v. Sememes,* 2007 WL 1170644, at *2 (W.D. Va. 17 April 2007) ("In this instance, as the exhibits at issue were filed in connection with a non-dispositive motion, it is clear there is no First Amendment right of access.").

The presumption of access under the common law is not absolute and its scope is a matter left to the discretion of the district court. *Virginia Dep't of State Police v. Washington Post,* 386 F.3d 567, 575 (4th Cir. 2004). The presumption'" can be rebutted if countervailing interests heavily outweigh the public interests in access,' and [t]he party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption.'" *Id.* (quoting *Rushford v. New Yorker Magazine, Inc.,* 846 F.2d 249, 253 (4th Cir. 1988)). "Some of the factors to be weighed in the common law balancing test include whether the records are sought for improper purposes, such as promoting public scandals or unfairly gaining a business advantage; whether release would enhance the public's understanding of an important historical event; and whether the public has already had access to the information contained in the records.'" *Id.* (quoting *In re Knight Publ. Co.,* 743 F.2d 231, 235 (4th Cir.1984)). In addition, the public

must be given notice of a request to seal and a reasonable opportunity to challenge it. *Knight Publishing Co.*, 743 F.2d at 235. Finally, the court is obligated to consider less drastic alternatives to sealing, and where a court decides to seal documents, it must "state the reasons for its decision to seal supported by specific findings and the reasons for rejecting alternatives to sealing in order to provide an adequate record for review." *Id.*

In their motions, plaintiffs have not provided sufficient argument to support sealing. Nor have they adequately demonstrated to the court that there are no alternatives to sealing each of the documents in their entirety, such as redaction of the purportedly confidential information. Consequently, the court concludes that plaintiffs have failed to adequately support their motions to seal.

CONCLUSION

For the foregoing reasons, the motions to seal (D.E. 77, 78) are DENIED WITHOUT PREJUDICE to their being re-filed. Any such renewed motion shall be supported by a memorandum stating with specificity and citation to applicable legal authorities the basis upon which the movant contends the presumption of access has been overcome and upon which less drastic alternatives than the relief proposed are not adequate. Such renewed motions shall be filed no later than 13 December 2010. The Clerk is DIRECTED to maintain the proposed sealed documents (D.E. 46-1 to -17) under temporary seal until such time as the court has ruled on any renewed motions to seal with respect to those documents. If no renewed motion to seal is filed by 13 December 2010 with respect to any of the proposed sealed documents, the Clerk is DIRECTED to unseal such documents.

SO ORDERED