IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Mark A. Williams, et al., :

Plaintiffs, :

v. : Case No. 2:09-cv-566

Wellston City School District, et al., : JUDGE WATSON

MAGISTRATE JUDGE KEMP

Defendants. :

OPINION AND ORDER

I. Introduction

This civil rights case was filed by plaintiff Mark A. Williams, who was, at one time, the principal of Bundy Elementary School, a school within the Wellston, Ohio City School District. In 2007, he resigned that position after a "fitness for duty" examination had been scheduled by the District and conducted by Dr. Marjorie Gallagher. As part of that process, Dr. Gallagher wrote a report commenting on Mr. Williams' fitness to continue in the teaching profession. Mr. Williams has consistently maintained that the report is flawed and contains information which, in the words of his complaint, is "false, unsubstantiated, defamatory, and injurious to [his] reputation, career, livelihood, employment, person, professional standing and licensure as an educator, and personal and professional standing in his community." Complaint, Doc. #3, ¶14.

According to the complaint, Dr. Gallagher's report was to be held in confidence by members of the School Board and its attorneys. However, Mr. Williams claims that it was released to members of the general public in violation of Ohio law. He also claims (and this is why the case was removed to this Court) that the release of the report violated his constitutional rights,

including his right to privacy and his procedural and substantive due process rights, and that the defendants are liable to him under 42 U.S.C. §1983. He has since filed an amended complaint, but it does not substantially alter these core allegations.

During the proceedings leading up to Mr. Williams' resignation, the Board was represented by the Columbus law firm of Bricker and Eckler. Bricker and Eckler was involved in drafting an agreement, which is an attachment to the defendants' answer, by which Mr. Williams resigned his employment with the School District and the School District agreed not to place into his personnel file "any documents related to the matters giving rise to this Agreement." Agreement, ¶5. The Agreement also contains mutual releases of liability for causes of action "known or unknown" and included the Board's "agents, consultants [] and other representatives" within the scope of the release. Agreement, ¶8.

All of this background is important because Mr. Williams has now subpoenaed one of the Bricker and Eckler attorneys, C. Allen Shaffer, for a deposition. Both Mr. Shaffer and the defendants moved to quash the deposition subpoena, raising a variety of substantive and procedural grounds for doing so. The procedural grounds raised by Mr. Shaffer will not be addressed in this Opinion and Order because, in a telephone conference held with counsel on October 25, 2010, his attorney represented that Mr. Shaffer would abide by whatever ruling the Court would make on whether, as a matter of substantive law, his deposition could properly proceed. The Court now turns to that question.

II. Some Additional Background

As discussed more fully below, the parties are not in complete agreement about what legal standard applies to a request to depose a former attorney for one of the parties who was never counsel of record in the current litigation. Under any standard,

however, one of the key questions is what relevant information, if any, the witness has to offer. To answer that question, the Court must examine the parties' competing versions of the role played by Mr. Shaffer in the events leading up to Mr. Williams' resignation and the execution of the Agreement between him and the School District.

One of the issues that arose in connection with the fitness for duty examination had to do with Mr. Williams' computer usage. As he puts it in his memorandum in opposition to the motions to quash, "Defendants contend that pornographic, offensive and/or immoral data was found on the hard drives of [School District] computers that, at various times, are said to have been used by Mark Williams." Those hard drives were examined and Dr. Gallagher apparently used the results of that examination when preparing her report. This much appears to be undisputed.

Dr. Gallagher is a psychiatrist and did not herself perform any forensic examination of the hard drives. According to a letter which defendants apparently produced in discovery, and which is attached to Mr. Williams' memorandum, she got the information about the content of these hard drives from Bricker and Eckler. The letter conveying that information was signed by Sue W. Yount, but the parties apparently agree that Mr. Shaffer was involved in its drafting. Moreover, the letter states, in the first two paragraphs, that Mr. Shaffer "directed, managed and analyzed the data from a computer forensic analysis performed by an independent expert," and the information in the letter came from "Mr. Shaffer's summary of items that were unusual in some way from what one would expect, in that they varied from the norm either in content, amount, or seeming applicability to the elementary school principal's duties." The letter then noted various types of inappropriate, questionable, or unauthorized computer use which the review of these computers reportedly

revealed.

Mr. Williams claims that the accuracy of these statements, which found their way into Dr. Gallagher's report and which have now been placed in the public domain, is a key issue in this case. More specifically, he asserts that the information about what was on the hard drives was subject to "manipulation and/or tortious mischaracterization" so that, in relying on and repeating this information, Dr. Gallagher would necessarily reach the conclusion that Mr. Williams was unfit to continue to work in the teaching profession. He notes that although others were involved to some degree in analyzing the computer information, such as Franklin "Joey" Rapp, the School District's Technology Coordinator, and Brigitte Sollie, a forensic computer examiner, both of them denied, in their depositions, conducting the type of evaluation of the data which is contained in Attorney Yount's letter. That has led Mr. Williams to conclude that Mr. Shaffer was the one who performed the final analysis and reached the conclusions, expressed in the letter, about what the images or data meant and how they related to Mr. Williams' ability to act appropriately in his role as an educator and administrator. That analysis and those conclusions are the proposed subjects of Mr. Shaffer's deposition. Although it appears that the excerpt from Ms. Sollie's deposition to which Mr. Williams' memorandum refers was inadvertently omitted from the version filed with the Court (that version contains two copies of Exhibit A, the excerpt from Mr. Rapp's deposition, and no Exhibit B, which was to be the excerpt from Ms. Sollies' deposition), the Court will accept, for purposes of ruling on the motion to quash, Mr. Williams' characterization of her testimony.

In a broad sense, given Mr. Shaffer's involvement, as described in the Yount letter, in directing, managing and analyzing information from Ms. Sollie's forensic analysis, and

his work in summarizing the "unusual" items listed in that letter, it appears that he has information that relates to the claims and defenses asserted in this case. Mr. Williams does claim that the release of Dr. Gallagher's report not only caused him damage because it made public information that, while truthful, he was entitled to keep private, but that it made public untrue information about him, and that some of that untrue information came directly from Mr. Shaffer. The question then becomes whether, under the applicable legal standard, an attorney who possesses this type of information may properly be deposed.

III. Deposing Counsel for a Party

Any time a deposition notice names an opposing party's attorney - current or former - as the deponent, red flags go up. Most courts agree with the proposition that "quashing a subpoena and the complete prohibition of a deposition are certainly extraordinary measures which should be resorted to only in rare occasions." Alexander v. Federal Bureau of Investigation, 186 F.R.D. 60, 64 (D.D.C. 1998). Thus, under ordinary circumstances, even if the proposed deponent swears that he or she knows nothing about the issues in the case, "the party seeking the discovery is entitled to test the asserted lack of knowledge." Naftchi v. New York University Medical Center, 172 F.R.D. 130, 132 (S.D.N.Y. 1997). However, there are certain specific circumstances to which this general rule does not apply, primarily because those circumstances involve the possibility or probability that the deposition has been noticed not simply as an effort to obtain relevant information, but to harass or burden the opposing party. One of those is a request to depose a high-ranking government or corporate official who likely knows little or nothing about the case, a situation which has spawned the development of the "apex" rule. See, e.g., Mulvey v. Chrysler Corp., 106 F.R.D. 364 (D.R.I. 1985). Another is a request to depose an attorney who

either currently or formerly represented the opposing party.

Certainly, if a request is made to depose the opposing party's current litigation counsel, a whole host of issues is created. Questioning the attorney on the other side of a case implicates the attorney-client relationship, threatens to intrude on the attorney-client privilege, jeopardizes the attorney's work product, and raises the question of whether the attorney must withdraw or be disqualified from further representation because he or she has become a material witness. The potential to use such a request for improper purposes is also great. Consequently, over time, the courts have developed a three-part test to be used in evaluating whether such a deposition should go forward, focusing on whether there are other ways to get the same information, whether the attorney actually possesses any relevant and non-privileged information, and how crucial that information is to the preparation of the case. See Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986). That test has been cited with approval by the Court of Appeals for this Circuit, See Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621, 628-29 (6th Cir. 2002), and applied by Judges of this Court. See, e.g., Hina v. Anchor Glass Container Corp., 2008 WL 2201979 (S.D. Ohio May 23, 2008) (King, M.J.).

Before applying the Shelton test to the facts of this case, however, it is important to note that Mr. Shaffer, the proposed deponent, is not and never has been litigation counsel for the defendants in this case, nor has his former law firm, Bricker and Eckler, served in that capacity. Mr. Williams therefore argues that a different standard applies to his request to depose Mr. Shaffer, and that the correct standard is set forth in Judge Gaughan's decision in Vita-Mix Corp. v. Basic Holdings, Inc., 2007 WL 2344750 (N.D. Ohio August 15, 2007).

Vita-Mix was a patent infringement case. During the course

of the case, the accused infringer, who claimed the patent in suit was invalid or unenforceable, sought to depose the plaintiff's patent counsel. Plaintiff resisted on the ground that the Shelton test, as adopted by the Court of Appeals in Nationwide, supra, applied and had not been satisfied. The court rejected that argument, noting that this test "has thus far been applied by the courts of the Sixth Circuit exclusively to depositions of litigation counsel," id. at *3, and held that, applying the usual rules of when witnesses with relevant information may be deposed, that there was no barrier to the requested deposition.

Vita-Mix has not been without its critics. For example, in Massillon Management. LLC v. Americold Realty Trust, 2009 WL 614831 (N.D. Ohio January 21, 2009), the court disagreed with Vita'Mix's restriction of the use of the Shelton test solely to requests to depose outside litigation counsel, and approved the application of the three Shelton factors to a request to depose an in-house counsel who was involved in the matter being litigated. The court noted, correctly, that Shelton itself involved a request to depose an in-house attorney, and it reasoned that even if a less restrictive test, such as the one proposed in United States v. Philip Morris, Inc., 209 F.R.D. 13 (D.D.C. 2002), were followed, an in-house attorney who had been "intimately involved in [the] dispute since well before it blossomed into a lawsuit" and who had "played an integral role in developing ... litigation strategy" should not be deposed unless the requesting party could make the showing required by Shelton. This Court has applied Shelton in similar circumstances. See Fresenius Medical Care Holdings, Inc. v. Roxane Laboratories, Inc., 2007 WL 543929 (S.D. Ohio 2007); see also Gruenbaum v. Werner Enterprises, Inc., 2010 WL 3942818 (S.D. Ohio October 7, 2010). However, the Massillon Management court did note that

Shelton, although broader in scope than suggested by Vita-Mix, should not be applied "in all situations where a party seeks to depose an attorney ...." Massillon Management, 2009 WL 614831, *5 n.8.

The Court of Appeals for the Eighth Circuit, which decided Shelton, has since had an opportunity to clarify the extent of its holding in that case. In Pamida, Inc. v. E.S. Originals, Inc., 281 F.3d 726 (8th Cir. 2002), a case which did involve a request to depose the opposing party's current litigation counsel, the court refused to apply Shelton because the scope of the discovery being requested did not relate to the ongoing case, but to a prior case which had been concluded. It noted that the evils which led the Shelton court to develop the heightened test for deposing opposing counsel were present only when the scope of the deposition included the ongoing litigation, and therefore held that the party requesting the attorneys' depositions "need not satisfy Shelton to depose the ... attorneys regarding information involving the concluded patent infringement case." Id. at 730-31. This gloss on Shelton has been adopted by district courts within the Sixth Circuit, see, e.g., Ellipsis, Inc. v. Color Works, Inc., 227 F.R.D. 496 (W.D. Tenn. 2005), although it is not entirely clear that the Court of Appeals would follow Pamida. See Chesher v. Allen, 122 Fed. Appx. 184 (6th Cir. January 6, 2005). In any event, this Court need not resolve that dilemma because neither the defendants nor Mr. Shaffer argue that he is "opposing counsel" here in the sense that he is actively litigating this case on the defendants' behalf.

There are competing lines of cases from other circuits which, under some circumstances, might be instructive here. However, as the court noted in In re Subpoena Issued to Dennis Friedman, 350 F.3d 65 (2d Cir. 2003), only the Sixth and Eighth Circuits have adopted Shelton, so cases from other jurisdictions

which rely on "a flexible approach to lawyer depositions whereby the judicial officer supervising discovery takes into consideration all of the relevant facts and circumstances to determine whether the proposed deposition would entail an inappropriate burden or hardship," see id. at 72, may not be consistent with the controlling law this Court must apply. Thus, the Court must distill the important principles for this case from the Shelton line of decisions.

Doing so is not particularly easy. For example, in Newkirk v. ConAgra Foods, Inc., 2010 WL 2135263 (D. Neb. May 27, 2010), the court applied Shelton to a request to depose an attorney who was neither litigation counsel nor an in-house attorney but who had provided advice to one the parties in the case on the same subject matter that was involved in the litigation, and in anticipation of that litigation. Roughly the same result was reached in Desert Orchid Partners. L.L.C. v. Transaction System Architects, Inc., 237 F.R.D. 215 (D. Neb. 2006), which involved an attorney who was involved in developing the defense strategy for both the case at bar and other similar cases. It can be inferred from these decisions, however, as well as cases such as Cardenas v. Prudential Ins. Co. of America, 2003 WL 21293757 (D. Minn. May 16, 2003), that one of the motivating factors behind Shelton itself, and decisions which have applied that case to attorneys who are not actively litigating the current controversy, is the need to protect an opposing party's litigation strategy. When the attorney whose deposition is requested is not litigation counsel, is not in-house counsel who is involved to some extent in directing litigation, or is not an attorney who has advised the client concerning the same or similar litigation or has helped develop its defense strategy, the reasons for applying Shelton are much less compelling because there is little or no risk that the attorney's testimony might

reveal any litigation strategy, or that the purpose of the deposition is to drive a wedge between the opposing party and its current counsel.

Here, the record is not particularly well-developed on some of these issues, perhaps because the parties' memoranda were filed over a very short time period. Nevertheless, the burden of demonstrating good cause for a protective order or an order to quash does rest with the movant, so any deficiencies in the record inure to Mr. Williams' benefit. With all of this in mind, the Court holds, for the reasons that follow, that the moving parties have not met their burden of showing that this deposition ought not to be allowed.

First, the Court concludes that Shelton is not applicable here. Mr. Shaffer is not, and never has been, counsel for defendants in this litigation. There is no evidence that he has consulted with defendants about the issues in this litigation, about defense strategies in similar litigation, or about the defense strategy in this case. There is similarly no evidence that he has a current attorney-client relationship with any of the defendants. He is not and never has been their in-house counsel. Thus, there is no risk that taking his deposition will disclose trial strategy, work product information, or impact defendants' trial counsel's continued ability to function effectively in that role. Consequently, Mr. Shaffer, although an attorney, will be treated as any other witness for purposes of determining if it is appropriate to depose him.

Mr. Shaffer has not submitted an affidavit swearing that he knows nothing about any of the issues in this case, and it is clear from the Yount letter that he has knowledge about matters such as what was on Mr. Williams' hard drives and why the data from those drives was characterized in the way set forth in the letter. It appears undisputed that his characterization of that

data was viewed by, and perhaps taken into account by, Dr. Gallagher in her report, the disclosure of which is at the center of this case. Under the broad relevance standard contained in Fed.R.Civ.P. 26(b)(1), even as narrowed by the 2000 amendments to that Rule, this information appears to be discoverable because it relates to Mr. Williams' claim that the information in Dr. Gallagher's report was incorrect and that its release injured his reputation and professional standing. See, e.g., In re Cooper Tire & Rubber Co., 568 F.3d 1180, 1189 (10th Cir. 2009) (holding that the scope of relevance for discovery purposes is still broader than "admissibility" at trial).

Most of Mr. Shaffer's memorandum in support of his motion to quash focuses on the relevancy question, but from a different vantage point. He asserts that all of the information which Mr. Williams seeks to discover is relevant only to claims that were released in the Agreement which Mr. Williams and the School District entered into on August 8, 2007. In fact, Mr. Shaffer argues that by signing the release, Mr. Williams released "all claims ... against the Defendants in the instant case." Motion to Quash, Doc. #42, at 13. In a footnote, Mr. Shaffer acknowledges that Mr. Williams' claim for breach of the Agreement, which is one of the eight claims pleaded in his amended complaint, was probably not released by the language contained in the agreement, but he asserts that this claim is no more than a re-pleading of the other seven claims and therefore has no independent merit.

The major problem with this argument is that it assumes something that the Court has not decided (and has not yet been asked to decide), which is whether the Agreement's release language is broad enough to encompass claims that, *after* the Agreement was signed, defendants acted to (allegedly) deprive Mr. Williams of rights guaranteed to him by the United States

Constitution by disseminating Dr. Gallagher's report to the public. Although the defendants have pleaded the Agreement's release provisions as their tenth defense and have asserted in their counterclaim that filing this lawsuit was a breach of the Agreement, the Court has not ruled on the merits of those allegations, and the eight claims asserted by Mr. Williams are still being litigated. As such, they form part of the "claim[s]" to which Rule 26(b)(1) refers when it defines what is properly within the scope of discovery. While the Court may properly deny discovery with respect to claims that have been stricken, see Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 352 (1978), the converse is also true - that as long as a claim remains in the case, it is improper (unless some other reason exists to do so) to deny discovery that is relevant to that claim. To hold otherwise would put the Court in the untenable position of ruling on the merits of the parties' claims and defenses in the context of making a discovery ruling, rather than by way of a proper merits-directed motion such as one filed under Rule 12 or Rule 56.

To be certain, if a party asserts a claim or defense that patently lacks merit and then attempts to use such a claim or defense as a basis to conduct unnecessary or expensive discovery, the party who is the target of such conduct is not without a remedy. The Court does have broad discretion to stay discovery under those circumstances in order to allow the legal sufficiency of the claim or defense to be tested through motions practice. See, e.g., Hahn v. Star Bank, 190 F.3d 708 (6th Cir. 1999). However, the defendants have neither filed a motion directed to the sufficiency of Mr. Williams' claims nor moved for a stay based on the intent to do so, and it is questionable whether Mr. Shaffer, as a non-party, has standing to ask the Court to stay all discovery because, in his view, the complaint states no

viable causes of action. Similarly, he cannot properly rest his request to quash the subpoena on the grounds that because he, as an employee of Bricker and Eckler and an attorney for the defendants at the time the Agreement was signed, has a right under the Agreement not to be sued, he somehow has a right not to be deposed as well. There is nothing in the Agreement, as the Court reads it, to suggest that it bars otherwise proper discovery from the parties who were released from liability. It does not say so explicitly, and that would be an unusual construction of standard release language, which is ordinarily thought to bar the assertion of legal claims in the future but not requests for discovery.

To be sure, independent of any assertion that the Agreement either makes all of Mr. Williams' claims frivolous or that it somehow prevents him from asking Mr. Shaffer for discovery, Mr. Shaffer could still obtain an order quashing the subpoena if he could show that to comply would cause him to suffer undue burden or expense. However, even though he is a non-party and therefore a stranger to this litigation, and deserves heightened consideration from the Court, Mr. Shaffer still bears the burden of showing that he would suffer unnecessary hardship if he were forced to provide the requested discovery. See Jones v. Hirschfeld, 219 F.R.D. 71, 74-75 (S.D.N.Y. 2003) ("The burden of persuasion in a motion to quash a subpoena and for a protective order is borne by the movant"). Mr. Shaffer has made no showing that the deposition will be unreasonably lengthy or that he will be put to such extraordinary expense that his attendance and testimony will subject him to the type of hardship which either could not be made up for by some payment of expenses, or which would be so severe as to support an order quashing the subpoena. The Court is confident that every effort will be made to accommodate Mr. Shaffer's legitimate business and personal

interests, and that he will be paid any mileage and fees required by law, so that the burden to him will not differ significantly from the burden any non-party experiences by being deposed in someone else's lawsuit. Consequently, the Court concludes that there is no basis for granting either his or the defendants' motion to quash.

One final note. Throughout the memorandum filed by defendants, and even in Mr. Shaffer's memorandum, there are suggestions that the questions which Mr. Shaffer will be asked may call for the disclosure of privileged information, or that the proposed deposition is simply and end-run around a state court ruling in Mr. Williams' license revocation case. Of course, it is impossible to know in advance exactly what questions will be asked at the deposition even if Mr. Williams' counsel attempts to stay within the scope of questioning which he has identified in his opposing memorandum. Should the concerns identified by defendants and Mr. Shaffer be borne out by the way in which the deposition is conducted, they are, of course, free to interpose appropriate objections, instructions not to answer (assuming that a privilege is being asserted), or to seek other relief as allowed by any applicable rule. The possibility of such events, however, does not constitute an independent basis for prohibiting the deposition altogether. See, e.g., Hay & Forage Indus. v. Ford New Holland, Inc., 132 F.R.D. 687, 689 (D. Kan. 1990).

IV. Order

For the foregoing reasons, the motions to quash filed by defendants (#41) and by non-party C. Allen Shaffer (#42) are denied. Additionally, plaintiff's motion to strike footnote 5 from Doc. #43 (#44) is granted.

Any party may, within fourteen days after this Order is filed, file and serve on the opposing party a motion for

reconsideration by a District Judge. 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due fourteen days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

/s/ Terence P. Kemp
United States Magistrate Judge