ROBBINS et al v. LOWER MERION SCHOOL DISTRICT et al Doc. 36

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BLAKE J. ROBBINS, et al.

Plaintiffs,

and

EVAN A. NEILL, RICHARD A. NEILL, and ELAINE LOUISE REED,

Plaintiff-Intervenors,

v.

LOWER MERION SCHOOL DISTRICT, et al.

Defendants.

Civil Action No. 10-665

EMERGENCY MOTION OF THE NEILL FAMILY
TO INTERVENE AND FOR A PROTECTIVE ORDER

Evan A. Neill, Dr. Richard A. Neill and Dr. Elaine Louise Reed ("the Neill Family"), through their counsel the American Civil Liberties Foundation of Pennsylvania and Schnader Harrison Segal & Lewis LLP, respectfully move this Court, on an emergency basis: (i) to intervene as of right in this action pursuant to Fed. R. Civ. P. 24(a)(2) or, in the alternative, for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(l)(B), and (ii) for a protective order pursuant to Fed. R. Civ. P. 26(c) prohibiting the parties to this litigation from disseminating the fruit of Lower Merion School District's illegal searches to any persons other than those whose privacy was invaded by any given search.

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As detailed in the accompanying brief, the Neill Family should be permitted to intervene and a protective order should issue because the parties to the litigation intend to exchange with one another and provide to third parties the materials that the District obtained using its laptop tracking system, which production would compound the privacy violations already inflicted by the District's warrantless searches. Intervention also is warranted because the Neill Family is not a party to the stipulation pursuant to which the District agreed to suspend its use of the laptop tracking system during the pendency of this suit and, therefore, arguably would be unable to compel compliance with or seek sanctions for violations of the stipulation if the District failed to comply with it. With respect to both issues, the interests of the named plaintiffs likely diverge from those of the Neill Family.

Respectfully submitted,

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Dated: April 5, 2010

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BLAKE J. ROBBINS, et al. Plaintiffs, and **EVAN A. NEILL, RICHARD A. NEILL, and ELAINE LOUISE REED,** Plaintiff-Intervenors, v. **LOWER MERION SCHOOL DISTRICT, et al.** Defendants.	Civil Action No. 10-665

BRIEF IN SUPPORT OF EMERGENCY MOTION OF THE NEILL FAMILY TO INTERVENE AND FOR A PROTECTIVE ORDER

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INTRODUCTION

Evan A. Neill, Dr. Richard A. Neill and Dr. Elaine Louise Reed ("the Neill Family"), seek to intervene and for a protective order to prohibit the parties to this litigation from further compounding any Constitutional violations by disseminating the fruit of Lower Merion School District's illegal searches to any persons other than those whose privacy was invaded by any given search. The Neill Family also seeks to intervene to ensure that, regardless of the resolution of the underlying suit, Lower Merion School District (the "District") will be prohibited from continuing to conduct illegal, warrantless searches of the homes of its students and their families.

BACKGROUND

On February 16, 2010, Harriton High School student Blake Robbins and his parents (the "Robbins Family") filed the underlying lawsuit alleging, among other things, that the District activated the tracking system on Blake Robbins' school-issued laptop and obtained photographs of him while he was using the laptop in his home. *See generally* Complaint (Docket No. 1). The Robbins Family purport to bring their suit on behalf of themselves and a class consisting of "all other students of Harriton High School . . . who have been issued by the School District a laptop computer equipped with a webcam, together with their families." *Id.* at ¶ 12. Plaintiff-Intervenor Even A. Neill is a student at Harriton to whom the District issued a laptop for both the 2008-2009 and 2009-2010 school years and, therefore, the Neill Family would qualify as members of the prospective class.

On February 20, 2010, the Robbins Family and the District entered into a Stipulation, which was approved by the Court, pursuant to which the District agreed that it was prohibited, "during the pendency of this action," from "remotely activating any and all web cams embedded in lap top computers issued to students within the Lower Merion School District or from remotely taking screenshots of such computers." February 20, 2010 Stipulation and Order, ¶ 1 (Docket No. 11). The Neill Family is not a party to the Stipulation and the prohibitions in it cease to have effect upon resolution of the Robbins' action.

On March 10, 2010, the Robbins Family and the District entered into another Stipulated Order. In the March 10 Order, the parties noted that counsel for the Robbins Family and the District were engaged in discovery designed "to ascertain, among other things . . . to what extent there exists evidence of the use of the laptop tracking software application (such as webcam photographs)." March 10, 2010 Stipulated Order, ¶ B (Docket No. 19). Later filings by the parties indicate that the Robbins Family and the District are searching for and intend to exchange with each other and with third parties any images, whether still photographs, video clips or screen shots, collected by the District's tracking system. For instance:

- The Robbins Family has subpoenaed the production of "copies of any and all images obtained by the School District via the remote activation of webcams embedded in the Laptops" and "all streaming video, audio tracks and still video [the District] captured . . . depicting any student . . . from September 2008 to the present." Plaintiffs' Motion to Compel Appearance of Carol Cafiero, Ex. B, ¶¶ 2, 14 (Docket No. 20);

- The District has "collected, and [is] in the process of analyzing approximately nineteen terabytes of electronic data from District computer systems." Defendants' Response To Plaintiffs' Motion For An Extension Of Time To File A Response to Motion To Intervene, p. 2 (Docket No. 26).

- "The District is sharing relevant information with plaintiffs' counsel and [a] computer forensic specialist." *Id*.

- "[T]he District intends to make public the results of its comprehensive investigation." *Id*.

- "[C]ounsel will be exchanging the results of their investigation and conducting other discovery to hopefully determine the full extent of . . . pictures, screen shots, or other information obtained from use of the technology," which "discovery may reveal that the children of the Intervenors and/or the attorneys for Intervenors or family members are actually depicted in pictures or videos obtained from use of the web cams." Plaintiffs' Motion for Extension of Time to File A Response To Motion To Intervene, ¶¶ 3, 5 (Docket No. 25).

As set forth in detail in the attached Complaint (*see* Exhibit A), the Neill Family seeks to ensure that: (1) any discovery is conducted in a fashion that protects the privacy interests of those who were subjected to illegal searches; and (2) the District is prohibited from infringing upon the privacy rights of its students and their families in the future. Because the parties have indicated that they currently are in the process of collecting and disseminating the photographs and other data collected by the tracking system, the Neill Family respectfully requests that the Court consider their motion to intervene and for a protective order on an expedited basis.

MOTION TO INTERVENE

Rule 24(a) and (b) provide, respectively, that a non-party may intervene as of right or by permission. Fed. R. Civ. P. 24(a) and (b). Courts traditionally broadly construe and liberally apply Rule 24 in favor of those seeking to intervene. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) ("In determining whether intervention is appropriate, we are guided primarily by practical and equitable considerations. We generally interpret the requirements

broadly in favor of intervention."); *see also Turn Key Gaming, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999). Because the requirements of Rule 24 are fully met here, whether under Rule 24(a) or 24(b), the Neill Family should be permitted to intervene.

A. THE NEILL FAMILY MEETS ALL THE REQUIREMENTS TO INTERVENE AS OF RIGHT.

Under Rule 24(a) for intervention as of right, anyone may intervene in an action:

> when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). The Third Circuit requires a movant under Rule 24(a) to establish that: (1) the motion is timely filed; (2) the movant has a "significant protectable interest" relating to the present action; (3) the disposition of the lawsuit may adversely affect the movant's interest if intervention is not allowed; and (4) existing parties would not adequately represent the movant's interests. *See, e.g., In re Community Bank,* 418 F.3d 277, 314 (3d Cir. 2005) (quoting *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987); *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc*., 72 F.3d 361, 365-69 (3d Cir. 1995); *see also Kleissler v. United States Forest Serv*., 157 F.3d 964, 969 (3d Cir. 1998). The Neill Family satisfies every element of the Third Circuit's four-part test.

(i) The Neill Family's Motion To Intervene Is Timely.

Timeliness is to be construed broadly in favor of the party seeking intervention. *United States v. Union Elec. Co.*, 64 F.3d 1152, 1158 (8th Cir. 1995). Courts look at the "totality of the circumstances" when analyzing whether a motion to intervene is timely filed. *United*

States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1181-82 (3d Cir. 1994) (timeliness is not merely a function of counting days). Factors relevant to the issue of timeliness of a motion to intervene include: the stage of the proceedings; prejudice to existing parties as a result of the complication of the proceedings; and length and reason for delay in applying, including at what point the applicant knew, or should have known, of the risk to his rights. *Mountain Top*, 72 F.3d 361 at 369-370 (reversing denial of a motion to intervene). In *Borkowski v. Fraternal Order of Police*, this Court found a motion to intervene timely based on the fact that very little discovery had taken place. 155 F.R.D. 105 (E.D. Pa. 1994) (Van Antwerpen, J.).

Under this framework, the Neill Family's motion to intervene is timely. The Robbins Family filed their Complaint only seven weeks ago. Pursuant to the Court's March 10, 2010 Stipulated Order, Defendants need not respond to the Complaint until April 26, 2010. *See* March 10, 2010 Stipulated Order, ¶ 1 (Docket No. 19). To the best of the Neill Family's knowledge, no depositions have yet taken place. No motion for class certification has been filed and no trial date has been set. In short, the action is in a nascent stage. As such, the Neill Family's motion to intervene is timely.

(ii) The Neill Family has a significant protectable interest which could be dramatically affected by the disposition of this case.

"In the class action context, the second and third prongs of the Rule 24(a)(2) inquiry [whether the movant has a significant interest that would be adversely affected if intervention is not permitted] are satisfied by the very nature of Rule 23 representative litigation. Therefore, when absent class members seek intervention as a matter of right, the gravamen of a court's analysis must be on the timeliness of the motion to intervene and on the adequacy of representation." *In re Community Bank*, 418 F.3d at 314 (quoting *Harris V. Pernsly,* 820 F.2d

592, 596 (3d Cir. 1987)). Even though, under the rule in *Community Bank*, the Court need not address the second and third prongs of the test under Rule 24(a) in a proposed class action such as this case, those prongs nevertheless are satisfied here.

The Neill Family has two significant and protectable interests relating to this litigation. First, the Neill Family has a significant, protectable interest in ensuring that any images of them obtained through the District's tracking system are not disclosed to anyone other than the members of the Neill Family whose privacy was violated. In other words, the agents of the District, the District's forensic experts, the Robbins Family, counsel for the parties, the press and the general public all must be prohibited from viewing the fruit of the District's illegal searches, lest the privacy of those searched be violated all over again.

Second, the Neill Family has a significant, protectable interest in ensuring that the District does not continue to use the tracking system to perform unreasonable searches of students and their families. Because the Neill Family is not a party to the stipulation pursuant to which the District agreed to refrain from activating the tracking system during the pendency of this litigation, they arguably would be unable to compel compliance with or seek sanctions for violations of the stipulation if the District failed to adhere to it. *See Reynolds v. Butts*, 312 F.3d 1247, 1250 (11th Cir. 2002) (denying motion to enforce consent decree by non-named class members who did not intervene).

The Neill Family's interests would be adversely affected if they are not permitted to intervene. The District and the Robbins Family already have indicated in Court filings that they are attempting to locate the images and other data collected by the District's tracking system and that they intend to share that information with one another and third parties. *See supra*, p.

2-3. In addition, because the Robbins Family is seeking money damages, they may well settle their lawsuit with the District, which would terminate both this action and the stipulation through which the District agreed to cease using the tracking system during the pendency of the lawsuit.

In short, even though the Neill Family need not establish that they satisfy the second and third prongs of the test under Rule 24(a) in order to intervene in this purported class action, they have satisfied those two prongs.

(iii) The Robbins Family Does Not Adequately Represent The Interests Of The Neill Family.

The United States Supreme Court has held that the adequacy of representation prong of the Rule 24(a) test "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (quoted in *Mountain Top*, 72 F.3d at 368-69). "The most important factor in determining adequacy of representation is how the interest of the absentee compares with the interest of the present parties. . . ." *Mountain Top*, 72 F.3d at 369-69 (quoting 7C Wright, Miller & Kane, Federal Practice and Procedure § 1909, at 318-19 (1986)). Thus, representation is considered inadequate when, "although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests." *Brody v. Spang*, 957 F.2d 1108, 1123, 1125 (3d Cir. 1992) ("Since Fitzgerald group's claims pit the interests of students . . . directly against those of school officials . . . we cannot expect school officials to be vigorous in defending applicant's legal interests.").

Here, although the interests of the Neill Family and the Robbins Family overlap with respect to their claims that the District's unauthorized searches violated the Fourth Amendment of the Constitution, their interests diverge in other key respects. To begin with, because the Robbins Family is seeking monetary damages, they have an interest in obtaining evidence of the District's illegal and warrantless searches, as that evidence may enhance their damages case. Indeed, the Robbins Family already is attempting to obtain the fruit of the District's warrantless searches. *See* Plaintiffs' Motion to Compel Appearance of Carol Cafiero, Ex. B, ¶¶ 2, 14 (Docket No. 20) (subpoena requesting the production of "copies of any and all images obtained by the School District via the remote activation of webcams embedded in the Laptops" and "all streaming video, audio tracks and still video [the District] captured . . . depicting any student . . . from September 2008 to the present"). The Neill Family strenuously opposes allowing anyone other than those whose privacy was invaded by any given search to view the images and data collected by the District – including counsel – as doing so would compound the privacy violation.

In addition, the interests of the Neill Family and the Robbins Family diverge with respect to the stipulation prohibiting the District from activating the tracking system during the pendency of the litigation. Because the Robbins Family is requesting money damages, a sufficiently high monetary settlement offer from the District presumably would end the case, which automatically would terminate the stipulation. The Neill Family, by contrast, is not seeking monetary damages and would not settle their suit against the District without ensuring that a permanent injunction is in place prohibiting the District from activating the tracking system in a manner that constitutes an unreasonable search of students and their families. And even while the stipulation remains in force, the interests of the Neill Family differ from those of

the Robbins Family. The Neill Family seeks to ensure that the District complies with the order requiring it to cease using the tracking system. The Robbins Family, by contrast, would be less inclined to rush to enforce compliance with the order, as violations by the District would improve their case for damages.

Because the goals and interests of the Robbins Family diverge from those of the Neill Family in key respects, the Robbins Family cannot adequately represent the interests of the Neill Family.

B. THE NEILL FAMILY ALSO MEETS THE REQUIREMENTS FOR PERMISSIVE INTERVENTION.

Under Rule 24(b), permissive intervention is available upon timely application "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b). Rule 24(b) further requires the court to consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id*.

Granting permissive intervention is within the wide discretion of the district court. *Brody*, 957 F.2d at 1124. In exercising that discretion, courts consider various factors, including timeliness, prejudice to existing parties and judicial economy. *See id*. (this Court weighed the prejudice of allowing permissive intervention against the benefit to judicial economy); *see also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 779-780 (3d Cir. 1994) (focusing on timeliness in allowing permissive intervention).

Here, there are common questions of law and fact: how, why and when the District activated the tracking system, with whom the data collected from those activations was

shared and where it is stored, and whether the District's conduct violated the Constitutional rights of its students and their families. In addition, the Neill Family's motion is timely, as discussed above. Moreover, allowing the Neill Family to intervene to protect their privacy rights and to ensure that the District is permanently enjoined from activating the tracking system in a manner that constitutes an unreasonable search of students and their families will in no way prejudice the existing parties to this litigation. Finally, allowing the Neill Family to intervene will preserve judicial economy, as it will obviate the need for the Neill Family to file a separate action against the District to protect their interests. For all of these reasons, the Neill Family should be permitted to intervene pursuant to Rule 24(b).

MOTION FOR PROTECTIVE ORDER

Rule of Civil Procedure 26(c) provides this Court with authority to enter a protective order for good cause shown. Here, the District and the Robbins Family already have made clear in filings submitted to the Court that they are attempting to locate the images and other data collected by the District's tracking system and that they intend to share that information with one another and third parties. *See supra*, p. 2-3. Permitting anyone other than the persons whose privacy was violated by any given unauthorized search to view the fruit of those searches might well cause extreme embarrassment and, more importantly, re-victimize those whose privacy already was invaded by the District's unlawful searches. Therefore, the Court should enter a protective order prohibiting the District, the Robbins Family and any other party to this action from disclosing the fruit of the District's illegal searches to any persons other than those whose privacy was invaded by any given search.

CONCLUSION

For the foregoing reasons, the Neill Family respectfully requests that this Court grant their motion to intervene and enter a protective order to protect their right to privacy.

Respectfully submitted,

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Dated: April 5, 2010

CERTIFICATION OF GOOD FAITH

Pursuant to Fed. R. Civ. P. 26(c)(1), I hereby certify that I attempted to confer in good faith with other effected parties in an effort to resolve without court action the dispute giving rise to this Motion for Protective Order.

/s/ Stephen J. Shapiro

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Emergency Motion Of The Neill Family To Intervene And For A Protective Order and Brief in support thereof has been filed electronically and is available for viewing and downloading from the ECF system and that, on April 5, 2010, I caused a true and correct copy of the foregoing document to be served on the following persons by the following means:

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