2014 PA Super 170

JOHN J. DOUGHERTY Appellant v. KAREN HELLER Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1333 EDA 2012

Appeal from the Order Entered April 11, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No(s): December Term 2009 No. 00699

BEFORE: GANTMAN, P.J., FORD ELLIOTT, P.J.E., BENDER, P.J.E., DONOHUE, J., ALLEN, J., LAZARUS, J., MUNDY, J., OLSON, J., and OTT, J.

CONCURRING AND DISSENTING OPINION BY MUNDY, J.:**FILED AUGUST 14, 2014**

I join the Majority insofar that it decides the order at issue is appealable pursuant to the collateral order doctrine. However, I disagree with the Majority's conclusion that Appellant failed to establish good cause for protective relief pursuant to Pennsylvania Rule of Civil Procedure 4012. After thoroughly reviewing the certified record, I believe that good cause exists for the minimal protection requested by Appellant, to wit, restricting the pretrial use of his videotaped deposition to litigation purposes. In my view, the trial court abused its discretion when ordering the videotaped deposition of Appellant to occur without entering an order limiting its pretrial use. As I believe such protection is warranted in this case, I respectfully dissent.

The Majority sets forth that we apply an abuse of discretion standard when reviewing discovery orders. Majority Opinion at 9, *citing* ***McNeil v. Jordan***, 894 A.2d 1260, 1268 (Pa. 2006); ***accord Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity***, 91 A.3d 680, 2014 Pa. LEXIS 1111, *19 (Pa. 2014) (opinion in support of affirmance) ("within the ambit of the discretionary authority allocated by the rules to the trial courts, we review for abuse of discretion[]" (citation omitted)). "An abuse of discretion exists when the [trial] court has reached a conclusion which overrides or misapplies the law, or when the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will." ***Middletown Twp. v. Lands of Stone***, 939 A.2d 331, 335 n.3 (Pa. 2007). Our scope of review is plenary. ***Id.*** Thus, we may review the entire record when reaching our decision. ***Id.***

Generally, the Pennsylvania Rules of Civil Procedure allow for liberal discovery. ***See*** Pa.R.C.P. 4003.1 (providing that, subject to a few exceptions, a party may obtain discovery regarding any relevant, non-privileged matter). As the scope of discoverable information is broad, "there is a resultant potential for abuse in the discovery process." ***Stenger v. Lehigh Valley Hosp. Ctr.***, 554 A.2d 954, 960 (Pa. Super. 1989). As a result of this feasible gamesmanship, the Rules prohibit discovery which "is sought in bad faith… [or] would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any

person or party." Pa.R.C.P. 4011. A party seeking such protection may move for a protective order pursuant to Rule 4012. A court may issue a protective order for "good cause[.]" Pa.R.C.P. 4012. If the trial court concludes that the party seeking a protective order has met this burden, "the court may make any [protective] order which justice requires to protect a party[.]" Pa.R.C.P. 4012(a).

As oft used as the term "good cause" is when discussing protective orders, the phrase is not well defined under Pennsylvania law. ***See*** Majority Opinion at 17. Thus, we have routinely concluded that "[t]here are no hard-and-fast rules as to how a motion for a protective order is to be determined by the court." ***Hutchison v. Luddy***, 606 A.2d 905, 908 (Pa. Super. 1992), *quoting* ***Allegheny W. Civic Council, Inc. v. City Council of the City of Pittsburgh***, 484 A.2d 863, 866 (Pa. Cmwlth. 1984).

Yet, the United States Court of Appeals for the Third Circuit has opined upon the meaning of "good cause" within Federal Rule of Civil Procedure 26(c).[1] ***See*** Majority Opinion at 17, *citing* ***Pansy v. Borough of Stroudsburg***, 23 F.3d 772, 786-787 (3d Cir. 1994). That Court delineated

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[1] Pa.R.C.P. 4012 is similar to F.R.C.P. 26(c) but for Pennsylvania's addition of the word "unreasonable" to describe the "annoyance, embarrassment, oppression, undue burden or expense" that the discovery would cause a party or deponent. ***See*** Majority Opinion at 16 n.9, *citing* Pa.R.C.P. 4012; F.R.C.P. 26(c). When comparing the language of the federal and state rules, Rule 4012 envisions a broader view of prohibited conduct.

the following seven factors for its district courts to balance when determining if good cause exists for a Rule 26(c) protective order.

> 1) [W]hether disclosure will violate any privacy interests;
>
> 2) whether the information is being sought for a legitimate purpose or for an improper purpose;
>
> 3) whether disclosure of the information will cause a party embarrassment;
>
> 4) whether confidentiality is being sought over information important to public health and safety;
>
> 5) whether the sharing of information among litigants will promote fairness and efficiency;
>
> 6) whether a party benefitting from the order of confidentiality is a public entity or official; and
>
> 7) whether the case involves issues important to the public.

Shingara v. Skiles, 420 F.3d 301, 306 (3d Cir. 2005), *citing* ***Pansy***, ***supra*** at 787-791. Although federal opinions are not binding upon this Court, they may provide persuasive authority. ***See Commonwealth v. Dunnavant***, 63 A.3d 1252, 1255 n.2 (Pa. Super. 2013), *appeal granted*, 73 A.3d 524 (Pa. 2013).

This matter appears before us because Appellee refused to agree that she would not publically disseminate Appellant's videotaped deposition prior to its introduction at trial. Appellant's Brief at 9. When a party's deposition is sought during pretrial discovery, Pennsylvania Rule of Civil Procedure 4017 permits the taking of such deposition "as a video deposition by means

of simultaneous audio and visual electronic recording." Pa.R.C.P. 4017.1(a). Thus, Appellee possesses the unfettered right to take Appellant's videotaped deposition but for a Rule 4012 protective order.

Within his motion for protective order, Appellant requested relief in one of two ways.[2] ***See*** Appellant's Cross-Motion for Protective Relief, 3/22/12, at 1. Appellant requested the court to preclude Appellee from **either** videotaping his deposition **or** disseminating his videotaped deposition for non-litigation use prior to trial. ***Id.*** Appellant argues that he is entitled to an order protecting his videotaped deposition from pretrial dissemination for the following reasons: (1) Appellant's status as a self-designated public figure; (2) the parties' litigious and acrimonious relationship; (3) the nature of the underlying litigation, *i.e.*, defamation; (4) an ulterior motive of Appellee to gain access to his videotaped statements; and (5) the susceptibility of videotaped depositions to editing and manipulation in light of Appellee's ability to easily broadcast such a recording. ***Id.*** at 7-9. Appellant asserts these allegations amount to good cause for Rule 4012 protective relief. ***See generally id.***

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[2] I note that the authority Appellee cites to support her claim that Appellant waived this issue by failing to object to the videotaped deposition prior to the date and time noticed is non-precedential. ***See Dunnavant***, ***supra*** (regarding federal court opinions); ***Petow v. Warehime***, 996 A.2d 1083, 1088 n.1 (Pa. Super. 2010) (regarding Commonwealth Court decisions), *appeal denied*, 12 A.3d 371 (Pa. 2010).

Within its opinion, the Majority concludes that Appellant "offers no factual evidence in support of his contention[that good cause exists for a protective order], [but for] two exceptions[.]" Majority Opinion at 16. The Majority concedes "(1) Appellant references several statements of counsel made at the aborted deposition and later during argument before the trial court, suggesting counsel's predisposition to disseminate Appellant's deposition, and (2) [Appellant cites] those facts alleged in support of his defamation claim, including an assertion that Appellee harbors animus towards him." ***Id.*** at 16.

Initially, I believe the Majority's contention that Appellant presents only two pieces of evidence to support his good cause claim belies the certified record. Nevertheless, I believe these two assertions themselves establish good cause to support the requested minimally restrictive protective order as both of these assertions allow for an inference that Appellee sought his videotaped deposition for an improper purpose. ***See Shingara***, ***supra***.

Herein, Appellant and his counsel appeared at the date and time scheduled for his videotaped deposition. Deposition, 3/16/12, at 2; Appellee's Motion to Compel, 3/19/12, Exhibit G. While the parties were making preliminary statements on the record, the following exchange occurred between the parties.

> [Appellant's counsel]: Since this is being videotaped, we have some concerns since it involves

the media that perhaps this could go beyond use for court filings or court proceedings.

We're perfectly fine [proceeding with the videotaped deposition] with the understanding that it's going to be used just for that purpose, but we are not comfortable if it goes to a third party, any portions of this videotape. And we'd like assurances that that will not be the case.

…

I'm not trying to handcuff your use. We[] just want[] to make sure that we're not going to be watching the news and all of a sudden a clip of today's deposition appears and [is used] for purposes outside of this litigation. And that's all we want assurances, that that's not going to be the case.

[Appellee's counsel]: That's not the intent, yes.

[Appellant's counsel]: Well I want assurances that that's not going to be the case.

[Appellee's counsel]: **I am not going to give you an assurance that that's not going to be the case**. That's not the intent. I plan on using this in connection with the litigation. I have never not used a transcript and a video deposition not in connection with litigation.

…

[Appellant's co-counsel]: Well, no, no [counsel], we want to make, so it's very clear, we want [an] agreement that this will be used by you just for litigation. You're not going to turn it over to like the news media, television for anything like that. That's all we want.

[Appellee's counsel]: … I never had an intent of doing that, and I'm not planning on doing it. …

[Appellant's co-counsel]: We want [an] agreement that you won't do it.

[Appellee's counsel]: Well, I don't think that I'm obligated not to and I don't want to be put to agreeing to that - -

[Appellant's co-counsel]: You're obligated if we're having this televised that you're not using it for other purposes in the litigation and you're not going to turn it over to television stations or the media in general just to broadcast it. You are obligated to do that.

[Appellee's counsel]: I am obligated by whatever my obligations are under the rules.

[Appellant's counsel]: See, this is a problem for us, [counsel], because … we need to assess that any more damage than already has been done, from our vantage point, is not going to occur. Now, we recognize you have a right to do a videotaped deposition, and we're not disputing that.

[Appellant's co-counsel]: For purposes of litigation.

[Appellant's counsel]: That's exactly right.

And we need to know that assurance because then we have to assess whether perhaps there's a need to have a [trial c]ourt step in and decide that the videotape option that you otherwise would be entitled to is not going to occur without that assurance.

You certainly would help us put that issue aside if you will right now represent to us that besides this litigation, the videotape will not be used for any other purpose or released to any other third parties outside of relationship with any filing in this case or court proceeding.

I think it's a simple request. And as [counsel] said, it's really the professional responsibility and duty you owe.

…

[Appellee's counsel]: … I don't have the authority. All I have the authority to say to you is I abide by the rules, and I will abide by the rules. And if the ethical rules put constraints on what lawyers can do with materials in discovery, I abide by those rules.

[Appellant's co-counsel]: Well, [counsel], we're not going to go ahead with … videotaping [this deposition] if you are not in a position to tell us that you will not turn it over to the media to have it broadcast[ed].

…

[Appellee's counsel]: I'm not saying that I am going to give it to some TV station to just broadcast. **But I don't know who might ask it of me**, I don't know - - I certainly am not calling up anybody and asking them to take this videotape.

But I am not in the position to assure you that under all circumstances I would not provide the videotape to someone else if it seemed appropriate.

…

[Appellant's counsel]: [] I think it's significant to [Appellant], given his history, that we have a very, very solid agreement as to how we're going to handle this tape. Because, you know, you are the media and we're here because of what we contend to be malicious conduct by the media of a public figure.

And we think that without giving us this assurance, it raises a great deal of doubt of what the intentions are here.

…

> [Appellant's counsel]: [A]ll we want[] [are] assurances that if somebody on the outside requested the tape or if you were inclined to think of releasing it that we would get advance notice so we could then have a [trial c]ourt decide whether that's appropriate or not.
>
> The fact that we can't have that basic agreement again raises strong flags in our mind. We are not going to go forward with the videotaping. You can choose to go forward with just having the transcript.
>
> Otherwise, we're going to seek the protective relief and we'll let the [trial c]ourt decide how we're going to proceed with the videotaped portion of this.

…

Id. at 4-9, 11-12, 17-18, 23-24, 32-33 (emphases added).

Upon reviewing the aforementioned exchange, I agree with Appellant's concern about whether Appellee was seeking Appellant's **videotaped** deposition for a legitimate purpose. ***See Shingara***, ***supra***. I believe the only proper pretrial use of a videotaped deposition is within the scope of the underlying litigation. ***See Seattle Times Co. v. Rhinehart***, 467 U.S. 20, 32-34 (1984); ***Stenger***, ***supra*** at 960-961; ***MarkWest Liberty Midstream & Res., LLC v. Clean Air Council***, 71 A.3d 337, 345 n.15 (Pa. Cmwlth. 2013). Appellee's adamant refusal to limit the dissemination of this deposition for such purpose has the potential to inflict upon Appellant further "unreasonable annoyance, embarrassment, oppression, burden or

expense[.]" Pa.R.C.P. 4012. Additionally, Appellant's assertion that "of the [17] depositions that have been noticed[in this case to date], only [his] was sought to be done by videotape[]" further bolsters my concern. Appellant's Brief at 8. Therefore, I believe the trial court abused its discretion when it refused to grant Appellant a Rule 4012 protective order on this ground.

Appellant also argues that "there exists a long history of defamation litigation between [himself], [Appellee]'s employer, and other media entities." ***Id.*** at 7, *referencing* ***Dougherty v. Phila. Newspapers, LLC***, No. 004224 (Phila. Cty. July 2009); ***Dougherty v. Phila. Newspapers, LLC***, No. 003325 (Phila. Cty. June 2009); ***Dougherty v. Metro Corp.***, No. 003325 (Phila. Cty. June 2009); ***Dougherty v. Phila. Newspapers, LLC***, No. 004790 (Phila. Cty. Mar. 2009); ***see also*** Appellant's Cross-Motion for Protective Relief, 3/22/12, Exhibit A. Appellant claims that "[Appellee]'s and her media-employer's dislike of [him] was acknowledged at depositions taken in this case." Appellant's Brief at 7. Specifically, Appellant testified that, when Appellee worked at The Philadelphia Inquirer and the Philadelphia Daily News, articles were published over many years that "critical[ly] depict[ed]" union labor within Philadelphia. Deposition, 3/7/12, at 107, 109; Appellant's Cross-Motion for Protective Relief, 3/22/12, Exhibit B. Additionally, Signe Wilkinson (Wilkinson), a friend of Appellee and an employee-cartoonist at The Philadelphia Daily News, was deposed regarding her published work that was unfavorable to Appellant. Deposition, 3/2/12,

at 31-37; Appellant's Cross-Motion for Protective Relief, 3/22/12, Exhibit C. Specifically, Wilkinson admitted to drawing an image of a very large Appellant leading several very small city council people around on a leash following a Philadelphia city council election in the fall of 2011. ***Id.*** at 31. Also, in the mid-1990s, when beheadings were occurring in Iraq and the Pennsylvania Convention Center was being built, Wilkinson sketched Appellant with a large sword in reference to the Convention Center project. ***Id.*** at 35-37.

Although Appellee claims the number of suits between Appellant and her employer illustrate that Appellant is merely a "serial litigant[,]" I agree with Appellant that these filings support his allegation of discord between the parties. Appellee's Brief at 26. Notably, the trial court also acknowledged that "th[is] alleged acrimonious relationship as outlined by [Appellant] [] establishes the basis of his concerns[regarding pretrial dissemination.]" Trial Court Opinion, 6/21/12, at 5 (when concluding the order failed the importance prong of the tripartite collateral order test). Likewise, the Majority acknowledges that "an uncorrected version of the original column[, *i.e.*, the basis for the underlying action,] remained available on Appellee's Facebook page for some brief period of time and on a third-party website for approximately two years[]" despite Appellee's formal recognition of the errors contained in such article and her subsequent retraction. Majority Opinion at 2. In light of the foregoing, the depositions of Appellee and her

friend and coworker further illustrate the animus between the parties and its potential to cause further "unreasonable annoyance, embarrassment, oppression, burden or expense[]" to Appellant. Pa.R.C.P. 4012. Accordingly, I believe the trial court abused its discretion when it failed to grant a minimally intrusive protective order based upon the parties contentious relationship.

Additionally, I believe the trial court overlooked a significant reality within its good cause analysis, to wit, the nature of the underlying allegation. As this matter now stands, Appellant alleges Appellee made defamatory statements against him within an article published in The Philadelphia Inquirer, which was further dispersed through her two Facebook pages. Appellant's Second Amended Complaint, 11/3/10, at 7-11. Generally, "[d]efamation is a communication which tends to harm an individual's reputation so as to lower him [] in the estimation of the community or deter third persons from associating or dealing with him []." ***Joseph v. Scranton Times, L.P.***, 89 A.3d 251, 2014 Pa. Super. LEXIS 123, * 20 (Pa. Super. 2014) (citation omitted); ***see also*** 42 Pa.C.S.A. § 8343 (outlining the burdens of proof in a defamation claim). The form of the underlying action raises concerns that the action itself could cause the litigant "unreasonable annoyance, embarrassment, oppression, burden or expense[.]" Pa.R.C.P. 4012. Consequently, Appellant requested an assurance from Appellee that she would not disseminate his videotaped

deposition before its introduction at trial, to diffuse his fears regarding Appellee's motive behind this discovery method. Deposition, 3/16/12, at 4-5; Appellee's Motion to Compel, 3/19/12, Exhibit G. Notably, Appellant did not request to ban the post-trial dissemination of the deposition; he merely sought to prohibit the pretrial distribution of it. ***Id.*** In my mind, the form of the underlying action, coupled with Appellee's predisposition to disseminate Appellant's deposition for non-litigation purposes and the parties' cantankerous relationship, necessitates a minimally intrusive Rule 4012 protective order. This order would protect Appellant from any future "unreasonable annoyance, embarrassment, oppression, burden or expense" that palpably could occur within his defamation action. Pa.R.C.P. 4012. Thus, I believe the trial court abused its discretion when it denied such relief.

I note the Majority opines that "it is self-evident that a party seeking a protective order must, at the very least, present some evidence of substance that supports a finding that protection is necessary[]" and that "[s]uch evidence must address the harm risked, and not merely an unsubstantiated risk of dissemination[.]" Majority Opinion at 18. Presently, the Majority concludes that Appellant did not present a substantiated risk of dissemination. ***Id.*** I cannot agree.

Herein, the record illustrates that long-feuding parties are involved in a defamation action regarding Appellant's philanthropic actions within

Philadelphia. Assuming *arguendo*, that the pretrial dissemination of Appellant's deposition would not violate any privacy interests, Appellant has illustrated that he is a public figure who has brought an action against a reporter of a large media entity who allegedly harmed his reputation within the community. ***See Joseph***, ***supra***. This case commands a minimally-restrictive protective order to further protect Appellant from "unreasonable annoyance, embarrassment, oppression, burden or expense[.]" Pa.R.C.P. 4012. As such, I believe the trial court exercised manifestly unreasonable judgment when it declined Appellant's request for such protection.[3] ***See Middletown***, ***supra***.

Based upon my review of the record and the applicable law, I believe the trial court abused its discretion when it denied Appellant's request for a protective order. Accordingly, I would reverse the trial court's April 11, 2012 order. Therefore, I respectfully dissent.

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[3] Based upon this resolution, I express no opinion as to Appellant's first issue.