



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF STATE COUNSEL
LITIGATION BUREAU

Writer Direct: (518) 776-2590

September 13, 2021

Hon. Thérèse Wiley Dancks
United States Magistrate Judge
United States District Court
Northern District of New York
Federal Building and U. S. Courthouse
P. O. Box 7346
Syracuse, NY 13261-7346

Re: *Orr, Alana v. McGinty, Anthony et al*
Northern District of New York
17-CV-1280 (GLS)(TWD)

Dear Judge Dancks:

This office represents the Defendant, Anthony McGinty, in the above-referenced matter. Please accept this correspondence as Defendant's letter brief in opposition to Defendant's August 30, 2021 letter motion to remove the temporary protective order over the deposition of Defendant McGinty, which was held on August 20, 2021.

Plaintiff did not provide sufficient notice under FRCP 30(b)(3):

As a preliminary matter, the deposition in question was videotaped without sufficient notice, and use of the video should be precluded. Plaintiff did not provide sufficient notice under FRCP 30(b)(3) to the deponent that his deposition would be videotaped, and therefore, the temporary protective order should not be removed. The purpose of FRCP 30(b)(3) is to inform the deponent of the pertinent information, including the manner of recording the deposition. The Notice of Deposition served by Plaintiff in this matter states that "the oral examination will be recorded stenographically and *may* also be videotaped." (*emphasis added*). Both the scope and logistics of Judge McGinty's deposition were discussed at great length at the June 30, 2021 Court-ordered conference. At no time during the conference did Plaintiff's counsel indicate an intention to videotape the deposition. The parties engaged in communications thereafter in preparation for the Court-ordered status report regarding depositions in this matter, and again, Plaintiff's counsel did not indicate an intention to videotape the deposition. Plaintiff did not communicate the intention to videotape this deposition until August 9, 2021 in an email to the Court, and even then, Defendant's counsel could not confirm the intention or any details related

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to the manner of such recording until the Court Conference on August 18, 2021, when the deposition in this matter was scheduled for August 20, 2021. Plaintiff did not serve Defendant with a supplemental notice.¹ Because Plaintiff did not provide sufficient notice under FRCP 30(b)(3) to the deponent that his deposition would be videotaped, the temporary protective order should not be removed, and Plaintiff should be precluded from using the video recording.

Plaintiff should not be permitted to harass, embarrass or oppress Defendant:

The Court should not permit Plaintiff to publish the video recording of Judge McGinty's deposition and should maintain the protective order over the video recording during the pendency of these proceedings. Fed. R. Civ. P. 26(c) provides that "the court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense including ... forbidding the disclosure or discovery;... prescribing a discovery method other than the one selected by the party seeking discovery;... [and] requiring that a deposition be sealed and opened only on court order." Plaintiff's counsel indicated during the August 18, 2021 court conference, that the intended purpose of videotaping Judge McGinty's deposition was to publish the video recording to anyone within the Ulster County Family Court community who would have interest in viewing it. Plaintiff's intention to publish the video recording of Defendant's deposition can have no other purpose but to harass, embarrass or oppress Defendant, and influence the outcome of Plaintiff's underlying family court matter, and therefore release of this video recording should not be permitted during the pendency of this action.

Based on her motion, Plaintiff intends to make the videotape public, the only possible purpose of which can be to harass, embarrass or oppress Defendant. Plaintiff's motion relies on a public access argument; however, the caselaw that Plaintiff puts forth to support Plaintiff's position that "depositions are inherently public in nature" are not relevant to this matter, as they contemplate the use of evidence at trial. Furthermore, "there is no public right of access to materials produced during the initial stages of discovery." *Terrorist Attacks on Sept. 11, 2001*, 454 F. Supp.2d 220, 222 (S.D.N.Y. 2006).

"Generally speaking, dissemination of pretrial discovery materials by the receiving party is not prohibited absent a protective order. Nonetheless, dissemination for non-judicial purposes is unusual and rightly so." *Kent v. NY State Pub. Emples. Fedn*, 2019 US Dist LEXIS 18719, at *3 (N.D.N.Y. Feb. 5, 2019, No. 1:17-CV-268 (GTS/CFH) citing *Am. News & Info. Servs. v. Rovella*, 2017 US Dist LEXIS 140059, at *6-7 (D Conn Aug. 30, 2017) (internal quotation marks and citations omitted). "The discovery rules are a matter of legislative grace. They compel parties to divulge information for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes." *Am. News & Info. Servs. v. Rovella*, 2017 US Dist LEXIS 140059, at *6-7 (D Conn Aug. 30, 2017) (internal quotation marks and citations omitted).

¹ FRCP 30(b)(3), "The party who notices the deposition *must* state in the notice the method for recording the testimony... With *prior notice* to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice." (emphasis added)

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While Plaintiff points to this Court's decision in *Kent*, arguing that media attention alone is not enough to warrant a continued protective order in this matter, this Court's decision in *Kent* establishes why the Court should maintain the current protective order. This Court recognized in *Kent* that a "clearly defined and serious injury resulting from disclosure" warrants a protective order. *Kent* at *9. Judge McGinty is a sworn officer of the Ulster County Family Court, tasked with adjudicating family court matters which impact hundreds of families in Ulster County every year. He has already received one threat, which can be traced to the publicity raised by Plaintiff's recent disclosures to the press, requiring him to recuse himself from an Ulster Family Court matter. Permitting Plaintiff to inappropriately publish the deposition video recording could further endanger the Judge personally and threaten the judicial process.

In *Kent*, this Court acknowledged that a particular articulated burden, such as, for example, misuse of information for financial or commercial gain, could warrant a protective order *Id.* at at *10 citing *Paisley Park Enter., Inc. v. Uptown Prods.*, 54 F. Supp.2d 347, 348 (S.D.N.Y. 1999) (videotaped deposition of plaintiff, a rock artist, was permitted solely for purposes of an infringement suit, but the court prohibited publication, noting "it is readily apparent that the defendants intend to use any videotape for purposes entirely unrelated to the litigation as well as for the lawsuit itself. Rule 30(b)(2) was amended to permit videotaped depositions as a matter of routine in recognition of the fact that videotapes are a means of presenting deposition testimony to juries that is superior to readings from cold, printed records. It was not intended to be a vehicle for generating content for broadcast and other media. Hence, defendants' likely use of any videotape for purposes unrelated to the resolution of the dispute that is the subject of this lawsuit cuts in plaintiffs' [deponent's] favor.")

At the time her deposition was taken, Plaintiff had not provided notice of intention to videotape Defendant's testimony, but based on Plaintiff's testimony, the only possible use of the video recording is to publicly harass, embarrass or oppress Defendant in order to influence the outcome of her underlying family court matter. At her deposition, Plaintiff testified, in sum, that she believes she cannot get justice with Judge McGinty presiding over her ongoing family court matter.² Plaintiff further testified that one of her objectives in bringing this lawsuit is to nullify all the decisions by Judge McGinty in her family court case and have full custody of her daughter returned to her. Despite the fact that the only relief available to Plaintiff in this matter is prospective injunctive relief under the ADA, Plaintiff clearly intends to misuse the judicial process in this matter, including the video recording of Judge McGinty's deposition, to influence the outcome of her underlying family court matter, or otherwise harass or embarrass Defendant.

Accordingly, Defendant requests that the Court deny Plaintiff's letter motion to remove the temporary protective order in this matter, and allow that protective order to remain throughout the pendency of this litigation.

² Defendant has not yet received Plaintiff's deposition transcript, and therefore a direct quote is unavailable at this time.

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Thank you for your consideration of this submission.

Respectfully Submitted,

s/ Kasey K. Hildonen

Kasey K. Hildonen
Assistant Attorney General
Bar Roll No. 520351
kasey.hildonen@ag.ny.gov

cc: Joshua A. Douglass, Esq.
122 US-44
P.O. Box 481
Millerton, NY 12546