



IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

THE SUSTAINABLE JOURNALISM
FOUNDATION *d/b/a* NONDOC MEDIA
and WILLIAM W. SAVAGE III,

Plaintiff

v.

STATE OF OKLAHOMA, *ex rel.* BOARD OF
REGENTS OF THE UNIVERSITY OF
OKLAHOMA,

Defendant.

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED
JUN 15 2022
In the office of the
Court Clerk MARILYN WILLIAMS

DEFENDANT’S MOTION FOR PROTECTIVE ORDER

Defendant State of Oklahoma *ex rel.* Board of Regents of the University of Oklahoma (the “University”) presents its Motion for Protective Order (the “Motion”). The University respectfully requests the Court grant this Motion and enter the proposed protective order attached hereto as *Exhibit 1*, and states:

INTRODUCTION

This case only concerns whether the University properly denied Plaintiffs’ request for “[a]ny and all reports created by the law firm Jones Day for the University of Oklahoma relating to David Boren or Jim ‘Tripp’ Hall,” under the Oklahoma Open Records Act (the “ORA”). Plaintiff’s Motion to Compel Discovery at 2 (citing 51 O.S. §§ 24A.1, *et seq.*) (emphasis added) [hereafter “Motion to Compel”]. In an effort to generate public interest in this case, however, Plaintiffs have published the pleadings filed in this case¹—which they are permitted to do—but

¹ Tres Savage, *NonDoc files lawsuit seeking Jones Day reports from OU*, NonDoc (June 11, 2021) <https://nondoc.com/2021/06/11/nondoc-files-lawsuit-seeking-jones-day-reports-from-ou/>; Tres Savage, *‘Inflammatory assertions’: Read OU’s answer to NonDoc’s lawsuit*, NonDoc (Aug. 12, 2021) <https://nondoc.com/2021/08/12/ou-answer-to-nondoc-lawsuit/>.

have also taken to creating public records out of discovery requests and related conversations against the standing order of this Court. *See generally* the University's Combined Motion to Strike Plaintiff's Motion to Compel Discovery and for Sanctions. In an effort to curb the risk of trial by public media, the University proposed a standard protective order. Because Plaintiffs believe that the First Amendment usurps this Court's ability to issue a protective order, this Motion is necessary and a protective order must be granted.

STATEMENT OF CONFERENCE

Given Plaintiffs propensity to publish court documents, the University emailed a copy of its proposed protective order to Plaintiffs on May 4, 2022. Rather than propose alternative language, Defendant's position is that it can unilaterally decline a protective order because it is "not appropriate in this public records matter." Garner Eml. (May 17, 2022) (Attached to Plaintiffs' Motion to Compel as Exhibit D). The parties conferred on May 20, 2022, where the University reinforced its position and Plaintiffs were unreceptive to a protective order:

Thank you for calling me today. At the close of our call a few minutes ago, it appears that your client is unwilling to agree to a Protective Order such that the University could disclose information to for purposes of forwarding your litigation while protecting it from unwarranted disclosure and publication by your client NonDoc. That is unfortunate. From our view, this entire case is about the application or certain privileges to documentation requested under the Open Records Act. We believe that the requests you have sent are directly affected by this privilege. However, at our last meet and confer, we agreed to produce some documents which would give you a good indication of the privileges. Simply put, your client's unwillingness to cooperate and stipulate to a Protective Order—or even proposal without alternative language—is unreasonable. **Protective orders exist for many reasons including things like preventing cases from being tried in the press. *Inhofe v. Wiseman*, 1989 OK 41, 772 P.2d 389, 394.** As I alerted you, we will seek a motion for a protective order promptly. I understand you are filing a motion to compel today and will seek a special hearing. We look forward to receiving your motion.

Exhibit 2, Dennis Eml. (May 20, 2022) (emphasis added). Plaintiffs failed to respond to that email, instead electing to file their Motion to Compel Discovery.

ARGUMENTS AND AUTHORITIES

The Oklahoma Discovery Code safeguards against abusive discovery tactics including protection for certain privacy concerns. *See* 12 O.S. § 3226.1. More specifically, the Oklahoma Supreme Court has provided that pretrial discovery is **not public** but is considered private as a matter of common practice until admitted into evidence. *See Inhofe v. Wiseman*, 1989 OK 41, ¶ 10, 772 P.2d 389, 393. The *Inhofe* Court stated that "[m]uch of the information surfacing during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Traditionally, **discovered information, not yet admitted, is not a public source of information.**" *Id.* (emphasis added) (citation omitted). The known risk of Plaintiffs (1) publishing matters of the court record and (2) filing documents in the public record in violation of the local rules, both constitute "good cause shown" to protect the University from the annoyance, harassment, embarrassment, oppression of having confidential materials published. 12 Okla. Stat. § 3226(C); *YWCA of Oklahoma City v. Melson*, 1997 OK 81, ¶ 17, 944 P.2d 304, 310

In *Melson*, the Oklahoma Supreme Court cited with approval a decision of the United States Supreme Court stating as follows:

Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties There is an opportunity, therefore, for litigants to obtain-incidentally or purposefully-information that not only is irrelevant but if publicly released could be damaging to reputation and privacy.

1997 OK 81, ii 24 n.41, 944 P.2d 304,311 n.41 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (emphasis in original)). Thus, "[e]ven if the information sought is within the bounds of discovery, **the production of sensitive documents should be allowed in the least intrusive manner.**" *Melson*, 1997 OK 81, ¶ 25 n.41, 994 P.2d 312 n.45 (citing *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325 (Mo. App. 1985) (emphasis added)). Accordingly, "[a]ll discovery must be filtered through the procedure established by 12 O.S.1991 § 3226(C)." *Melson*, 1997 OK 81, ¶ 17, 944 P.2d at 310 (emphasis in original). Protective orders thus permit parties to produce sensitive material without fear of public dissemination and therefore promote the overriding goal of the Oklahoma Discovery Code to "to provide the just, speedy, and inexpensive determination of every action." 12 Okla. Stat. § 3225. "With this authority at hand, judges should not hesitate to exercise appropriate control over the discovery process." *Cf. Quinn v. City of Tulsa*, 1989 OK 112, 777 P.2d 1331, 1342 (quoting *Herbert v. Lando*, 441 U.S. 153, 177 (1979)). A protective order is needed here.

As permitted by section 3226 of the Oklahoma Discovery Code, the University sent a reasonable protective order to Plaintiffs to permit discovery to proceed while protecting the University's confidential information. *Exhibit 1*, Proposed Protective Order; *See* 12 Okla. Stat. § 3226. Plaintiffs rejected the University's proposed protective order out of hand. Because the University has a valid interest in (1) maintaining confidential information where this case almost exclusively is premised on privileges and exceptions to production of records and (2) ensuring this matter it adjudicated by this Court and not the court of public opinion.

CONCLUSION

WHEREFORE, the University respectfully requests the Court grant this Motion and enter the proposed protective order attached hereto as *Exhibit 1*.

Respectfully submitted,



Michael Burrage, OBA No. 1350
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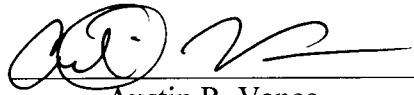
**ATTORNEYS FOR STATE OF
OKLAHOMA, ex rel. BOARD OF
REGENTS OF THE UNIVERSITY OF
OKLAHOMA**

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June 2022, a true and correct copy of the foregoing was mailed to:

Kathryn E. Gardner
Reporters Committee for Freedom of the Press
110 S. Hartford Ave., Ste 2524
Tulsa, OK 74120
kgardner@rcfp.org

Tracy Schumacher
114 E. Main St.
Norman, OK 73069
tracy@lawgroupok.com


Austin R. Vance

EXHIBIT

1

Cynthia Norman

From: J. Renley Dennis
Sent: Friday, May 20, 2022 1:12 PM
To: 'Kathryn E. Gardner' <kgardner@rcfp.org>
Cc: 'Lisa Zycherman' <lzycherman@rcfp.org>; 'drew.neville@mcafeetaft.com' <drew.neville@mcafeetaft.com>; Michael Burrage <mburrage@whittenburragelaw.com>; Austin R. Vance <avance@whittenburragelaw.com>
Subject: RE: Follow up re: meet and confer conference/outstanding discovery issues in CV-2021-1770

Ms. Gardner,

Thank you for calling me today. At the close of our call a few minutes ago, it appears that your client is unwilling to agree to a Protective Order such that the University could disclose information to for purposes of forwarding your litigation while protecting it from unwarranted disclosure and publication by your client NonDoc. That is unfortunate. From our view, this entire case is about the application or certain privileges to documentation requested under the Open Records Act. We believe that the requests you have sent are directly affected by this privilege. However, at our last meet and confer, we agreed to produce some documents which would give you a good indication of the privileges. Simply put, your client's unwillingness to cooperate and stipulate to a Protective Order—or even proposal without alternative language—is unreasonable. Protective orders exist for many reasons including things like preventing cases from being tried in the press. *Inhofe v. Wiseman*, 1989 OK 41, 772 P.2d 389, 394. As I alerted you, we will seek a motion for a protective order promptly. I understand you are filing a motion to compel today and will seek a special hearing. We look forward to receiving your motion.

Best regards,

J. RENLEY DENNIS

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