

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

CHARLENE PICARD, Individually :  
and as Administratrix :  
of the Estate of :  
TIMOTHY R. PICARD, SR., :  
Plaintiff, :  
v. : CA 09-318 S  
CITY OF WOONSOCKET by and :  
through its Treasurer, Carol :  
A. Touzin, et al., :  
Defendants. :

**MEMORANDUM AND ORDER**

**GRANTING MOTION FOR PROTECTIVE ORDER**

Before the Court is Plaintiff's Motion for Protective Order (Docket ("Dkt.") #37) ("Motion for Protective Order" or "Motion"). By the Motion, Plaintiff Charlene Picard, individually and as Administratrix of the Estate of Timothy R. Picard, Sr. ("Plaintiff" or "Mrs. Picard"), seeks an order granting the following relief: (1) excluding the individual Defendants from the depositions of the other Defendants; (2) precluding the individual Defendants from reading the deposition transcripts or discussing testimony of the other Defendants until all of the Defendants' depositions have been concluded; (3) precluding the individual Defendants from discussing the deposition testimony of the other Defendants with counsel until after they have been deposed; and (4) precluding Defendants from attending Plaintiff's deposition in person but allowing them to see

and hear the deposition by way of video conferencing.<sup>1</sup> See Motion. Individual Defendants David Antaya, Christopher Brooks, Justin A. Glode, Pamela Jalette, Patrick T. McGourty, Matthew Richardson, and Scott Strickland ("Defendants")<sup>2</sup> have filed an objection to the Motion. See Individual Defendants, Antaya, Brooks, Glode, Jalette [sic], McGourty, Richardson, Strickland's Objection to Plaintiff's Motion for Protective Order (Dkt. #42) ("Objection"). Plaintiff has filed a reply memorandum. See Reply Memorandum in Support of Plaintiff's Motion for Protective Order (Dkt. #43) ("Reply Mem."). A hearing was held on April 4, 2011.

### **Facts**

Around 3:00 a.m. on August 20, 2006, Plaintiff called 911 for emergency medical assistance at the home in Woonsocket, Rhode Island, which she shared with her husband, Timothy Picard, Sr.

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<sup>1</sup> At the April 4, 2011, hearing, Plaintiff's attorney clarified that this portion of the Motion seeks only to exclude Defendants from being present in the same room as Plaintiff during her deposition and that Defendants would be allowed to see and listen to the deposition from a nearby room via video conferencing. Upon hearing this clarification, it was the Court's impression that Defendants no longer opposed this portion of the Motion. To the extent that the Court may have misunderstood Defendants, their objection is overruled. The arrangement proposed by Plaintiff's attorney allows for adequate consultation between Defendants and their counsel. Good cause also exists for the separation because requiring Plaintiff to testify in close proximity to the police officers whom she believes are responsible for the death of her husband would impose an undue burden on her.

<sup>2</sup> Defendants are all Woonsocket police officers, except for Pamela Jalette ("Jalette"), who was the dispatcher on duty at the time of the incident. See Individual Defendants' Memorandum of Law in Support of Their Objection to Plaintiff's Motion for Protective Order ("Defendants' Mem.") at 1 n.1.

("Mr. Picard").<sup>3</sup> See Memorandum in Support of Plaintiff's Motion for Protective Order ("Plaintiff's Mem.") at 2. At approximately 3:15 a.m., as a result of the 911 call, Woonsocket police officers were dispatched to Plaintiff's home. Id. at 2-3. Emergency rescue personnel from the Woonsocket Fire Department were never dispatched to that location. Id. at 3. Around 3:20 a.m. police officers David Antaya ("Antaya") and Justin A. Glode ("Glode") arrived at the Picard home. Id. Mrs. Picard was outside her home and Mr. Picard was inside his home dressed in boxer shorts. Id. According to Plaintiff, Glode and Antaya were asked to leave the premises, but refused to do so and instead proceeded to arrest Mr. Picard without a warrant and without probable cause.<sup>4</sup> Id.

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<sup>3</sup> Defendants add that "[p]rior to this call [Mr. Picard] was involved in a domestic dispute with his son, Timothy Picard, Jr." Defendants' Mem. at 2.

<sup>4</sup> Defendants state that when Glode and Antaya arrived at the home they observed Mr. Picard, who was outside the house, "first grab [Mrs. Picard] and then push her into the house." Defendants' Mem. at 2. Defendants further state that:

When the two responding officers attempted to ascertain why the 911 call had been made, they were confronted by an aggressive and highly agitated [Mr.] Picard. The two officers attempted to take [him] into custody, which then caused [Mr.] Picard to lash out. A violent struggle ensued between [Mr.] Picard and officers Glode and Antaya, during which time the officers were forced to use pepper spray on [Mr.] Picard with no apparent effect.

Id. at 2 3. Citing Mr. Picard's allegedly violent behavior and the failed effects of the pepper spray, Defendants contend that the two officers were compelled to call for backup and two more officers were dispatched to the scene. Id. at 3. According to Defendants: "The four officers eventually were able to subdue and handcuff Picard. He was then transported to the Woonsocket police station where he was to be booked and charged for several crimes, including the assault of four police

Plaintiff alleges that in the course of the arrest Glode and Antaya used pepper spray on Mr. Picard in amounts that exceeded the proper recommended use and created an immediate need for decontamination and medical assistance. Id. Plaintiff further alleges that instead of being provided medical assistance, Mr. Picard was taken to the Woonsocket police station. Id.

At the police station, Plaintiff claims that Mr. Picard was tasered three separate times while his hands were handcuffed behind his back.<sup>5</sup> Id. The first instance allegedly occurred while Mr. Picard was standing at the booking window surrounded by three police officers. Id. The next two instances allegedly occurred while Mr. Picard was lying face down on the floor with his hands still cuffed behind his back and surrounded by five police officers one of whom had his knee in the middle of Mr. Picard's back. Id. According to Plaintiff, after the third taser, Mr. Picard started to turn blue and developed heavy breathing. Id. He was taken by rescue to Landmark Medical Center where he was pronounced dead after unsuccessful attempts to revive him. Id. at 3-4. Plaintiff claims that during the approximately nine minutes from

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officers." Id.

<sup>5</sup> Defendants claim that Mr. Picard continued to be uncooperative and combative during his transport to and upon arrival at the station. Defendants' Mem. at 3. Defendants dispute "that Picard was tasered three times while already 'disabled' and 'hand cuffed' ...." Id. They maintain that he was combative and struggling violently with the officers, even at the station, and that he was tasered only twice, "and this was only after Picard persisted in resisting arrest." Id.

the point at which Mr. Picard began to exhibit life-threatening signs until the arrival of emergency personnel none of the five police officers administered CPR or made any attempt to place Mr. Picard in a non-life-threatening situation.<sup>6</sup> Id. at 4.

### **Law**

Fed. R. Civ. P. 26(c)(1) provides in relevant part that “[t]he court may, for good cause, issue an order to protect a party or a person from annoyance, embarrassment, oppression, or undue burden or expense ... designating the persons who may be present while the discovery is conducted.” Fed. R. Civ. P. 26(c)(1).<sup>7</sup> The burden is

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<sup>6</sup> Defendants dispute that Mr. Picard exhibited any life threatening symptoms before the rescue personnel arrived on the scene. They state that “[s]hortly after the struggle, an officer noticed a decline in Picard’s appearance. That officer immediately called the dispatcher to request a rescue.” Defendants’ Mem. at 3 4. Defendants further note that Mr. Picard’s death was listed by the medical examiner as acute cocaine intoxication and excited delirium syndrome. Id. at 4.

<sup>7</sup> Fed. R. Civ. P. 26(c)(1) provides:

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. 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 one or more of the following:

....

(B) specifying terms, including time and place, for the disclosure or discovery;

....

on the movant to show the necessity for the issuance of the order. Public Citizen v. Liggett Group, 858 F.2d 775, 789 (1<sup>st</sup> Cir. 1988).

"[D]ue to the heightened interests of parties in the proceedings, 'factors that might justify exclusion of non-parties from a deposition might not be sufficient to exclude parties because of the parties' more substantial interests in being present.'" Dade v. Willis, No. Civ.A. 95-6869, 1998 WL 260270, at \*1 (E.D. Pa. Apr. 20, 1998) (quoting Hines v. Wilkinson, 163 F.R.D. 262, 266 (S.D. Ohio 1995));<sup>8</sup> see also Galella v. Onassis, 487 F.2d 986, 997 (2<sup>nd</sup> Cir. 1973) (stating that "such an exclusion should be ordered rarely indeed"); Kerschbaumer v. Bell, 112 F.R.D. 426 (D.D.C. 1986) ("Most courts have granted protective orders to bar parties from attending depositions only in very limited

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(E) designating the persons who may be present while the discovery is conducted ....

Fed. R. Civ. P. 26(c)(1).

<sup>8</sup> The Dade v. Willis court, after quoting this statement from Hines v. Wilkinson, went on to conclude: "Consequently, the principle has become well established that judges may exclude a party from a deposition only with a finding of 'extraordinary circumstances.'" Dade v. Willis, No. Civ.A. 95 6869, 1998 WL 260270, at \*1 (E.D. Pa. Apr. 20, 1998) (quoting 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2041 at 536 (2d ed. 1994)). However, the 1994 edition of Wright & Miller states (as does the 2010 edition) only that "[t]he courts have not felt precluded from excluding a party from a deposition in extraordinary circumstances ...." 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2041 at 536 (2d ed. 1994). This is not the same as stating that a finding of "extraordinary circumstances" is a "well established" principle before a party may be excluded. Thus, while the Dade opinion is otherwise persuasive, this Court declines to join it in holding that it is "well established that judges may exclude a party from a deposition only with a finding of 'extraordinary circumstances,'" Dade, 1998 WL 260270, at \*1.

circumstances.”).

In deciding the instant Motion, the Court “must engage in detailed analyses of the circumstances of the parties and issues involved, and require a specific showing of good cause by the movant.” Dade, 1998 WL 260270, at \*1; see also Gill v. Gulfstream Park Racing Ass’n, 399 F.3d 391, 402 (1<sup>st</sup> Cir. 2005) (“[T]he ‘good cause’ standard in the Rule is a flexible one that requires an individualized balancing of the many interests that may be present in a particular case.”) (alteration in original).

### **Discussion**

At the hearing, the Court asked Plaintiff’s counsel which of the grounds identified in Rule 26(c)(1) (“annoyance, embarrassment, oppression, or undue burden or expense”) Plaintiff relied upon in seeking a protective order. Plaintiff’s counsel responded, in essence, that the order was needed to protect Plaintiff from an “undue burden” in attempting to obtain information from the individual Defendants regarding what happened to her husband after he was taken into custody. In support of her Motion, Plaintiff notes that “virtually all of the fact witnesses are the Defendants themselves,” Plaintiff’s Mem. at 5, that Mr. Picard is deceased and cannot provide any evidence of what happened, see id., and that Mrs. Picard was not present when the pepper spray or taser was used against her husband, see id. Plaintiff posits that in the close-knit world of a police department, it is reasonable to assume that

each of the police officers will be mindful of the others' testimony and would be reluctant to testify to a conflicting version of events. See id. at 5-6. Plaintiff also suggests that a Defendant's testimony may be inadvertently affected simply by hearing what another Defendant perceived and experienced. See id. at 6. Plaintiff contends that her interest in obtaining "unfiltered, unobstructed, and uninfluenced testimony regarding the events of August 20, 2006, outweighs the Defendants' interests in attending the other Defendants' depositions." Id. at 6-7.

As supporting authority for her request, Plaintiff quotes the following excerpt from Dade:

The instant matter similarly presents a case where the extraordinary circumstances require sequestration of the party deponents. Plaintiff alleges various civil rights violations caused by the alleged brutality of the defendant police officers. These claims are matters solely within the knowledge of the three individuals at issue here and, consequently, credibility is the crucial issue. Because two of the witnesses are not only partners on the police force, but defendants who possess an interest in the outcome of this case, the risk that the testimony of one will, either consciously or subconsciously, influence the testimony of the other is substantially elevated. Permitting Officer Willis to be present during Officer Butler's deposition, and vice versa, would lend an advantage in terms of bolstering each other's stories and eliminating inconsistencies that would be more apparent had they not been permitted to be present. Plaintiff's criminal status, coupled with defendants' color of authority, stands as a significant enough credibility obstacle to overcome without sanctioning defendants' potential alteration of their testimony.

Dade, 1998 WL 260270, at \*2.

Defendants in their opposition to the Motion cite case law

stating that a motion to exclude a party from a deposition should rarely be granted. See Individual Defendants' Memorandum of Law in Support of Their Objection to Plaintiff's Motion for Protective Order ("Defendants' Mem.") at 5 (citing Galella v. Onassis, 487 F.2d 986, 997 (2<sup>nd</sup> Cir. 1973)). Defendants also argue that Plaintiff has made no showing that "extraordinary circumstances" exist, id. (citing Dade, 1998 WL 260270, at \*1), for the granting of the Motion.<sup>9</sup>

Defendants note that each officer has already given statements concerning this case to the Woonsocket Police Department and the Rhode Island State Police and that statements given to the latter were "lengthy."<sup>10</sup> Id. at 6. Defendants posit that it is unlikely "almost five years after the event, that allowing each officer to attend another officer's deposition would somehow change their perception of the events, perceptions which have already been recorded multiple times." Id. In fact, Defendants suggest that the existence of their prior statements provides Plaintiff with a safeguard "far less drastic than the proposed protective order," id., in that Plaintiff can use Defendants' prior statements to cross-examine any defendant both during his own deposition and later at trial in the event any testimony seems tainted or altered

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<sup>9</sup> See n.8.

<sup>10</sup> Plaintiff disputes this characterization. See Reply Memorandum in Support of Plaintiff's Motion for Protective Order at 3 4. Based on Plaintiff's description of the statements, it appears that they may not be as detailed or as exhaustive as the term "lengthy" suggests.

as a result of attending another officer's deposition, see Defendants' Mem. at 6. However, as it can be reasonably assumed that at this point all Defendants have reviewed not only their own prior statements but also those of the co-Defendants, the existence of the prior statements and the deponents' knowledge of the contents of those statements in the Court's view serves to highlight the difficulty which Plaintiff faces in obtaining each deponent's unaffected and uninfluenced recollection of what occurred. Indeed, Defendants, in arguing against Plaintiff's contention that exclusion is necessary in order to assess credibility, observe that "[s]equestering the officers in this instance is akin to closing the gate after the horse has already been let loose." Id. at 8.

Defendants argue that Plaintiff's concern that one or more of the individual Defendants might be intimidated by the presence of five colleagues is misplaced because Antaya is now retired and no longer a peer or supervisor of the other officers and Officer Brooks is now a Lieutenant and no longer a peer of the remaining officers. See id. at 6. Defendants also cite the fact that "these officers work day in and day out with each other in highly stressful situations," id., and that "[t]hey must rely on and support each other in their line of work," id. Yet, it is precisely this close relationship and bond among Defendants which Plaintiff cites as a reason for her concern that the testimony of one officer may

influence the testimony of one or more of the others. The Court finds, in the circumstances of this case, that Plaintiff's concern is reasonable. The strong bond among police officers is unlikely to be significantly diminished by retirements or promotions.

Defendants dispute Plaintiff's claim that sequestration is necessary in order to assess Defendants' credibility by again noting that they have already provided multiple statements and that they will not be providing a "raw reaction," Defendants' Mem. at 8, to the events. The Court, however, understands Plaintiff to mean by such term that she wishes the opportunity to obtain the recollections of each Defendant uninfluenced by the deposition testimony of the other Defendants even though those recollections may have already been influenced by their knowledge of each other's statements and the consultations with their attorney. See id. ("[F]or the past five years, since the events took place, they have continued to work together, to confer with their attorney, and to prepare for this litigation.").

Defendants argue that if Plaintiff is fearful that any Defendant will alter his testimony after attending another Defendant's deposition, Plaintiff can cross-examine such Defendant using his prior statements if they conflict with his deposition testimony. Id. Because this safeguard exists, Defendants claim that there is no need to bar Defendants from each other's depositions. The Court is not so persuaded. It seems probable

that if Plaintiff finds any inconsistencies among the deposition testimony of Defendants it will be primarily with respect to matters not addressed in the prior statements. Thus, the prior statements would not provide a safeguard as effective as Defendants contend.

In balancing the right of Defendants as parties to be present for all depositions against Plaintiff's right to depose individual Defendants in circumstances which do not impose an undue burden on her, the Court notes that if the Motion is denied the potential prejudice to Plaintiff is permanent. Once Defendants have heard each other's deposition testimony, the effects of such testimony cannot be removed. In contrast, if the Motion is granted, Defendants are not permanently deprived of the knowledge of the deposition testimony of their co-Defendants. After all Defendants have been deposed, they will have full and unrestricted access to that testimony.

This Court, like the Dade court, is cognizant that "many courts have declined to order sequestration based on a broad conclusory allegation that, should the witnesses be allowed to attend each other's depositions, they will tailor their testimony to conform to one another." Dade, 1998 WL 260270, at \*3 (citing cases); see also Kerschbaumer, 112 F.R.D. at 426-27 (stating that "a minority" of courts have granted motions to sequester "simply to ensure that deponents testify only to matters within their

independent recollections and without any influence from statements made by other witnesses"). However, as in Dade, this Court is persuaded that "the facts in this particular case give rise to more than an inchoate fear," Dade, 1998 WL 260270, at \*3, that the presence of all seven Defendants may influence the deposition testimony.

Specifically, the combined effect of the following facts constitute good cause for granting the instant Motion. First, Mr. Picard is deceased and is not available to provide any testimony regarding Defendants' acts or omissions regarding his arrest and confinement. Second, while in police custody, Mr. Picard's physical condition deteriorated to the point that rescue personnel were summoned and he was transported to Landmark Medical Center. Efforts to revive him were unsuccessful and he was pronounced dead.<sup>11</sup> Third, the only witnesses to what happened to Mr. Picard between the time he was taken into police custody and the arrival of the rescue personnel are Defendants.<sup>12</sup> Fourth, Defendants are (or formerly were) all employed by the same police department of a relatively small city, and it is undisputed that there is a strong bond among at least six of Defendants who are (or formerly were)

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<sup>11</sup> Defendants state that Mr. Picard was pronounced dead at 4:45 a.m. See Defendants' Mem. at 4.

<sup>12</sup> Plaintiff's counsel stated at the hearing that there is a soundless video recording which shows Mr. Picard at the Woonsocket police station, but she indicated that not every moment of his presence at the station was captured on the recording.

police officers. See Defendants' Mem. at 6. Fifth, the sheer number of Defendants who would be present at each deposition (seven) weighs in favor of the Motion.<sup>13</sup> Depositions are usually conducted in small, somewhat informal settings with only a few persons present. Such settings are conducive to putting the deponent at ease and aid the examiner in his or her efforts to obtain information from the deponent. The presence of a much larger group alters this dynamic, especially when, as here, the group consists of the deponent's fellow police officers. The proceeding will unavoidably be more formal and potentially confrontational.

This Court, like the Dade court, recognizes that in order for the sequestration to have the desired result there must be some limitation on the dissemination of the contents of Defendants' depositions. See Dade, 1998 WL 260270, at \*3-4. At the same time, the duration of such limitation must be no longer than necessary to achieve the desired goal. Accordingly, the Court orders that the depositions be scheduled back-to-back<sup>14</sup> so that they may be conducted within no more than a ten day period. During that ten day period,

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<sup>13</sup> It can be reasonably inferred that the arrival of all seven Defendants for the first scheduled deposition surprised Plaintiff's counsel. See Plaintiff's Mem. at 45 (noting that "each of the Defendants arrived intending to attend the deposition" and stating that thereafter the deposition was suspended and the other deposition notices canceled until the matter could be heard by the court).

<sup>14</sup> By back to back, the Court means that to the extent possible the depositions shall be scheduled on consecutive days (except where a weekend or holiday intervenes).

the following restrictions shall apply:

1. The depositions shall be conducted with no person present other than the party to be deposed, counsel, and the court reporter.

2. Defendants' counsel may not inform any other Defendant, orally or through provision of a transcript, about what the other Defendants testified to at their depositions.

3. Defendants shall be barred from discussing their deposition testimony with each other until after the completion of all of the depositions of Defendants.

4. No Defendant shall be allowed to obtain a copy of his own or any other deposition transcript until after the completion of all of the depositions of Defendants.

With respect to Plaintiff's deposition, the Court additionally orders that Defendants shall not be in the same room as Plaintiff, but they must be able to see and hear Plaintiff's deposition via video conferencing from a nearby room.

#### **Conclusion**

For the reasons stated above, Plaintiff's Motion for Protective Order is GRANTED to the extent stated above. To the extent that the Motion seeks any greater relief, it is denied.

So ordered.

ENTER:

*/s/ David L. Martin*

DAVID L. MARTIN  
United States Magistrate Judge  
April 13, 2011