

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

MARK KILCLINE :
 :
 v. : C.A. No. 10-432S
 :
 EDWARD A. CHARBONEAU, :
 et al. :

MEMORANDUM AND ORDER

Before the Court is Plaintiff’s Motion for Protective Order filed pursuant to Fed. R. Civ. P. 26(c)(1)(E). (Document No. 30). In particular, Plaintiff seeks an Order which (1) excludes the individual patrol officer defendants (Silva, Urban and Gleason) from attending the depositions of each other; (2) precludes them from reading the deposition transcripts or discussing each other’s testimony until all of their depositions have been concluded; and (3) precludes them from discussing the deposition testimony of their co-defendants with counsel until after their depositions have all been concluded. *Id.* Plaintiff argues that the Order is necessary to eliminate “the risk, if not the certainty, that [the officers] will conform their testimony to one another, severely prejudicing [him] in his attempt to ascertain credible facts necessary to prosecute his civil rights claims.” (Document No. 31 at pp. 1-2). Defendants object and argue that they are parties to this case, and there is not good cause to deprive them of their right to attend case-related proceedings. (Document No. 32). A hearing on the Motion was held on April 17, 2012. For the following reasons, Plaintiff’s Motion is DENIED.

This case is assigned to District Judge Smith. In Picard v. City of Woonsocket, C.A. No. 09-318S, 2011 WL 3740673 (D.R.I. Aug. 23, 2011), Judge Smith recently denied a similar request for

a protective order¹ regarding the deposition testimony of police officer defendants in an analogous civil rights case. In his ruling, Judge Smith noted that “courts generally are loath to exclude parties from depositions in the absence of ‘compelling or exceptional circumstances.’” Id. at *3 (quoting BCI Commc’n Sys. Inc. v. Bell Atlanticom Sys., Inc., 112 F.R.D. 154, 160 (N.D. Ala. 1986)). He also noted that “[t]he weight of the authority holds that parties should not be excluded from depositions ‘because of some inchoate fear that perjury would otherwise result.’” Id. at *4 (quoting Laws v. Cleaver, No. 3:96CV92 (JBA) (JGM), 2000 WL 87160 at *1 (D. Conn. Jan. 6, 2000)). Ultimately, Judge Smith reasoned that “credibility is an issue in every case, and without a specific, particularized reason for believing that these Defendants are any more likely than the average defendants to provide perjurious testimony, the Court is not free to exclude Defendants from proceedings in a suit they have been called upon to defend.” Id. at *4.

Plaintiff here has shown no material distinction between the facts in this case and those in Picard to warrant a different result. In both cases, the plaintiffs suffered serious injuries inflicted by the defendant police officers and were subsequently unable to provide their own version of the events – Plaintiff here due to his injuries and the plaintiff in Picard due to his death. In both cases, the defendant police officers were effectively the only eyewitnesses to the alleged excessive force. In both cases, the defendant police officers had previously given statements regarding the incidents in question to the Rhode Island State Police. Finally, in both cases, the plaintiffs did not offer any

¹ In denying the request in Picard, Judge Smith vacated a prior order of Magistrate Judge Martin granting a protective order similar to that requested by Plaintiff in this case because it was “clearly erroneous.”

specific, particularized evidence of likely perjury.² Thus, based on these factual similarities, I am compelled to follow Judge Smith's recent precedent in Picard and deny Plaintiff's Motion.

Furthermore, Plaintiff's attempt to distinguish Picard based on claimed deficiencies in the questioning of the defendant police officers during interviews conducted by the Rhode Island State Police shortly after the shooting incident is unavailing. I have reviewed the transcriptions of such interviews and, although they may have been conducted differently than Plaintiff's counsel would have liked, they do not bolster Plaintiff's argument as to the risk of collusion/perjury warranting a protective order. In fact, the defendant police officers responded in detail to questions about their interactions with Plaintiff on the day of the shooting and, if anything, the existence of these prior contemporaneous statements should reduce the risk of collusion/perjury. Finally, as observed by Judge Smith in Picard, any mirrored testimony and/or conflicts between deposition testimony and prior recorded statements are simply "grist for the adversarial-system mill" and not grounds to preclude parties from attending depositions. Picard, supra at *4.

For the foregoing reasons, Plaintiff's Motion for Protective Order (Document No. 30) is DENIED.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
April 18, 2012

² Plaintiff's attempted reliance on a dispute between Defendant Silva and his supervisor which resulted in discipline (see Document No. 31-1) is not particularly compelling evidence of propensity for perjury given the relatively minor nature of the interpersonal dispute and because Defendant Silva was not a "shooter" in the incident.