STATE OF SOUTH CAROLINA)
)
COUNTY OF MARLBORO)

Gary Locklear, individually and as Personal Representative of the Estate of Roy Locklear,

Plaintiffs,

vs.

Marlboro County, Marlboro County Sheriff's Office, Marlboro County Detention Center, Dr. Charles Bush, Southern Health Partners, and South Carolina Law Enforcement Division,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 2017-CP-34-00064

ORDER

Date of Hearing: February 13, 2018
Appearances: Patrick J. McLaughlin, Attorney for Plaintiff
John E. Tyler, Attorney for Defendants Bush and Southern Health Partners

THIS MATTER is before the court on the Plaintiff's Motion to Compel Discovery Against Defendants Dr. Charles Bush and Southern Health Partners (hereinafter "Bush/SHP"). The court, having reviewed the Plaintiff's motion and exhibit packet, the Defendants' submitted affidavit and having considered arguments of counsel, grants the Plaintiff's motion.

BRIEF STATEMENT OF THE CASE

On November 5, 2014, Roy Locklear turned himself in to SLED Agent Brian Truex, who had been trying to locate Locklear and arrest him on a bench warrant issued by the Marlboro County Drug Court. The bench warrant itself documents that it was issued because Locklear had violated the terms of drug court by failing five (5) consecutive drug tests. Prior to Locklear turning himself in, Agent Truex spoke with Roy's father, Gary Locklear, who is the Plaintiff in

this case. The Plaintiff informed Agent Truex that his son was a drug addict who had struggled with drug addiction for much of his life, to the point that Roy had lost most of his teeth.

While being transported to the Marlboro County Detention Center (MCDC), Roy personally discussed his drug addiction with Agent Truex, going so far as to ask Agent Truex for assistance in getting help, leading Agent Truex to contact Will Harrington with the Marlboro County Drug Court from the vehicle. Upon arrival at MCDC, Roy was booked. Despite the information from the warrant and the information relayed by both Roy and his father, when booked, the question on the booking form dealing with whether or not Roy had "drug dependency problems" was not checked.

Within twenty-four (24) hours of being booked, Roy attempted suicide by hanging himself in his cell. After being discovered, Roy was nonresponsive and was transported to McLeod Regional Medical Center in Florence, South Carolina where he was diagnosed with severe anoxic brain injury. Roy died on November 14, 2014.

A summons and complaint was filed in this matter on or about February 24, 2017, following a Notice of Intent to file suit in a medical malpractice case that had been filed pursuant to S.C. Code §15-79-125. The factual allegations supporting the Plaintiff's causes of action deal with the acts/omissions of the Defendants in transporting, booking and screening the decedent and in failing to provide him the reasonable standard of care necessary for a drug addict in a detention center setting.

HISTORY OF THE CURRENT DISPUTE

The current dispute involves Bush/SHP's failure to adequately respond to the Plaintiff's initial discovery requests. As noted during argument, given the relatively short amount of time Roy was actually in custody at MCDC before his attempted suicide and subsequent transport to

the hospital, the allegations against Bush/SHP arise from the role they play as the "Responsible Physician" for MCDC pursuant to the *Minimum Standards for Local Detention Facilities in South Carolina.*

On or about May 3, 2017, the Plaintiff served all defense counsels with initial discovery Interrogatories and Requests for Production.

Subsequent to serving those discovery requests, Plaintiff's counsel had to contact all of the Defendants due to not timely receiving responses. Ultimately, Plaintiff's counsel had to file a motion to compel against the other Defendants in this matter, said motion being filed on or about December 5, 2017. Bush/SHP were not included in that original motion to compel because they produced discovery responses on or about November 13, 2017. However, in acknowledgement that those initial responses were not adequate, Bush/SHP's counsel contacted Plaintiff's counsel to let him know that he was in the process of trying to get the information to more fully respond.

Via email dated May 8, 2018, Plaintiff's counsel reminded Bush/SHP's counsel that the Plaintiff was owed supplemental discovery responses and that he needed that material prior to upcoming depositions scheduled for the week of June 11, 2018. Bush/SHP's counsel responded via email that he "should be able to supplement by Wednesday of next week."

On Friday May 18, 2018 (two days after the supplementation response that had been promised the week before), Bush/SHP's counsel sent an email that included a table of contents for Bush/SHP's policies and procedures manual asking Plaintiff's counsel to call to "discuss which items are necessary for this case" and informing Plaintiff's counsel for the first time that Bush/SHP would require a confidentiality agreement, which was in the process of being drafted.

Plaintiff's counsel responded to that email via a reply email on May 18, 2018, explaining why such proposed responses were inadequate, his objections to a confidentiality agreement and letting Bush/SHP's counsel know he would be available the first part of the following week to discuss. Receiving no further communication or any supplemental discovery response, the current motion to compel was filed on June 6, 2018. In that motion, the Plaintiff specifically identified thirteen (13) interrogatories (Nos. 3, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19 and 20) and five (5) requests to produce (Nos. 3, 4, 5, 9 and 11) as being inadequate/non-responsive.

On July 10, 2018, Bush/SHP supplemented discovery responses and produced a privilege log asserting that a 101-page manual titled "Policy and Procedure Manual for Health Services in Jail" was the "Confidential Work Product of Southern Health Partners, Inc."

LEGAL STANDARDS

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1) SCRCP.

The rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed. Samples v. Mitchell, 329 S.C. 105, 113-114, 495 S.E.2d 213, 215 (Ct. App. 1997) (citing Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). "The entire thrust of the discovery rules

involve full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party." Id. at 113, 217 (citing State Highway Dep't v. Booker, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973)).

ARGUMENTS OF THE PARTIES

Plaintiff's Arguments:

The Plaintiff argues that Bush/SHP has refused to answer/respond to discovery requests on three apparent grounds:

1) That Bush/SHP wants the Plaintiff to answer his own discovery requests by asking the Plaintiff to review a table of contents of their policies and procedures and then "discuss what is needed for this case." The Plaintiff argues this position violates and ignores the purpose of the South Carolina Rules of Civil Procedure;
2) That Bush/SHP only wants to produce material/documents in response to Requests to Produce under a confidentiality agreement. The Plaintiff argues this position violates and ignores the purpose of the South Carolina Rules of Civil Procedure. The Plaintiff also argues that the material/documents he seeks would be subject to production under the South Carolina Freedom of Information Act; and,
3) That Bush/SHP objects to Interrogatories No. Eighteen (18) and No. Nineteen (19) because they are "overbroad, unduly burdensome, and/or not reasonably calculated to lead to the discovery of admissible evidence." The Plaintiff argues these objections are unacceptable nonspecific, boilerplate objections that fail to properly respond and that the interrogatories are limited in scope, not unduly burdensome, reasonably calculated to lead to admissible evidence and that Bush/SHP are in the best position to be able to provide the information sought.

Bush/SHP's Arguments:

Bush/SHP argues that a confidentiality agreement and/or protective/confidentiality order is necessary because of the "confidential and proprietary" nature of the information that would be disclosed upon production of the responsive material/documents.

Bush/SHP argues that responding to Interrogatory No. 18 would be unduly burdensome.

DISCUSSION

Providing answers to interrogatories asking for specific information

The Court first addresses the issue over Bush/SHP wanting the Plaintiff to review a table of contents and then "discuss which items are needed for this case." The Court notes that subsequent to the filing of Plaintiff's motion, Bush/SHP provided supplemental discovery responses wherein they responded to specific requests in Interrogatories No. 9, 11 and 13 by identifying specific sections of the "Policy and Procedure Manual for Health Services in Jail." However, the Court is concerned that the original attempted response by Bush/SHP is a tactic being used more and more in civil litigation: parties attempting to avoid having to identify specifics in response to interrogatories.

The South Carolina Rules of Civil Procedure make clear that "each interrogatory shall be answered separately and fully in writing under oath..." Rule 33(a) SCRCP. The purpose of the requirement that each interrogatory be answered separately and fully in writing under oath is stated clearly within the rule itself: "the answers may be used to the extent permitted by the rules of evidence." Rule 33(d) SCRCP. Or as one of our Federal Court of Appeals has more plainly stated: "Answers to interrogatories are evidence." Emmel v. Coca-Cola Bottling Co. of Chicago, 95 F.3d 627, 635 (7th Cir. Ct. App. 1996).

Put simply, parties are entitled to ask opposing parties to specifically answer discovery requests. As long as those requests fall within what is allowed by the rules, the opposing party has to respond. The party requesting those responses may then use the responses against the other party. This basic concept is what makes discovery work. It is the potential exposure from inaccurate or inadequate responses later on in litigation that forces parties to respond fully and accurately to discovery requests.

I FIND that the Plaintiff was justified in refusing to answer his own interrogatories and instead filing a motion to compel that Bush/SHP answer his interrogatories.

Confidentiality/Protective Order

"What transpires in the court room is public property." Craig v. Harney, 331 U.S. 367 (1947). Rule 26(c) contemplates that, unless compelling reasons exist for imposing restrictions, all discovery will take place in an open court. *See* e.g., Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 789 (1st Cir. 1998), Cert. denied, 488 U.S. 1030 (1989); In re Agent Orange Product Liability Litigation, 82 F.2d 139, 145-146 (2nd Cir. 1987), Cert. denied, 484 U.S. 953 (1987). As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying access to the proceedings. AT&T v. Grady, 594 F.2d 594, 596 (7th Cir. 1978). "When parties 'call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.'" Co. Doe v. Pub. Citizen, 749 F.3d 246, 271 (4th Cir. Apr. 16, 2014).

"Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending…may make an order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden by expense, including […] (7) that a trade secret or other confidential research,

development, or commercial information not be disclosed or be disclosed only in a designated way." Rule 26(c) SCRCP, irrelevant portions omitted. Pursuant to the language of the rule, issuing any kind of protective order is within the Court's discretion and can only take place after a showing of good cause.

Bush/SHP bears the burden of showing good cause exists for protection under Rule 26(c). In order to meet that burden, a defendant must state particular and specific facts to justify its position. Gulf Oil Company v. Bernard 452 U.S. 89, 102 (1981); Rivera v. Nibco, Inc., 364 F.3d 1057, 1063 (9th Cir. 2004). Further, defendants must not only show that the documents at issue contain trade secrets, but must also show that the release of these documents would cause cognizable or commercial harm. United States v. Hooker Chemical and Plastic Corp., 90 F.R.D. 421 (W.D. N.Y. 1991); Grundberg v. Upjohn Company, 137 F.R.D. 372, 395 (D. Utah 1991); DDS, Inc. v. Lucas Aerospace Power Transmission Corp., 182 F.R.D. 1, 4 (1998). Defendants must demonstrate that any disclosure will work a "clearly defined and very serious injury" to the company. Waelde v. Merck, Sharp, and Dohme, 94 F.R.D. 27, 28 (E.D. Mich. 1981).

Particular and specific demonstrations of fact, as opposed to stereotypes or conclusory statements, must be demonstrated. General Dynamics Corp. v. Selb Manufacturing Corp., 41 F.2d 1204, 1212 (8th Cir. 1973), Cert. denied, 414 U.S. 1162 (1974).

The Court finds Bush/SHP fails to meet this burden. Specifically, the only support Bush/SHP offered the Court in support of their argument was the affidavit of Jennifer I. Hairsine, the President and Chief Executive Officer of Southern Health Partners, Inc. That affidavit offers only self-serving, conclusory statements such as "this policy manual is confidential and contains proprietary information." *Affidavit of Jennifer Hairsine*, ¶8. There is no attempt to explain to the Court what makes this material proprietary information; just a conclusory assertion that it is. The

affidavit contains no specific demonstrations of fact regarding any clearly defined and very serious injury Bush/SHP would suffer if not afforded the protection they seek. Rather, there is only an anecdotal assertion that "SHP has been damaged in the past by former vendors and employees, as well as a former opposing expert witness attempting to access and use SHP's policy and Procedure Manual and other proprietary information to obtain business from SHP's existing and potential clients." *Affidavit of Jennifer Hairsine*, ¶9.

Bush/SHP did not identify to the Court any specific instance of such harm occurring and ignores the fact that the affidavit itself discredits their argument. Simply put, if former vendors, employees and opposing expert witnesses already have access to this alleged proprietary material, how can it be "secret"? "Unlike other assets, the value of a trade secret hinges on its secrecy." Laffite v. Bridgestone Corp., 381 S.C. 160, 674 S.E.2d 154 (2009).

The Plaintiff effectively drove home this point during the hearing by showing the Court that he had obtained forty-nine (49) pages of the 101-page "Policy and Procedure Manual for Health Services in Jails," the alleged proprietary material for which Bush/SHP argues it needs protection. Plaintiff's counsel was able to obtain this material as it had previously been produced in other litigation without any protection. That combined with the admissions in Ms. Hairsine's own affidavit support the fact that the ship has sailed on Bush/SHP's ability to claim this material is secret. "In order to be protected, a trade secret must be the subject of reasonable efforts 'to maintain its secrecy.'" Hartstock v. Goodyear Dunlop Tires N. Am. Ltd., 2018 S.C. Lexis 44, 7-8 (S. Ct. 2018), citing S.C. Code §39-8-20(5)(a)(ii). The protection Bush/SHP asks this Court to grant now is merely an attempt to shut the barn door after the proverbial horse has already left.

In addition to asking that Bush/SHP identify specific policies and procedures that would apply to certain factual scenarios based on the factual allegations of this case, the Plaintiff also requested, through his request to produce number nine (9), all policies and procedures "that were created or are used by the Defendant pursuant to the *Minimum Standards for Local Detention Facilities in South Carolina: Type H and/or IV Facility City, County, or Regional Jail and/or Combined Jail/Prison Camp* (hereinafter "MSSC") as published by the State of South Carolina. These standards were arrived at over a thirty-three (33) year period beginning in July of 1980 and resulting in the publication of the current standards on July 26, 2013.

The MSSC were promulgated by statute. Specifically, S.C. Code §24-9-10 through §24-9-50. MSSC, §1001, p.1.

The MSSC represents the State of South Carolina's regulations "prepared and adopted for operation, administration, and design of detention facilities. These regulations shall be known as 'Minimum Standards.'" MSSC, §1002, p.4. They are subject to FOIA and readily available to the public.[1]

The MSSC requires that each facility "shall have a written manual of all policies and procedures for the operation of the facility" and that "the policies and procedures shall be made readily available to all personnel." MSSC, §1021, p.13.

The MSSC also requires that each facility "shall have written procedures for admitting new inmates which include [...] (d) Medical screening (See 2053) [...] (j) Screening interview [...] (m) Classification for assignment to a housing unit." MSSC, §1042, p.19.

[1] As the Plaintiff noted, a Google search of "sc minimum standards for detention centers" on May 30, 2018 returns links to readable/downloadable PDF versions of MSSC through the S.C. Association of Counties and the South Carolina State Library Digital Collection websites among others.

The MSSC has several sections devoted to medical issues (§§2050 – 2057) that the Plaintiff noted in his motion. For the purposes of this order, the Court highlights two particular sections:

2051 RESPONSIBLE PHYSICIAN

> Each facility shall have a written agreement or arrangement with a licensed or certified physician or medical authority for the review and approval of the facility's medical services. If the facility has a contract for inmate medical services, the medical provider will be responsible for developing all related policies and procedures. Documentation of the review and approval for medical services and for medical procedures (See Standard 2052) is maintained on file. (Revised July 2013)
> MSSC, §2051, p.51.

Bush/SHP has been identified as the "Responsible Physician" for MCDC. The Court specifically mentions §2051 because it requires documentation of the review and approval for medical services and for medical procedures and requires that documentation be "maintained on file." As the Plaintiff pointed out at the hearing, nowhere in their discovery responses does it appear that Bush/SHP has produced or even identified such documentation. If that documentation is part of the material Bush/SHP asserts is "confidential work product," that fact in and of itself shows the spurious nature with which Bush/SHP asserts such designation.

As evidenced by documents provided to the Court during the hearing, Bush/SHP labels everything "Confidential Work Product of SHP." The Plaintiff provided the Court with documents that are personal medical records for Roy Locklear that Bush/SHP labeled "Confidential Work Product of SHP." Bush/SHP obviously recognizes these documents are not confidential work product, as they already produced them. However, they are evidence of the way Bush/SHP abuses the designation.

2052 MEDICAL PROCEDURES

> Each facility or its contract medical provider shall develop and implement written standard operating procedures, which are approved by the responsible physician or medical authority, for the following:

(Revised July 2013)

(a) Receiving screening (See 2053)
(b) Health appraisal data collection (See 2056)
(c) Non-emergency medical services
(d) Emergency medical and dental services
(e) Deciding the emergency nature of illness or injury
(f) Dental screening, hygiene, examination, and treatment
(g) Provision of medical and dental prostheses
(h) First aid
(i) Chronic care
(j) Convalescent care
(k) Medical preventive maintenance
(l) Delousing
(m) Detoxification
(n) Pharmaceuticals
(o) Screening referral, and care of mentally ill and of mentally retarded inmates
(p) Notification of next of kin or legal guardian in case of serious illness, injury, or death
(q) Prohibition against conducting medical and/or pharmaceutical testing for experimental or research purposes
(r) Suicide prevention
(s) Prompt notification of parents or guardian and DJJ when a juvenile requires medical treatment of a non-routine nature.

MSSC, §2052, p.51-52.

Plaintiff essentially copied and pasted most of §2052 in to Interrogatory No. Thirteen (13), asking Bush/SHP to "please identify the written standard operating procedures that the Defendants developed and implemented for:" and then listed relevant subsections of §2052. In their supplemental discovery, Bush/SHP answered Interrogatory No. Thirteen (13), identifying specific sections of the "Policy and Procedure Manual for Health Services in Jail" that they had identified in their privilege log and for which they seek protection. Additionally, the only policies or procedures identified by Bush/SHP in their supplemental responses to the Plaintiff's requests to produce is the "Policy and Procedure Manual for Health Services in Jail." Thus, Bush/SHP's own discovery responses state that this "Policy and Procedure Manual for Health Services in Jail" was created to comply with the requirements of the MSSC.

Ms. Hairsine testified in her affidavit that "the counties with which we contract do not gain access to the policy manual, and, therefore, do not produce the manual in response to requests under FOIA." *Affidavit of Jennifer Hairsine*, ¶8(b).

As noted above, the State of South Carolina has delegated the development of certain written policies and procedures required by the MSSC to the "Responsible Physician." However, that delegation does not change the fact that each facility "shall have a written manual of all policies and procedures for the operation of the facility" and that "the policies and procedures shall be made readily available to all personnel." MSSC, §1021, p.13. That requirement for written policies and procedures that are readily available to all personnel includes any and all policies and procedures developed by a contracted medical services provider, including §2052. MSSC, §1021(b), p.13.

Bush/SHP's answer to Interrogatory No. Thirteen (13) demonstrates that their "Policy and Procedure Manual for Health Services in Jails" exists, at least in part, to meet the MSSC's requirement for a "written manual of all policies and procedures for the operation of the facility." However, at the same time, the sworn testimony they offer to the Court states that they do not allow the counties access to that manual. In having offered this testimony, Bush/SHP admits that they are violating MSSC §1021's requirement that "the policies and procedures shall be made readily available to all personnel."

At the hearing, the Plaintiff provided the Court with relevant Code sections from the South Carolina Freedom of Information Act, specifically, S.C. Code §§30-4-20, -30, -40, and -50. Plaintiff's counsel went through each code section explaining relevant language in support of the position that the policies and procedures required by the MSSC are public records under FOIA and as such should not be deemed confidential work product or trade secret.

The South Carolina Freedom of Information Act (S.C. Code §30-4-10 thru 30-4-165) mandates, upon request, the disclosure of records held by a "public body" unless the documents fall within enumerated exceptions. Burton v. York Co. Sheriff's Office, 358 S.C. 339, 347 (Ct. App. 2004). The Act goes on to enumerate matters exempt from disclosure in S.C. Code §30-4-40, of which the relevant portion to this case would be subsection (a)(1) "Trade Secrets" which the act defines as:

> Trade secrets, which are defined as unpatented, secret, commercially valuable plans, appliances, formulas, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person and which are generally recognized as confidential and work products, in whole or in part collected or produced for sale or resale, and paid subscriber information. Trade secrets also include, for those public bodies who market services or products in competition with others, feasibility, planning, and marketing studies, marine terminal service and nontariff agreements, and evaluations and other materials which contain references to potential customers, competitive information, or evaluation. S.C. Code §30-4-40(a)(1).

During the hearing, the Court specifically asked Bush/SHP to explain how the policies and procedures they were required to have, pursuant to the MSSC, fell within the definition of trade secrets pursuant to S.C. Code §30-4-40(a)(1). Bush/SHP could not offer any response other than a conclusory statement that the material was their proprietary work product.

The Court finds that policies and procedures required under the MSSC do not fall into the above definition. While Bush/SHP may not themselves be a "public body," the policies and procedures they developed and approved (as required by the MSSC for medical screening, care and classification at the Marlboro County Detention Center) are required by the MSSC to be in "the written manual of all policies and procedures for the operation of the facility" and "shall be made readily available to all personnel." MSSC, §1021, p.13.

The purpose of the MSSC requiring these policies and procedures to be in place is obvious: the policies and procedures used to screen, classify and care for persons under the control of the State are clearly a matter of great public concern and interest. If they so desire, the people of Marlboro County have the right to use FOIA to view the policies and procedures for healthcare that will applicable to those individuals providing care for the inmates being held at the County's detention center. The Court finds that this type of material fits squarely within the definition of information that is specifically designated as public information subject to FOIA as "administrative staff manuals and instructions to staff that affect a member of the public." S.C. Code §30-4-50(A)(2).

The Court notes that in her affidavit, Ms. Hairsine testifies that "SHP's sole business is jail health care services – we do not get pulled into other business lines. This allows SHP to be very familiar with state jail standards...as a basis for our policies, procedures, and operations." *Affidavit of Jennifer Hairsine*, ¶3. If that is true, then there is no excuse for Bush/SHP to not realize that the MSSC require that the policies and procedures they create/review/approve for use in South Carolina detention centers and jails must be readily available to all personnel of each facility. MSSC §1021. As such policies and procedures are used by a public body and are instructions to staff that affect a member of the public, they are public information subject to production under the South Carolina Freedom of Information Act. S.C. Code §30-4-20(c) and §30-4-50(A)(2).

The problem posed the by Bush/SHP's refusal to produce the requested discovery absent some confidentiality protection is exemplified by one particular document presented by the Plaintiff at the hearing. That document was obtained by the Plaintiff through discovery responses by Defendant Marlboro County Detention Center. It is one page, labeled "Page: 9" from a

document titled "SHP – Officer Training Manual/Information for Inmate Healthcare" and, not surprisingly, marked as being "Confidential Work Product of SHP." As explained to the Court, this document just happened to be in a folder of other material that was copied and produced to the Plaintiff in discovery.

Why is this document significant? It is significant because nowhere in Bush/SHP's discovery responses are there any references to an "Officer Training Manual/Information for Inmate Healthcare." In other words, it was nothing but dumb luck that alerted the Plaintiff to the existence of what would appear to be discovery material that is responsive to his discovery requests but not identified or produced by Bush/SHP.

The rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed. Samples v. Mitchell, 329 S.C. 105, 113-114, 495 S.E.2d 213, 215 (Ct. App. 1997) (citing Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). "The entire thrust of the discovery rules involve full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party." Id. at 113, 217 (citing State Highway Dep't v. Booker, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973)).

Parties should not have to count on luck in being able to discover evidence. That is precisely why the burden to keep discovery material secret is so high.

I FIND that Bush/SHP is not entitled to a confidentiality or protective order.

Interrogatories No. Eighteen (18) and No. Nineteen (19)

In failing to respond to Interrogatories No. Eighteen (18) and No. Nineteen (19), Bush/SHP merely inserted nonspecific, boilerplate objections stating "Defendants object to this

interrogatory as it is overbroad, unduly burdensome, and/or not reasonably calculated to lead to the discovery of admissible evidence."

"[T]he mere statement by a party that the interrogatory was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful objection to an interrogatory. On the contrary, the party resisting discovery 'must show specifically how...each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive." Curtis v. Time Warner Entm't-Advance/Newhouse P'ship, 2013 U.S. Dist. LEXIS 68115 (D.S.C. May 14, 2013), citing to Josephs v. Harris Corp., 677 F.2d 985, 992 (3d Cir. 1982).

In Interrogatory No. Eighteen (18), the Plaintiff asked for historical data concerning other incidents for persons in Bush/SHP's care that were similar to the incident involving Roy Locklear. The Plaintiff specifically limited the information sought to incidents of "attempted and/or committed suicide" and "emergency medical treatment due to substance abuse/dependency issues." The Plaintiff specifically limited the time frame to five (5) years preceding the incident with Roy Locklear through the subsequent years. The Plaintiff included subparts in the interrogatory to specifically note the information he was seeking.

"If there is an objection based upon an unduly broad scope, such as time frame or geographic location, discovery should be provided as to those matters within the scope which are not disputed. For example, if discovery is sought nationwide for a ten-year period, and the responding party objects on the ground that only a five-year period limited to activities in the State of South Carolina is appropriate, the responding party shall provide responsive discovery falling within the five-year period as to the State of South Carolina and then object to the overage." Curtis at 6.

The Court notes that despite having conversations with Plaintiff's counsel in the week leading up the hearing about whether the Plaintiff would agree to limit the request solely to MCDC (to which the Plaintiff did not agree), Bush/SHP has failed to produce even that limited response.

The Plaintiff argued, and the Court agrees, that as the entity assuming the responsibility for approving and reviewing policies and procedures for medical care within South Carolina detention facilities, the institutional knowledge Bush/SHP has regarding the effectiveness of those policies and procedures in detecting and preventing suicidal and emergency medical situations related to substance abuse is reasonably calculated to lead to admissible evidence in this case.

The Plaintiff argued, and the Court agrees, that this is the type of risk information a corporation involved in such a "highly competitive business," as Ms. Hairsine explains the provision of jail health care services to be, would likely track. If not for insurance purposes, at least for showing customers and potential customers how effective their "proprietary" policies and procedures are in relation to all the "new companies trying to enter into the market and gain market share." *Affidavit of Jennifer Hairsine*, ¶4.

Bush/SHP offered nothing more than conclusory statements as to how difficult obtaining the information may be and failed to provide any response whatsoever. As such, the court finds that Bush/SHP is to respond in full to Interrogatory No. Eighteen (18) with the caveat that they may merely provide initials instead of inmate names. This will protect the identity of the inmates while allowing the individual incidents to be identified if needed in any future reference.

As to Interrogatory No. Nineteen (19), the Plaintiff asked Bush/SHP to "please identify the person(s) responsible for training employees responsible for screening and/or booking of

inmates at the time of this incident and currently." Again, Bush/SHP initially asserted an improper nonspecific, boilerplate objection. In their supplemental responses, Bush/SHP answered "screenings and bookings are performed by employees of Marlboro County." However, the Plaintiff pointed out at the hearing that Tajuana Jacobs, the MCDC officer who booked Roy Locklear, discussed at her deposition training that they sometimes received, believed to be provided by Bush/SHP.

Plaintiff's counsel pointed out that section J-C-04 of the "Policy and Procedure Manual for Health Services in Jails" in the 49-pages of that document he had already obtained was titled "Training For Correctional Officers" and specifically discussed that the upon request, SHP would coordinate training for issues such as suicide prevention, screening techniques and recognizing chronic conditions/illnesses. The court finds that Bush/SHP needs to identify any persons they have had conduct such training and produce any materials used in any such training.

I FIND that Bush/SHP must respond in full to all the Plaintiff's interrogatories and requests to produce, including Interrogatories No. Eighteen (18) and No. Nineteen (19).

Sanctions

The selection of a sanction for discovery violations is within the trial court's discretion. The sanction should be aimed at the specific conduct of the party sanctioned and not go beyond the necessities of the situation to foreclose a decision on the merits of the case. Griffin Grading & Clearing, Inc. v. Tire Service Equip. Manufacturing Co., Inc., 334 S.C. 193,198 511 S.E.2d 716, 718 (Ct. App. 1999). In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice. Griffin at 199, 719.

An appellate court will not interfere with a trial court's decision on discovery sanctions unless the trial court abused its discretion. Clark v. Ross, 284 S.C. 543, 328 S.E.2d 91 (Ct. App. 1985). An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of the appellant, thereby amounting to an error of law. Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989).

S.C.R.C.P. Rule 37(a)(3) provides that "an evasive or incomplete answer is to be treated as a failure to answer." While Rule 37(b) provides for sanctions for failure to comply with an order of the circuit court, Rule 37(d) also provides that the same sanctions shall be available "if a party…fails to serve answers…to interrogatories submitted under Rule 33."

A failure to exercise discretion amounts to an abuse of that discretion and is an error of law. Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). Even though the imposition of sanctions is usually left to the sound discretion of the trial judge, whatever sanction the judge imposes should serve to protect the rights of discovery provided by the Rules. Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery. Samples at 114, 217.

The court finds the conduct of Bush/SHP in this discovery dispute to be abusive. Specifically, the court notes that Bush/SHP ignored their duty under the rules to either adequately respond to the Plaintiff's discovery requests or to move for protection. Despite the discussion in this order about the protection sought by Bush/SHP, the court notes they never actually moved for such protection.

"In all cases where the policy manual might be at issue, our course of dealing is to request confidentiality agreements with all counsel which limit the use of the policy manual to

the litigation in question and which require any expert who reviews the policy manual to destroy it upon completion of the litigation." *Affidavit of Jennifer Hairsine*, ¶8(d). While that may be the practice of Bush/SHP, the State of South Carolina Rules of Civil Procedure are a little more demanding. "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown..." begins Rule 26(c) SCRCP. That language is clear: a party seeking protection must ask the court for it.

Instead of seeking the protection they admittedly seek in all cases where similar discovery is requested, Bush/SHP engaged in dilatory conduct. Specifically, after acknowledging the inadequacy of their initial discovery responses, Bush/SHP made representations to the Plaintiff that more adequate responses would be forthcoming.

Some six (6) months later, after being reminded of the promised supplementation and noticed that the Plaintiff needed those supplemental responses before the depositions scheduled for the week of June 11, 2018, Bush/SHP again represented to the Plaintiff that they would be supplementing their responses the following week. Rather than supplementing as promised, Bush/SHP instead attempted to avoid actually answering interrogatories and for the first time informed the Plaintiff that he would have to enter in to a confidentiality agreement to obtain his requested discovery. The Court notes Bush/SHP offered no explanation for their delay in failing to supplement their responses as they originally represented to the Plaintiff they would do when they submitted their initial response.

As a result of this conduct, the Plaintiff had to proceed with the first round of depositions in this matter without having adequate discovery responses from Bush/SHP. At the very least, this prejudiced the Plaintiff from being able to examine Officer Jacobs adequately about training

The court finds Attorney McLaughlin's hourly rate of Four Hundred and no/100 ($400.00) Dollars per hour to be reasonable. In doing so, the Court notes it is aware of Attorney McLaughlin's reputation in the legal community and recognizes the complex nature of the present case, which is a medical malpractice case involving multiple defendants, both public and private.

Attorney McLaughlin submitted an affidavit documenting a total of eight (8) hours worked on this matter (not including time for travel and attendance at the hearing which occurred in Bennettsville, South Carolina) and Twenty-five and no/100 ($25.00) Dollars in costs for the filing fee. Attorney McLaughlin represented to the court that his affidavit was conservative in its documentation of only eight (8) hours in work on this motion. Having been provided with a twenty-one (21) page motion and an additional exhibit packet containing relevant standards, statutes, other material and seeing Attorney McLaughlin's presentation at the hearing, the court finds it likely he worked in excess of the eight (8) hours submitted on his affidavit.

The court finds that Bush/SHP must pay to Attorney McLaughlin Three Thousand Seven Hundred Fifty and no/100 ($3,750.00) Dollars for attorney's fees and costs within thirty (30) days of the date of this order.

Additionally, the court finds that Bush/SHP must respond in full to all the Plaintiff's interrogatories and requests to produce by August 17, 2018. For every day that Bush/SHP fail to respond after August 17, 2018, they will owe Plaintiff's counsel the sum of Two Hundred and no/100 ($200.00) Dollars per day.

I FIND that the Plaintiff is entitled to sanctions in the form of attorney's fees and costs as described above, as well as additional sanctions by way of the per-day fee described above for any failure respond in full by the August 17, 2018 deadline.

CONCLUSION

Based on the above, Defendants Bush/SHP are ordered to reimburse Attorney Patrick J. McLaughlin Three Thousand Seven Hundred Fifty and no/100 ($3,750.00) Dollars for attorney's fees and costs within thirty (30) days of the date of this order for violating the South Carolina Rules of Civil Procedure. Additionally, Defendants Bush/SHP are ordered to pay Two Hundred and no/100 ($200.00) Dollars per day for every day past the August 17, 2018 deadline that they fail to fully respond to the Plaintiff's interrogatories and requests to produce.

AND IT IS SO ORDERD.

July 31, 2018

Roger E. Henderson
Circuit Court Judge – 4th Circuit