

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

WXIA-TV d/b/a 11ALIVE NEWS
and ANDY PIERROTTI,

Plaintiffs,

v.

NEIL WARREN, in his official capacity as
the Cobb County Sheriff; ROBIN E.
CLEMENTS, in her official capacity as Open
Records Custodian for the Cobb County
Sheriff's Office; and NATHAN J. WADE,

Defendants.

Civil Action No.: 20105803

ORDER ON MOTION FOR INTERLOCUTORY INJUNCTION

The above-styled case came before the Court for hearing via Zoom videoconferencing, pursuant to the ongoing Declaration of Statewide Judicial Emergency, on October 12, 2020. The hearing, set by Order for Expedited Response and Hearing, was limited by notice to the issue of interlocutory injunctive relief. At the hearing, the Court heard evidence and argument. Upon careful consideration of the evidence, the record, and the law, the Court finds the following:

Plaintiffs seek records concerning three inmates that were in the custody of the Cobb County Sheriff's Office ("CCSO") at the time of their deaths. The death of Bradley Emory on March 10, 2019, was investigated by the CCSO and its Internal Affairs for criminal or unlawful activity. The investigation was closed and released to the public in late 2019/early 2020. The death of Reginald Wilson on December 29, 2018, was investigated by the CCSO and its Internal Affairs for criminal or unlawful activity. The investigation was closed and released to the public in 2019. The death of Stephanie McClendon on June 19, 2020, is still under investigation by the CCSO and its Internal Affairs for criminal or unlawful activity.

In June of 2020, numerous records were produced by the CCSO in response to discovery requests in a civil case filed by the estate of Wilson.¹ Also in June of 2020, prior to McClendon's death, Defendant Warren and his Chief Deputy Sonya Allen sought the assistance of a third party to conduct an independent review of the investigations into the deaths of Emory and Wilson, as well as any other inmate with a claim of mistreatment, to look for any conduct that would constitute criminal or unlawful activity and alleviate any concerns the public might have. This third party is a local attorney, Defendant Wade, who agreed to conduct this review *pro bono publico* and was given access to CCSO records, premises, employees, and inmates. Defendant Wade testified that, since that time, he reviewed inmate files at the CCSO and spoke with inmates and employees. He has not produced any reports or other documentation of his review, has no timetable for compiling and releasing a report, and does not possess any materials belonging to the CCSO and responsive to the Open Records Act request.

On August 24, 2020, Plaintiffs submitted an Open Records Act request to Defendant Clements, as custodian of records for the CCSO, seeking the complete criminal and internal affairs case files for the three inmates named above. On August 27, 2020, Defendant Clements responded that the requested records were exempt from disclosure at that time pursuant to O.C.G.A. §50-18-72(a)(4). Counsel for Plaintiffs contacted Defendant Clements to obtain the requested records, contending that the records had been made public and were no longer subject to the "pending investigation" exemption. Counsel for Defendants Warren and Clements responded that, although the records regarding Emory and Wilson were made public, a review of the records began in June of 2020 and the Cobb County District Attorney would be determining

¹ Although originally named as a party to the litigation, Defendant Warren was dismissed by joint motion of the parties following the production of the requested records.

whether any Grand Jury action should be taken. As to McClendon, the investigation of her death was still pending and had not been closed.

Plaintiffs filed a Verified Complaint to Enforce the Georgia Open Records Act on September 17, 2020, and a Motion for Interlocutory and Final Injunction on September 21, 2020. The pleadings assert that Defendants have wrongfully withheld information that would be subject to mandatory disclosure under the Open Records Act, as codified at O.C.G.A. § 50-18-70 *et seq.* The Court ordered that Defendants file an expedited response on the limited issue of interlocutory injunctive relief on or before October 9, 2020, in anticipation of the hearing set for October 12, 2020.

On September 28, 2020, Defendant Wade filed an Answer, citing the inapplicability to himself of any of Plaintiffs' causes of action. On October 9, 2020, Defendants Warren and Clements filed a Response in Opposition to Plaintiffs' Motion for Interlocutory Injunction. Defendants Warren and Clements argue that granting Plaintiffs' Motion and mandating disclosure of the sought-after records would contravene the purpose of interlocutory relief, which is to preserve the *status quo ante litem* until a final adjudication can be reached on the merits.

The Open Records Act provides that "[a]ll public records shall be open for personal inspection and copying, except those which by order of a court of this state or by law are specifically exempted from disclosure." O.C.G.A. § 50-18-71(a). In response to Plaintiffs' request, Defendants Warren and Clements raised the exemption from disclosure contained at O.C.G.A. § 50-18-72(a)(4): "[r]ecords of law enforcement, prosecution, or regulatory agencies in any pending investigation or prosecution of criminal or unlawful activity, other than initial police arrest reports and initial incident reports;..." This exemption contains its own caveat, however, and provides that an investigation or prosecution that has become final or otherwise terminated

shall no longer be deemed “pending”. Id. At that point, the previously exempt records would be subject to disclosure.

The law recognizes the need for a strong “pending investigation” exemption. Materials “made and maintained in the course of a pending investigation should not in most instances, in the public interest, be available for inspection by the public.” Unified Gov’t v. Athens Newspapers, LLC, 284 Ga. 192, 194 (2008). The investigation cannot go on indefinitely; however, “a seemingly inactive investigation which has not yet resulted in a prosecution logically ‘remains undecided’ and is therefore ‘pending’ until it is concluded and the file closed.” Id. at 196.

The Court first addresses Plaintiffs’ request that the action be advanced to a trial on the merits and that permanent relief be entered. Under certain circumstances, a trial court can order, either before or after beginning an interlocutory hearing, that the action be tried on the merits and transformed into a final hearing. O.C.G.A. § 9-11-65(a)(2). “[T]he court’s authority to so consolidate is ‘tempered by the due process principle that fair notice and an opportunity to be heard must be given the litigants before the disposition of a case on the merits.’” McHugh Fuller Law Group, PLLC v. PruittHealth-Toccoa, LLC, 297 Ga. 94, 96 (2015) (citations omitted). Absent notice, the court can only go forward with disposition on the merits “where there is no objection or where the parties have acquiesced.” Barnes v. Channel, 303 Ga. 88, 93 (2018). In the matter pending, the Court’s notice indicated that only the issue of interlocutory relief would be considered, due to the expedited nature of the responsive pleadings and hearing. The Court did not advise Defendants that the Court would go forward with a final trial on the merits and Defendants did not acquiesce to such a disposition. As such, the Court is limited to interlocutory relief.

“Although an interlocutory injunction is an extraordinary remedy, and the power to grant it must be prudently and cautiously exercised, the trial court is vested with broad discretion in making that decision.” Western Sky Financial, LLC v. State of Ga., 300 Ga. 340, 352 (2016). The trial court must answer four questions: (1) is there a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) does the threatened injury to the moving party outweigh the threat of harm to the party being enjoined; (3) is there a substantial likelihood that the moving party will prevail on the merits at trial; and (4) does granting the interlocutory injunction disserve the public interest? Id. at 352-353. The ultimate purpose of an interlocutory injunction is to maintain the *status quo ante litem* until the action can be adjudicated on the merits. India-American Cultural Ass'n v. iLink Professionals, Inc., 296 Ga. 668, 670 (2015). It is essential that the court ascertain the *status quo ante litem* based upon the totality of evidence before it at the time of hearing. Id.

The Court heard evidence from Plaintiffs and Defendant Wade, and Defendants Warren and Clements presented the affidavit of Chief Deputy Allen. At this point, the Court cannot determine whether an investigation into criminal or unlawful activity is ongoing with respect to the deaths of Wilson and Emory. This is what remains to be determined at final hearing on the merits. Based upon the evidence presented, the Court finds that in order to maintain the *status quo ante litem*, Defendants Warren and Clements should be required to release any records previously released to the public. There is little threat of irreparable injury to the moving party; however, the threat of injury to the movants outweighs the threat of harm to Defendants, there is a substantial likelihood of success on the merits as to these records, and there is a public interest in both protecting and releasing the information. It is therefore ORDERED that the plaintiffs' Motion for Interlocutory Injunction is **GRANTED** as to those records previously released to the public. Any records relating to the investigation still pending regarding McClendon, as well as

any records regarding Wilson or Emory that may have been developed or created since the previous release of information, shall remain exempt from disclosure until a final ruling from this Court.

The Court also finds that it is proper to advance the trial to a final hearing on the merits. Accordingly, the Court is specially setting this matter for final hearing on **Tuesday, October 27, 2020, at 1:30 pm**. The parties will be notified by separate Rule Nisi.

The Court further finds that, although Defendant Wade would be a witness in this cause of action, there is no evidence that Defendant Wade possesses any documents or other materials subject to the Open Records Act request. Upon oral motion of Defendant Wade, and after hearing testimony, it is ORDERED that Counts Two and Three as to Defendant Wade are **DISMISSED** without prejudice.

SO ORDERED, this 14 day of OCT. 2020.

A handwritten signature in black ink, appearing to read "A. Gregory Poole", written over a horizontal line.

A. GREGORY POOLE
Judge, Superior Court
Cobb Judicial Circuit

CERTIFICATE OF SERVICE

This is to certify that I have this day served the parties in the foregoing matter with a copy of the **ORDER ON MOTION FOR INTERLOCUTORY INJUNCTION** via PeachCourt electronic service and by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon, as follows:

Ian Byrnside, Esquire
S. Derek Bauer, Esquire
Erin Morrissey Victoria, Esquire
Baker & Hotstetler, LLP
1170 Peachtree Street, NE, #2400
Atlanta, Georgia 30309
ibyrnside@bakerlaw.com
dbauer@bakerlaw.com
evictoria@bakerlaw.com

H. William Rowling, County Attorney
Lauren S. Bruce, Assistant County Attorney
Cobb County Attorney's Office
100 Cherokee Street, #350
Marietta, Georgia 30090
h.william.rowling@cobbcounty.org
lauren.bruce@cobbcounty.org

Nathan Wade, Esquire
The WB Firm
2000 Powers Ferry Road
Marietta, Georgia 30067
nathan@thewbcfirm.com
nathanwade@lawyer.com

This 14th day of October, 2020.



Tracie Keeton
Judicial Administrative Specialist to:
A. Gregory Poole
Judge, Superior Court
Cobb Judicial Circuit