

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

MARY TROUPE, et al.

PLAINTIFFS

VS.

CIVIL ACTION NO. 3:10-cv-153-HTW-MTP

HALEY BARBOUR, et al.

DEFENDANTS

RULE 72(a) APPEAL OF MAGISTRATE JUDGE'S ORDER [DOC. NO. 110]

Pursuant to Federal Rule of Civil Procedure 72(a) and Local Rule 72(a)(1), Gannett River States Publishing Corporation d/b/a The Clarion-Ledger (the "Clarion Ledger") appeals the Magistrate Judge's October 19, 2016 "Order Denying [92] Motion to Vacate" [Doc. No. 110]. In support of its appeal, the Clarion Ledger states the following:

INTRODUCTION

The Magistrate Judge's Order denying the Clarion Ledger's Renewed Motion to Vacate the Protective Order covering Technical Assistance Collaborative's ("TAC") report on Mississippi's existing mental health services (the "TAC Report") is clearly erroneous and contrary to law. Indeed, the Magistrate Judge cites the public's and parties' interest in the settlement of this action as the basis for restricting public access to the TAC Report. However, the parties have concluded settlement negotiations in this matter, and the Plaintiffs, who support the Clarion Ledger's request for the TAC Report to be made public, have stated that "further [settlement] discussions are not anticipated at this juncture." Thus, the recommendations of TAC remain unknown to the public five years after the Report was rendered.

Furthermore, the State paid for the TAC Report with taxpayer dollars, used Mississippi citizens in its preparation, and promised to make it public. Despite these facts and the fact that it

made the other report prepared by TAC on the State's housing program public, the State moved for a Protective Order over the TAC Report at issue here only after the State learned of its contents. The State's after-the-fact "reliance" on the Protective Order is not a justification for keeping the TAC Report—a document of significant public interest—confidential.

For these reasons, which are more fully discussed below, in the Clarion Ledger's briefs in support of its original and renewed Motions to Vacate, and in the Plaintiffs' Response in Support of the Clarion Ledger's Renewed Motion to Vacate, the Clarion Ledger respectfully requests this Court to set aside the Magistrate Judge's Order and vacate the Protective Order covering the TAC Report.

FACTS

In December 2011, the United States Department of Justice's found that the State had violated the Americans with Disabilities Act with regard to its services and programs for persons with mental illness or developmental disabilities. [Doc. No. 48-1]. As a result of these findings and the DOJ's threat to bring an action against the State, the State agreed to engage national experts to assess its current services and provide technical assistance regarding implementation of expanded services. [Doc. No. 71-2].

In May 2014, the State engaged TAC to (1) assess and make recommendations for permanent supported housing, and (2) evaluate and provide recommendations and technical assistance regarding the State's current services and programs which are at issue in this litigation. *Id.* Following these assessments, the State published TAC's report on housing, but withheld from publication the TAC Report on the State's current services and programs. *See* <http://www.dmh.ms.gov/wp-content/uploads/2014/10/A-Statewide-Approach-for-Integrated-Supportive-Housing-in-Mississippi3.pdf>.

It is undisputed that the TAC Report was paid for with taxpayer money. [Doc. No. 71-3]. Furthermore, it is undisputed that it was understood by the organizations and families who participated in the assessment for the TAC Report that the State would make the TAC Report public. *Id.*; *see also* [Doc. No. 71-4] (“As one of the families who volunteered information for this study, I can assure you I was told many times the report would be available to the public,” said Ramona Russum of Beaumont.”).¹ It is also undisputed that TAC itself understood that the State would make the TAC Report public. *Id.* (“[TAC researcher Suzanne] Fields said she only recently learned the Department of Mental Health decided to withhold the report, which was delivered to the agency March 6. ‘It was our understanding that the children’s behavioral health assessment would be made publicly available,’ she said.”).

Nevertheless, the State refused the Clarion Ledger’s public records request for the TAC Report, forcing the Clarion Ledger to file a complaint to compel public access to records in the Chancery Court of Hinds County, Mississippi. [Doc. No. 71-1]. Before it filed and served its responsive pleading to the Clarion Ledger’s complaint, the State moved for and secured a Protective Order from this Court covering the TAC Report. [Doc. Nos. 68 & 70]. The State did not provide notice of its motion or the hearing on its motion to the Clarion Ledger until after this Court had already entered the Protective Order, thereby foreclosing the Clarion Ledger’s ability to oppose the Protective Order prior to its entry.

The Clarion Ledger moved to intervene and vacate the Protective Order on June 24, 2015. [Doc. Nos. 71 & 72]. On August 28, 2015, the Magistrate Judge allowed the Clarion Ledger to intervene in this action, finding that all of the requirements under Fed. R. Civ. P. 24(a)(2) had been met. [Doc. No. 77]. However, citing the ongoing settlement negotiations

¹ This article may also be found on the Clarion Ledger’s website at <http://www.clarionledger.com/story/news/2015/03/26/new-questions-dmh-study-withheld/70495564/>.

between the parties to this action, the Magistrate Judge denied the Clarion Ledger's Motion to Vacate the Protective Order to allow the public access to the TAC Report. *Id.* The Magistrate Judge's ruling was "without prejudice to the Clarion Ledger's right to request the Court to vacate or modify the Protective Order [70] once settlement negotiations are concluded." *Id.*

On December 17, 2015, the Court issued a minute entry for proceedings before Judge Wingate stating that the parties' settlement proceedings concluded and the case did not settle. Additionally, the Plaintiffs filed a Notice of Termination of Settlement Negotiations Between Plaintiffs and the United States and Defendants [Doc. No. 82]. Based on these events, and the Magistrate Judge's previous ruling that the Clarion Ledger could renew its request once settlement negotiations concluded, the Clarion Ledger again requested the State to provide it with a copy of the TAC Report. [Doc. No. 92-1]. The State ignored the request. Accordingly, the Clarion Ledger filed its Renewed Motion to Vacate the Protective Order. [Doc. Nos. 92 & 93].

Plaintiffs supported the Clarion Ledger's Renewed Motion to Vacate explaining that "[t]he original rationale that favored the imposition of a protective order – settlement negotiations between the parties – is no longer applicable due to the termination of settlement negotiations." [Doc. No. 96]. In fact, the Plaintiffs have indicated to the Court that "further [settlement] discussions are not anticipated." [Doc. No. 88]. Furthermore, the DOJ did not oppose the Clarion Ledger's Renewed Motion to Vacate and in fact filed its own action against the State following the breakdown of settlement negotiations regarding its own claims against the State.

Despite the conclusion of settlement negotiations in this matter, the dim prospects for future negotiations, and the Plaintiffs' support for allowing the public to access the TAC Report, the Magistrate Judge denied the Clarion Ledger's Renewed Motion. [Doc. No. 110]. The Clarion

Ledger now files this timely objection to the Magistrate Judge's Order and requests that this Court vacate the Protective Order and allow the public access to the TAC Report.

ARGUMENT

Rule 72(a) of the Federal Rules of Civil Procedure provides that the district judge "must consider timely objections and modify or set aside any portion of the [magistrate judge's] order that is clearly erroneous or is contrary to law." The magistrate judge's ruling must be set aside as clear error if the district court is left with the definite and firm conviction that a mistake has been made. As explained below, the Magistrate Judge made a mistake in denying the Clarion Ledger's Renewed Motion to Vacate, and his Order should therefore be set aside.

I. SETTLEMENT NEGOTIATIONS HAVE CONCLUDED AND FUTURE SETTLEMENT NEGOTIATIONS ARE NOT ANTICIPATED.

In both of its Orders denying the Clarion Ledger's original and renewed Motions to Vacate, the Magistrate Judge acknowledged that the TAC Report was of public interest, which weighed in favor of allowing the public to access it. [Doc. Nos. 77 & 110]. However, in the Order denying the Clarion Ledger's original Motion to Vacate, the Magistrate Judge reasoned that the parties' ongoing settlement negotiations outweighed the public's interest, and refused to vacate the Protective Order at that time. [Doc. No. 77]. The Magistrate Judge expressly indicated that the Clarion Ledger could renew its request when the settlement negotiations concluded. *Id.* at 8-9. Accordingly, the Clarion Ledger renewed its Motion when settlement negotiations terminated.

Given the breakdown of settlement negotiations and the length of time the State has had to resolve these matters with the Plaintiffs and the DOJ, the prospect of settlement of either case clearly was and is dim whether the TAC Report remains confidential or not. Indeed, neither the Plaintiffs nor the DOJ objected to the Clarion Ledger's renewed request for disclosure of the

TAC Report. In fact, the Plaintiffs support its disclosure because the settlement negotiations have concluded and they do not anticipate future negotiations. [Doc. Nos. 88 & 96]. Nevertheless, the Magistrate held that the public nature of the TAC Report was outweighed still by the prospect of settlement. [Doc. No. 110 at 6].

“District courts should not rely on the general interest in encouraging settlement, and should require a particularized showing of the need for confidentiality in reaching a settlement.” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994) (citing *Bank of Am. Nat'l Trust and Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 346 (3d Cir. 1986) (requiring particularized showing of need for secrecy to further settlement in a right of access doctrine case)).

Beyond its empty threat that “it will have no incentive to explore any future settlement discussions” if the TAC Report is released, the State has failed to articulate *why* the confidentiality of the TAC Report would facilitate settlement. [Doc. No. 98 at 16]. This is surely because whatever value the TAC Report might have had as a tool to facilitate settlement is now at an end. Both sides are totally familiar with its contents, exhaustive discussions were had, those discussions have been terminated and further discussions are not anticipated. A particularized need for confidentiality of the TAC Report has not been shown.

Nevertheless, even if the State had shown a particularized need for confidentiality, the interest in encouraging settlement should only be one factor to consider because:

settlements will be entered into in most cases whether or not confidentiality can be maintained. The parties might prefer to have confidentiality, but this does not mean that they would not settle otherwise. For one thing, if the case goes to trial, even more is likely to be disclosed than if the public has access to pretrial materials.

Pansy, 23 F.3d at 788 (quoting *United States v. Kentucky Utils. Co.*, 124 F.R.D. 146, 153 (E.D. Ky. 1989), *rev'd*, 927 F.2d 252 (6th Cir. 1991)). Thus, although unlikely, the fact that settlement could occur in the future does not alone mandate maintaining the Protective Order. The interest in the unlikely potential settlement of this matter therefore does not justify restricting the public's access to the TAC Report.

II. THE STATE'S "RELIANCE" ON THE PROTECTIVE ORDER DOES NOT JUSTIFY KEEPING THE TAC REPORT CONFIDENTIAL.

The Magistrate Judge also reasoned that the State's "reliance" on the Protective Order was a justification to keep the TAC Report confidential. [Doc. 110 at 6-7]. However, it is undisputed that TAC and the organizations and families who participated in the assessment for the TAC Report understood and believed that the State would make the TAC Report public. [Doc. No. 71-3]; *see also* [Doc. No. 71-4]. Furthermore, the State published the report prepared by TAC on the State's housing program for individuals with mental illness that was also prepared as a result of the DOJ's investigation, thereby signaling that both Reports were public records. Finally, it was only after the State learned of the TAC Report's contents that it obtained a Protective Order to prohibit the public from accessing it.²

"The parties' reliance on an order . . . should not be outcome determinative '[E]ven though the parties to a settlement agreement have acted in reliance upon that order, they [do] so with knowledge that under some circumstances such orders may be modified by the court.'" *Pansy*, 23 F.3d at 790 (quoting *City of Hartford v. Chase*, 942 F.2d 130, 138 (2d Cir. 1991))

² The State did not provide notice of its motion for protective order or the hearing on its motion to the Clarion Ledger until after this Court had already entered the Protective Order. Thus, the State foreclosed the Clarion Ledger's ability to oppose the Protective Order prior to its entry. Likely because the Clarion Ledger was not able to object to the entry of the Order, the Court did not articulate its findings supporting the Protective Order and "did not balance the competing public and privacy interests before entering the Order" as was required. *Pansy*, 23 F.3d at 786. Thus, the Protective Order was improvidently granted in the first place. "[N]o amount of . . . reliance thereon could substantiate an unquestioning adherence to an order improvidently granted. . . . [i]mprovidence in the granting of a protective order is [a] justification for lifting or modifying the order." *Id.* at 790 (internal citations and quotations omitted).

(Pratt, J., concurring)). Furthermore, “[t]he extent to which a party can rely on a protective order should depend on the extent to which the order induced the party to allow discovery or to settle the case,” or in this case, the extent to which the State engaged TAC to create the TAC Report.

Id.

Any “reliance” the State placed on the TAC Report being confidential was clearly after it learned of the contents of the Report. Its statement that it “never would have agreed to engage TAC to create the TAC Report, or to act as an intermediary to facilitate settlement negotiations regarding its findings, if the expert report would not be treated as confidential” is disingenuous given its prior and subsequent actions to receiving the Report, *i.e.*, its prior indication that the Report would be made public, its prior publication of the housing report, and its subsequent securing of the Protective Order only after learning of the contents of the Report. The State’s after-the-fact reliance on the confidentiality of the Report therefore does not justify restricting the public’s access to the TAC Report.

CONCLUSION

The Magistrate Judge’s Order denying the Clarion Ledger’s Renewed Motion to Vacate the Protective Order is clearly erroneous and contrary to law. The prospect of settlement of this litigation is dim whether the TAC Report remains confidential or not. Furthermore, the State’s actions indicated that the TAC Report would be made public and its “reliance” on the confidentiality of the TAC Report was only after it learned of the contents of the Report. Thus, these factors do not outweigh the public’s significant interest in the TAC Report. For the foregoing reasons, the reasons stated in the Clarion Ledger’s briefs in support of its original and renewed Motions to Vacate, and the reasons stated in the Plaintiffs’ Response in Support of the Clarion Ledger’s Renewed Motion to Vacate, the Clarion Ledger respectfully requests this Court

to set aside the Magistrate Judge's Order and vacate the Protective Order covering the TAC Report.

Dated: November 1, 2016.

Respectfully submitted,

**GANNETT RIVER STATES PUBLISHING
CORPORATION D/B/A THE CLARION-LEDGER**

By: /s/ Leonard Van Slyke

One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Leonard Van Slyke, do hereby certify that I electronically filed today the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to all attorneys of record in this matter.

Dated: November 1, 2016.

/s/ Leonard Van Slyke

Leonard Van Slyke