

**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-00153-HTW-LRA

HALEY BARBOUR, et al.

DEFENDANTS

RESPONSE TO RULE 72(a) APPEAL OF MAGISTRATE JUDGE'S ORDER

Introduction

The Rule 72(a) Appeal of Magistrate Judge's Order (Dkt. 114) filed by Gannett River States Publishing Corporation d/b/a/ The Clarion-Ledger (The Clarion Ledger) should be denied.

In May 2015, Magistrate Judge Parker entered a Protective Order, which found that the March 2015 TAC Mississippi Children's Behavioral Health Assessment (TAC Report) shall not be disclosed by any of the parties to the settlement negotiations in this case to anyone who is not a party to those negotiations. (Dkt. 70). Magistrate Judge Parker subsequently permitted The Clarion Ledger to intervene to challenge the Protective Order, but denied The Clarion Ledger's request to vacate the Protective Order. (Dkt. 77).

On August 3, 2016, The Clarion Ledger filed a Renewed Motion to Vacate Protective Order. Magistrate Judge Parker properly denied The Clarion Ledger's Renewed Motion. (Dkt. 110). The Clarion Ledger filed a Rule 72(a) Appeal of the Order denying The Clarion Ledger's Renewed Motion. (Dkt. 114).

A ruling of a magistrate judge will not be reversed, vacated, or modified on appeal unless the district judge determines that the magistrate judge's findings of fact are clearly erroneous, or that the magistrate judge's ruling is clearly erroneous or contrary to law. The Clarion Ledger does not claim that Magistrate Judge Parker's findings of fact are clearly erroneous, and it has failed to show that his ruling is clearly erroneous or contrary to law.

The bottom line is that Magistrate Judge Parker reached a conclusion that The Clarion Ledger does not like *after analyzing the issue under the legal standard advanced by The Clarion Ledger*. The Clarion Ledger's disagreement with Magistrate Judge Parker's conclusion hardly renders his Order (Dkt. 110) clearly erroneous or contrary to law. The Clarion Ledger's Rule 72(a) Appeal should be denied.

I. Standard of Review.

Local Rule 72(a)(1)(B) provides that “[n]o ruling of a magistrate judge in which he or she is empowered to hear and determine will be reversed, vacated, or modified on appeal unless the district judge determines that the magistrate judge’s findings of fact are clearly erroneous, or that the magistrate judge’s ruling is clearly erroneous or contrary to law.” *Accord, TV-3, Inc. v. Royal Ins. Co. of America*, 194 F.R.D. 585, 586 (Miss. 2000) (district court will uphold a magistrate judge’s order unless the objecting party shows that the order is clearly erroneous or contrary to law). Here, The Clarion Ledger does not allege that Magistrate Judge Parker’s findings of fact are clearly erroneous, and it has failed to show that his ruling is clearly erroneous or contrary to law.

II. October 2016 Order Is Not Clearly Erroneous Or Contrary To Law.

The Clarion Ledger contends that the October 2016 Order¹ is clearly erroneous or contrary to law because Magistrate Judge Parker did not use the analysis set forth in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3rd Cir. 1994). But Magistrate Judge Parker *did* use the analysis set forth in *Pansy*. The October 2016 Order cites *Pansy* three times. (Dkt. 110 at 4). The Clarion Ledger’s true complaint is that Magistrate Judge Parker reached a conclusion that

¹ FRCP 72(a) provides that “[a] party may not assign as error a defect in the order not timely objected to.” The Intervenor failed to object to appeal the August 2015 Order under Rule 72(a). Therefore, the Intervenor has waived its objections to the August 2015 Order. The August 2015 was without prejudice to the Intervenor’s “right to request the Court to vacate or modify the Protective Order [70] once settlement negotiations are concluded.” (Dkt. 77 at 2-3). The Intervenor can seek modification of the Protective Order, but it waived its objections to the findings of fact and rulings in the August 2015 Order by failing to appeal that Order.

The Clarion Ledger does not like after analyzing the issue under the legal standard favored by The Clarion Ledger.

Magistrate Judge Parker found that although the TAC report is eligible for protection as a confidential document, the court retains the power to modify a confidentiality order. (Dkt. 110 at 4). Turning to *Pansy*, Magistrate Judge Parker found that “[t]he party seeking to modify the order of confidentiality must come forward with a reason to modify the order. Once that is done, the court should then balance the interests, including the reliance by the original parties to the order, to determine whether good cause still exists for the order.” (Dkt. 110 at 4, *citing Pansy*, 23 F.3d at 790). As suggested by *Pansy*, Magistrate Judge Parker proceeded to “balance the interests” by weighing “the need for confidentiality of settlement related documents against the public’s right of access.” (Dkt. 110 at 4).

Magistrate Judge Parker explained his balancing of the interests as follows: “The Court previously held that the public has an interest in the TAC Report considering the fact that this action involves public entities such as the Mississippi Department of Mental Health and the fact that the TAC Report involves matters of legitimate public concern ... The Court, however, held that the public’s interest in the TAC Report was diminished by the fact that the report was created and exchanged for purposes of settlement.” (Dkt. 110 at 4-5) (internal citations omitted).

“Next, the Court determined that the interest in the confidentiality of settlement related documents should be balanced against the public’s interest in access to the TAC Report. The Court focused on the public’s interest in the settlement of this action.” (Dkt. 110 at 5) (internal citations omitted). After balancing these interests, the Court held that the value of disclosing the TAC Report was outweighed by the strong public interest in, and policy objectives furthered by, promoting settlement. (Dkt. 110 at 5) (citations omitted). “The Court finds that the parties should be given a reasonable opportunity to settle this case.” (Dkt. 110 at 5).

Magistrate Judge Parker then addressed The Clarion Ledger's claim in its Renewed Motion (Dkt. 92) and Brief (Dkt. 93) that because settlement negotiations have concluded, the public's interest in the TAC Report now outweighs the parties' interest in resolving this matter.² (Dkt. 110 at 6). The Clarion Ledger "describes the then on-going settlement negotiations as the only factor weighing in favor of maintaining the protective order." (Dkt. 100 at 6). Magistrate Judge Parker noted the mischaracterization in this claim: "A more accurate description of the Court's prior ruling ... would be that settlement negotiations were a factor which, alone, was sufficient to outweigh the public's interest in access to the TAC Report." (Dkt. 110 at 6).

Magistrate Judge Parker fully considered that the "parties apparently are not actively negotiating," but correctly found that "The Clarion Ledger has failed to establish that at this point the public's diminished interest in the report outweighs the interest in the confidentiality of settlement related documents." (Dkt. 110 at 6).

The Clarion Ledger also faulted Magistrate Judge Parker's reasoning that the State's reliance on the Protective Order was justification to keep the TAC Report confidential. (Dkt. 114 at 7). Magistrate Judge Parker committed no error in this regard. He correctly found that "the State's reliance on the Protective Order and the confidential nature of the settlement related documents also weighs against the public's diminished interest in the report. The State moved for a protective order specifically addressing the TAC Report prior to releasing the report to Plaintiff. The State points out 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.'" (Dkt. 110 at 6-7) (internal citations omitted).

² The Clarion Ledger claims that Plaintiffs agree that settlement negotiations have terminated at this time (Dkt. 114 at 4), but Plaintiffs' position is more nuanced than the Clarion Ledger represents. Plaintiffs have told the Court the following: "Several motions remain pending before this Court, and Plaintiffs submit that the resolution of these motions and the initiation of discovery are necessary before the parties can revisit settlement negotiations." (Dkt. 82 at 4-5). Plaintiffs plainly contemplate revisiting settlement negotiations.

Although The Clarion Ledger dismisses the State's position as "disingenuous" (Dkt. 114 at 8), Magistrate Judge Parker disagreed, and found the State's position credible.³ (Dkt. 110 at 7). "Where there are two plausible views, a decision cannot be 'clearly erroneous.'" *Murphy v. Lockhart*, 826 F.Supp.2d 1016, 1026 (E.D. Mich. 2011) (citation omitted). Even assuming for the sake of argument that The Clarion Ledger's view is plausible, the fact that The Clarion Ledger disagrees with Magistrate Judge Parker on this point hardly makes his Order clearly erroneous or contrary to law.

"Under a clearly erroneous standard, a district court can reverse a magistrate judge's order only if the court 'is left with the definite and firm conviction that a mistake has been committed.'" *LaVigna v. State Farm Mut. Auto. Ins. Co.*, 736 F.Supp.2d 504, 509-10 (N.D.N.Y. 2010) (citations omitted). The Clarion Ledger failed to satisfy the clearly erroneous standard. "Under a contrary to law standard, a district court can reverse a magistrate judge's order only if the order fails to apply the relevant law." *Id.* at 510 (citations omitted). Magistrate Judge Parker applied the relevant law that The Clarion Ledger asked him to apply – *i.e.*, *Pansy*. He also correctly applied Local Rule 83.7(j), *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853 (2 Cir. 1988), and *Landco Equity Partners, LLC v. City of Colorado Springs*, 259 F.R.D. 510, 513-14 (D. Colo. 2009). (Dkt. 110 at 3-7).

Relief Requested

For these reasons, The Clarion Ledgers' Rule 72(a) Appeal of Magistrate Judge's order (Dkt. 114) should be denied.

³ The Clarion Ledger also claims that "[a]ny 'reliance' the State placed on the TAC Report being confidential was clearly after it learned of the contents of the Report." (Dkt. 114 at 8). The August 29, 2014 letter agreement between the Department of Justice and the State says otherwise: "Documents created for use in the parties negotiations, including reports provided by or to TAC ... are not admissible as evidence because they are confidential ..." (Dkt. 71-2 at 6). In August 2014, the DOJ and the State agreed that any reports provided by TAC were confidential. The TAC Report at issue was completed in March 2015. (Dkt. 110 at 2). The State plainly relied on the TAC Report being confidential before work on the TAC Report was begun.

THIS the 8th day of November, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 8, 2016, I electronically filed this document with the Clerk of the Court using the ECF system, which sent notification of such filing to all ECF counsel of record in this action.

/s/ Harold Pizzetta, III
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