

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

**MARY TROUPE, et al.**

**PLAINTIFF**

**V.**

**CIVIL ACTION NO.: 3:10cv00153-HTW-MTP**

**HALEY BARBOUR, et al.**

**DEFENDANT**

**CONSOLIDATED WITH**

**UNITED STATES OF AMERICA**

**V.**

**THE STATE OF MISSISSIPPI**

**STATE OF MISSISSIPPI'S OBJECTIONS  
TO IN CAMERA REVIEW OF TAC REPORT**

**Introduction**

The State of Mississippi requests that the Court deny the *Troupe* Plaintiffs' post-appeal oral motion that the Court conduct an in camera review of the March 2015 TAC Mississippi Children's Behavioral Health Assessment (TAC Report) for the following reasons:

1. Pursuant to Local Rule 83.7 and express agreement of the parties, the TAC Report is a confidential settlement document and not admissible in evidence.
2. Any request for an in camera review of the TAC Report was waived because no party requested that the Magistrate Judge conduct an in camera review, and no party assigned the failure to conduct an in camera review as error in this Rule 72 appeal.
3. If the District Judge conducts an in camera review of the TAC Report he will be changing the record on appeal because the Magistrate Judge did not conduct an in camera review. The District Judge should review the same record that the Magistrate Judge reviewed.

For these reasons, the *Troupe* Plaintiffs' oral motion for in camera review should be denied.

**I. Procedural History Of Rule 72 Appeal.**

This matter is before the Court as an FRCP 72 appeal of a Magistrate Judge's order. In May 2015, Magistrate Judge Parker entered a Protective Order, which found that the 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).<sup>1</sup> The Clarion Ledger filed a Rule 72(a) Appeal of the Order denying The Clarion Ledger's Renewed Motion. (Dkt. 114).

At a hearing on The Clarion Ledger's Rule 72 appeal on February 10, 2017, the *Troupe* Plaintiffs made an oral motion that the Court conduct an in camera review of the TAC Report. Prior to that time, neither the *Troupe* Plaintiffs nor The Clarion Ledger requested an in camera review.

**II. Pursuant to Local Rule 83.7 And Express Agreement, The TAC Report Is A Confidential Settlement Document And Not Admissible In Evidence.**

The agreement that led to the creation of the TAC Report is memorialized in a letter agreement August 29, 2014, between the State of Mississippi and the United States. (Dkt. 71-2). The letter agreement provides in pertinent part as follows: "Documents created for use in the

---

<sup>1</sup> Magistrate Judge Parker correctly concluded that a break in settlement negotiations does not waive the confidentiality protections for settlement negotiations and documents created for the purposes of those settlement negotiations. (Dkt. 110 at 6-7). The appeal of the Magistrate Judge's ruling is not well taken and a thorough discussion of the well-settled law regarding the confidentiality of settlement documents was set forth in the State's briefing to the Magistrate Judge. (Dkt. 68, 73, 74, 97, 98, and 122). Although the *Troupe* Plaintiffs and DOJ temporarily ended the comprehensive settlement negotiations (Dkt. 82, p. 4), additional comprehensive settlement negotiations will certainly occur in this matter. It is not unusual that the negotiation positions of the parties will change as litigation progresses from its early stages. The State fully expects that three-party, comprehensive settlement negotiations will resume given the change in leadership at DOJ and in light of the limited amended complaint now advanced by the *Troupe* Plaintiffs.

parties' negotiations, including reports provided by or to TAC, and statements made between the parties and/or TAC regarding this matter *are not admissible as evidence because they are confidential and protected by Rule 408 of the Federal Rules of Evidence* unless the State and the Department of Justice agree otherwise.”<sup>2</sup> (Dkt. 71-2 at p. 6) (emphasis added). This is consistent with Local Rule 837(j)(1) & (2), which provides that “confidential information or data related to a mediation or settlement conference” are confidential and should not be disclosed.

As Judge Parker correctly noted, the State “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). An in camera review violates the agreements to keep the TAC Report confidential, and violates the prohibition against admitting the TAC Report into evidence.

### **III. Any Request For An In Camera Review Is Waived.**

An in camera review is not a part of this Rule 72 appeal. The *Troupe* Plaintiffs did not file or join The Clarion Ledger's Rule 72 Appeal. Prior to February 10, 2017, the *Troupe* Plaintiffs never asked the Court to conduct an in camera review of the TAC Report. Nor did the Clarion Ledger. Neither the *Troupe* Plaintiffs nor The Clarion Ledger have alleged that Judge Parker erred by not conducting an in camera review of the TAC Report. There is not one word in the Rule 72 appeal (Dkt. 114) about an in camera review.

FRCP 72(a) provides that “[a] party may not assign as error a defect in the order not timely objected to.” The *Troupe* Plaintiffs and The Clarion Ledger waived any right to seek an in camera review of the TAC Report by (i) never asking the Magistrate Judge to conduct an in camera review, and (ii) never contending in this Rule 72 appeal that the Magistrate Judge erred by not conducting an in camera review.

---

<sup>2</sup> The *Troupe* Plaintiffs also agreed to keep the TAC Report confidential (Dkt. 69) and joined the Agreed Protective Order governing the TAC Report (Dkt. 70).

When the *Troupe* Plaintiffs made their oral motion for in camera review, they identified no grounds whatsoever that warrant an in camera review. They gave no explanation at all regarding how an in camera review would purportedly assist the Court in resolving The Clarion Ledger's Rule 72 appeal. There is **nothing** before the Court that warrants an in camera review, especially since the issue is waived.

The bottom line is that if The Clarion Ledger or the *Troupe* Plaintiffs wanted an in camera review of the TAC Report, they should have asked the Magistrate Judge to conduct an in camera review, and not waited to raise the issue for the first time with the District Judge in a Rule 72 appeal of the Magistrate Judge's order. The *Troupe* Plaintiffs' post-appeal request for an in camera review has long been waived and must be denied.

**IV. This Court Should Not Change The Record On Appeal.**

This is a Rule 72 appeal. Under Rule 72, the standard of review is not de novo. Instead, 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 unless the magistrate judge's ruling is clearly erroneous or contrary to law. *See* Local Rule 72(a)(1)(B).

Given this standard of review, this Court should decide this Rule 72 appeal ***on the same record*** that Judge Parker had in issuing his Order. If this Court conducts an in camera review of the TAC Report, it is reviewing a different record than Judge Parker reviewed, which this Court should not do for obvious reasons.

Neither The Clarion Ledger nor the *Troupe* Plaintiffs asked Judge Parker to conduct an in camera review, so he justifiably made his rulings without doing so. Neither The Clarion Ledger nor the *Troupe* Plaintiffs have alleged that Judge Parker erred by not conducting an in camera

review. No issue has been raised in The Clarion Ledger's Rule 72 appeal regarding an in camera review of the TAC Report.

The *Troupe* Plaintiffs' should not be permitted to introduce a new issue into this Rule 72 appeal by making a post-appeal oral motion for in camera review when the appellant itself – *i.e.*, The Clarion Ledger – has not made an in camera review an issue in its appeal. The *Troupe* Plaintiffs' post-appeal attempt to alter the record in this Rule 72 appeal should be rejected.

Nonetheless, if this Court believes that the *Troupe* Plaintiffs' request for an in camera review of the TAC Report somehow warrants further consideration, it should remand this matter to the Magistrate Judge with instructions to determine whether an in camera review of the TAC Report is warranted.<sup>3</sup> This would permit this Court to review the same record that the Magistrate Judge reviewed in any subsequent appeal.

#### **Relief Requested**

For these reasons, the *Troupe* Plaintiffs' post-appeal oral motion for in camera review should be denied.

THIS, the 13th day of February, 2017.

Respectfully submitted,

PEHELPS DUNBAR LLP

BY: /s/ James W. Shelson

Reuben V. Anderson, MB 1587

W. Thomas Siler, MB 6791

James W. Shelson, MB 9693

R. Gregg Mayer, MB 102232

A. Martin Edwards, IV, MB 104677

4270 I-55 North

Jackson, Mississippi 39211-6391

Post Office Box 16114

---

<sup>3</sup> If an in camera review is ordered, the TAC Report should not be deemed a "court record" within the meaning of Local Rule 79.

Jackson, Mississippi 39236-6114  
Telephone: 601-352-2300  
Telecopier: 601-360-9777  
Email: andersor@phelps.com  
silert@phelps.com  
shelsonj@phelps.com  
gregg.mayer@phelps.com  
martin.edwards@phelps.com

Harold Pizzetta, III, Esq., MB 99867  
Assistant Attorney General  
General Civil Division  
Walter Sillers Building  
550 High Street  
Jackson, MS 39201

Attorneys for the State of Mississippi

**CERTIFICATE OF SERVICE**

I certify that on February 13, 2017, 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/ James W. Shelson  
JAMES W. SHELSON