

gk

g

54

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANDREA CONSTAND, : CIVIL ACTION NO. 05-1099
Plaintiff :
 :
v. : Philadelphia, Pennsylvania
 : November 4, 2005
WILLIAM H. COSBY, JR., :
Defendant :
..... :

FILED
DEC 02 2005
By MICHAEL E. KUNZ, Clerk
Dep. Clerk

TELEPHONE CONFERENCE
BEFORE THE HONORABLE EDUARDO C. ROBRENO
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff: DOLORES M. TROIANI, ESQUIRE
Troiani/Kivitz, LLP
38 North Waterloo Road
Devon, PA 19333

For the Defendant: PATRICK J. O'CONNOR, ESQUIRE
GEORGE M. GOWEN, III, ESQUIRE
Cozen O'Connor
1900 Market Street
Philadelphia, PA 19103

Audio Operator: J. Matkowski

Transcribed by: Paula L. Curran, CET

(Proceedings recorded by For the Record Gold sound recording; transcript provided by AAERT-certified transcriber.)



Laws Transcription Service
48 W. La Crosse Avenue
Lansdowne, PA 19050
(610) 623-4178

DH

1 (The following occurred via telephone conference.)

2 THE COURT: Good morning, this is Judge Robreno and
3 I have you on the record. May I have the appearances of
4 counsel beginning with plaintiff's counsel?

5 MS. TROIANI: Dolores Troiani for Andrea Constand.
6 Good morning, your Honor.

7 THE COURT: Good morning. And for the defendants?

8 MR. O'CONNOR: Patrick O'Connor for the Defendant
9 Cosby, along with George Gowen.

10 THE COURT: Okay, well, good morning.

11 MR. O'CONNOR: Jack Schmidt is also on the line,
12 sir.

13 THE COURT: Yes, well, good morning, Mr. Schmidt.
14 This is a status conference. I will not be making any
15 rulings on the merits. But I wanted to review where we are
16 and where we're going. Let me just say that I have read
17 every page and every line of the materials that you sent me.
18 So, I think I have a sense, not only for the trees, but also
19 for the forest of this case.

20 And let me make just a couple of comments here.
21 Number one, this is a difficult case for the lawyers to
22 handle, from both sides. And I appreciate that and I have a
23 sensitivity to that, as well. And I think that both sides
24 have, within the difficult burdens that they are carrying,
25 done the best that they can for their clients.

1 Now, it comes a time to cut the Gordian (ph) knot
2 and get to the bottom line here. And I think this is what I
3 would like to do. These are going to have to be determined
4 on a one-by-one basis to the extent that anyone wishes to
5 seek to compel a further answer. And what I think we should
6 do is the following. The party seeking to compel an answer
7 or a fuller answer to a question will file a motion to compel
8 and that will be done as follows. Each question and each
9 answer which is in controversy will be on a separate page.
10 There will be a question, there will be the answer and then
11 there will be a brief citation to the authorities and a one,
12 two or three line explanation why that action should be
13 compelled.

14 The party opposing the requests will then file a
15 response and that should also be done each response on a
16 separate page. So that, we will have the opportunity to have
17 the question, the answer and the response, together with the
18 explanations, all in two pages, one for each side. So, the
19 responding party should number the response by the same
20 number as the request.

21 Additionally, each side will be afforded the
22 opportunity to submit probably no longer than a five page
23 summary of the substantive arguments, if they wish to do
24 that. There may be themes or there may be particular running
25 objections that may need to be tied up and I want to give you

1 the opportunity to do that. We will do that. We will give
2 15 days for the motions to compel and each side will review
3 the transcript and make whatever requests each side wants to
4 make. And then the party opposing them will then have 15
5 days to respond to it.

6 The second issue is whether or not these proceedings
7 should then be conducted under some special rules of
8 confidentiality. Or whether they should be treated in the
9 same manner that other litigation is treated, i.e., that
10 while the discovery itself is confidential, ordinarily
11 proceedings involving the Court and enforcement of the
12 Court's orders, are conducted in open court and on the
13 record. And there can be pretty good arguments both ways.
14 So, the way to join that issue, it seems to me, is these
15 requests should be filed under seal and the answers should be
16 filed under seal.

17 When that is completed, then there will be an
18 opportunity for any party that wishes to argue that the seal
19 should not be lifted, to so show. And an opportunity to
20 oppose that. That is, it seems to me that before we have an
21 argument of whether or not the seal should be lifted, we need
22 to have on the record what it is that is going to be subject
23 public review.

24 MS. TROIANI: Your Honor, excuse me.

25 THE COURT: Yes?

1 MS. TROIANI: Do you want the motion about the seal
2 to be public?

3 THE COURT: No, well, that's a good point. I
4 suppose it shouldn't be.

5 MS. TROIANI: Well, I thought the Court had already
6 ruled that there wasn't going to be confidentiality in this
7 case.

8 THE COURT: Well, yes, except that for discovery,
9 the parties had agreed that there would be confidentiality.
10 That's the point of this whole thing.

11 MS. TROIANI: No, we did not. We agreed, sir, that
12 they could file a motion for confidentiality.

13 THE COURT: Yes.

14 MS. TROIANI: So, we think that that's the first
15 issue here.

16 THE COURT: Well, you can't file a motion until you
17 know what it is that is going to be held confidential.

18 MS. TROIANI: Mm-hmm.

19 THE COURT: So, that's what I want to lay the
20 predicate on the record of what it is that is going to be
21 confidential. So, I am suggesting a two-step process.
22 Number one, that the requests to compel and the oppositions
23 be filed under seal. Then the second point is whether or not
24 those matters that are filed under seal -- whether or not the
25 seal should be lifted. And then at the conclusion of that,

1 we'll have an answer to that question.

2 The difficulty here is the following. That the
3 courts have recognized that confidentiality can be attached
4 to discovery because, among other reasons, the Court is not
5 directly involved. The parties privately can make those
6 arrangements. If the motion to compel becomes a vehicle to
7 disclose the discovery, then the entire point of any
8 agreement that the parties have or any desire that the courts
9 have endorsed in the past for discovery, as opposed to court
10 proceedings, to remain confidential, it would be pointless.

11 Now, it may just be that that's the way it is. I
12 mean, I don't know the answer to that. But certainly, that's
13 what the question is going to be, whether or not the access
14 to the court which has been endorsed by the Supreme Court and
15 which in this case, I had initially ruled on, how that is
16 balanced within the context of discovery. And I like to walk
17 before I run on that issue. So, that's why I'm suggesting
18 that we do that. I mean, we could all, in the abstract, make
19 arguments one way or the other, but we won't know how they
20 apply to this case until I know specifically what it is that
21 you are seeking to compel.

22 Maybe you'll go back, you'll re-read the transcript
23 and you'll pick out, you know, a couple of questions, maybe
24 you pick out 100 questions. I don't know what you will do.
25 So, let's do it one at a time.

1 MS. TROIANI: And how do we file our motion to lift
2 the seal?

3 THE COURT: This is how that's going to be done.
4 And I'll have an order, by the way, on this. I just wanted
5 to talk to you because I think it's helpful to hear your
6 comments and then to also be able to address your concerns.

7 Parties seeking to compel the answers in the manner
8 in which I have described, will have 15 days to do that.
9 Party opposing will then have 15 days to respond. So, we
10 have a 30-day cycle there and that should be filed under
11 seal.

12 Now, once you have that in hand, there will be 15
13 days to file a motion in response to why the seal should not
14 be lifted. And whoever wishes to oppose the lifting of the
15 seal, should do that. Maybe nobody will oppose it, maybe
16 they will. The party who doesn't want the seal lifted should
17 then file a motion within 15 days. And the party who wishes
18 the seal lifted, they will oppose that and that will be a
19 30-day cycle. At that point -- and that should also be filed
20 under seal.

21 At that point, I will have both the record and the
22 motions and I may decide and then we'll have argument on the
23 record or whether I will decide the issue right there and
24 we'll see what happens. Okay. Any comments here? Ms.
25 Troiani, you seem to be disturbed by this proceeding.

1 MS. TROIANI: Yes, I am, your Honor, I'm extremely
2 disturbed by this.

3 THE COURT: Okay.

4 MS. TROIANI: Mr. Cosby chose to defame our client
5 in the media.

6 THE COURT: Right.

7 MS. TROIANI: I mean, you've read that part of the
8 deposition and although we didn't get many answers, but he
9
10
11 show that our client was telling the truth.

12 THE COURT: Mm-hmm.

13 MS. TROIANI: I'm very concerned about this
14 procedure. This is totally different than any other case
15 that is handled. Our courts are not secret. Our courts are
16 open to the public and they're open to the public for a
17 reason. And that is to preserve the integrity of this
18 process. And Mr. Cosby should not be granted star status in
19 the system. And I am extremely concerned about that. We, as
20 lawyers, must come to court knowing that no matter who our
21 client is, they're going to be treated like any other client.
22 And your Honor and I'm certainly saying this with all due
23 respect to the Court, there is absolutely no reason when a
24 man chooses to go public and put his defense in the
25 newspaper, why when we have decimated that defense and he has

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

now we have to conduct this litigation under seal.

I am also concerned that Associated Press came to you, tried to join in the motion for confidentiality and now they have no way of knowing what's going on here. They have no way of now presenting their case. You already ruled that this is not confidential. Frankly, your Honor, our client has three ways of vindicating herself. Settlement, trial or by having the public be made aware through these motions, what is going on in this court system.

THE COURT: Okay, well, then you'll make your argument. I mean, that's the essence of the argument. Nobody -- I'm not ruling on that argument. If that's the argument that wins the day, that's what's going to happen.

MR. O'CONNOR: I think Ms. Troiani has revealed her true intentions in trying this case, seeking justice three ways. Through settlement, through a trial and then through the newspapers. And I find that to be an outrageous statement.

THE COURT: Okay.

MR. O'CONNOR: Your Honor has ruled that she will have an opportunity to attempt to unseal discovery. But I've been practicing law for a long time and I've never had discovery in any case that I've been involved with, bandied

1 about in the press. Discovery is between the parties. It's
2 not what occurs in open court. What Ms. Troiani has been
3 attempting to do throughout this case is create issues which
4 would enable her to file motions which would circumvent the
5 confidentiality this Court has imposed on discovery.

6 THE COURT: Okay, I haven't imposed anything and the
7 point is that we're going to do this one step at a time. The
8 presumption of access is there. That's why the show cause
9 would be upon the party, why the seal should not be lifted.
10 So, the presumption is not a presumption that it will be
11 confidential, but there may be reasons why, in whole or in
12 part, some aspects may be confidential including, I recall if
13 my memory is correct, that the plaintiff wanted the names of
14 the Jane Does to remain confidential at one time. There was
15 some information concerning third parties that may -- the
16 Court may have to take into account, maybe not.

17 So, I think that both of you are getting agitated
18 prematurely. This is a court proceeding that needs to be
19 conducted in an orderly fashion so that there will be an
20 appropriate record for review. And as I indicated to you,
21 there are a lot of sensitive issues involved. The parties
22 involved, third parties, the interest of the public. All of
23 those have to be carefully assessed and we could just simply
24 do it one way or the other and I don't think that would be
25 appropriate. I think the Court's first ruling indicated a

1 desire to have the eye of the public on this and any other
2 proceedings, as the Supreme Court has directed us to do.

3 In fact, as you may know, just two or three weeks
4 after the decision that I made, the Third Circuit made a
5 decision in a case out of the Middle District where the judge
6 had sealed the -- I think it's some of the discovery in the
7 case. And it indicated that that should be pretty much on
8 the same basis that this Court had found was not appropriate.

9 So, we don't know where we're going to end up, but I
10 think that given all of the interests which are involved in
11 this case, it would be unfortunate to get too agitated too
12 early. And some of this can be saved for closing statements
13 at the conclusion of the case. So, this is -- we're going to
14 do this and I think then that in about 60 to 90 days, we'll
15 know, at least at this level, what the answer to these issues
16 and then we'll have to take it from there.

17 I'll have an order issued today outlining these
18 proceedings. You know, I think it is a fair and balanced way
19 and in no way is intended to rule on what is going to happen
20 to anything in this matter.

21 MS. TROIANI: Your Honor, we also have the issue
22 about whether or not Hall and Applied Telematics apply.

23 THE COURT: Yes.

24 MS. TROIANI: Would that --

25 THE COURT: That should be brought up. That should

1 be brought up. I think that that's why I gave you the
2 opportunity to summarize that. I think that there are two
3 over-arching issues here. I think that may be one. And I
4 think there is also the -- that there is some discrepancy as
5 to the scope of the attorney/client privilege. And I think
6 that also should be fleshed out. Those are, you know,
7 difficult issues. And I think they should be fleshed out.
8 And I said five pages, frankly, you know if you need more --
9 I mean, you know, we shouldn't arbitrarily limit, you know,
10 the wisdom that this Court can get. But I think brevity
11 would be helpful, but if you need more than that, that is
12 fine. And I think there is various views on that particular
13 issue.

14 I do hope that we relate that to the specifics of
15 the case, as opposed to some general discussion of the
16 soundness of that approach. But I think that that's
17 something that needs to be addressed here. And I didn't want
18 to address this, frankly, without an appropriate foundation.
19 And I think that's what this procedure intends to do. Not to
20 foreclose anyone from doing anything at the right time. But
21 if it is going to be done, it should be done after, you know,
22 some due deliberation here.

23 And I appreciate again, I think it's difficult for
24 the lawyers here and I think we're fortunate to have, you
25 know, the two of you who are experienced and have gone

1 through these wars. And that will serve the interests of
2 your clients and the interest of justice, hopefully. So, I
3 think a little patience may serve us all.

4 It may sound like a long time, I know, to litigants
5 when you're talking about 90 days. But, as you know,
6 litigation moves at a, you know, it has its own pace. and I
7 think under the circumstances of this case this is being done
8 with dispatch, as much as it is feasible under the
9 circumstances. So, I'll issue this order today.

10 Now, let me ask you this, until we resolve these
11 issues, can anything else be done or anything needs to be put
12 on hold until you flesh this out?

13 MS. TROIANI: Your Honor, we believe that we need to
14 flesh this out first, because -- and we had also requested in
15 our letter that you extend the time to add additional --

16 THE COURT: Okay, yes, well, we'll address those. I
17 mean, it seems to me that that will follow from whatever the
18 ruling is here, that we'll have to adjust that. But I didn't
19 know whether you were proposing to take any other depositions
20 or whether you now wanted to get this in place before you
21 proceed. Your preference is just to wait and see what
22 happens here.

23 MS. TROIANI: Yes, your Honor, we have some
24 subpoenas.

25 THE COURT: Okay.

1 MS. TROIANI: And we would expect that we can, you
2 know, for records and things like that, I'm sure we can --

3 THE COURT: Well, record discovery I don't see any
4 reason why that can't proceed. But maybe discovery should be
5 held in abeyance. Mr. O'Connor, what do you think?

6 MR. O'CONNOR: Well, I think -- I have no trouble
7 with that, your Honor.

8 THE COURT: Okay.

9 MR. O'CONNOR: Until you clarify the playing field
10 here, I think that's a wise decision.

11 THE COURT: Okay, fine. Okay, anything else then?
12 Okay, we'll get this order out today and hopefully, we can
13 resolve this entire matter in a 90-day cycle. Thank you.

14 MS. TROIANI: Thank you, your Honor.

15 (Proceeding adjourned 9:25 o'clock a.m.)

16

* * *

CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Geraldine C. Laws 12/2/05

Geraldine C. Laws, CET
Laws Transcription Service

Date