

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

STACY MCDOWELL, et al., :
Plaintiffs : **CASE NO. 2012 CVH 0064**
vs. : **Judge McBride**
PATRICK SHELDON : **DECISION/ENTRY**
Defendant :

Schwartz Manes Ruby & Slovin, Donald B. Hordes and Robert G. Block, attorneys for the plaintiffs Stacy McDowell and Mark McDowell, 2900 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202-3090.

Lindhorst & Dreidame Co., L.P.A., Michael F. Lyon and Bradley D. McPeck, attorneys for the defendant Patrick Sheldon, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202-4048.

This cause is before the court for consideration of a motion to compel and for sanctions filed by the plaintiffs Stacy and Mark McDowell and a motion for protective order filed by the defendant Patrick Sheldon.

The court scheduled and held a hearing on the motions on December 4, 2012. At the conclusion of that hearing, the court took the issues raised by the motions under advisement.

Upon consideration of the motions, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On January 13, 2012, the plaintiffs Stacy and Mark McDowell filed their present action against the defendant Patrick Sheldon setting forth claims for civil assault and battery, intentional infliction of emotional distress, and loss of consortium, as well as a claim for punitive damages. The claims arise from an alleged incident at the golf club where Stacy McDowell was employed and at which Patrick Sheldon was a guest at a golf outing hosted by Utter Construction Company for executives, managers, and employees of Utter Construction Company and Duke Energy.

In February 2012, plaintiffs' counsel obtained investigation and personnel files pertaining to the defendant from Duke Energy via a subpoena *duces tecum*. In April 2012, defense counsel indicated his intention to also subpoena Duke Energy for the pertinent files.¹ After an apparent conversation with Duke Energy's counsel, defense counsel indicates he was informed that the investigation file would not be released to him without an authorization executed by the defendant.

Defense counsel stated at the hearing on this matter that he never issued a subpoena to Duke Energy. Instead, defense counsel states that he requested the files from plaintiffs' counsel. Plaintiffs' counsel indicates that he did not wish to get in the middle of the issue between Duke Energy and the defendant and instead stated that he

¹ Plaintiffs' Motion to Compel and for Sanctions, Exhibits K and L.

would wait for defense counsel to serve Duke Energy with a subpoena. Plaintiffs' counsel also cited to a confidentiality agreement between the plaintiffs and Duke Energy pertaining to the subject files, and that agreement states that:

"The McDowell's (*sic*) and their counsel may distribute the documents or share information obtained from the documents with the following categories of persons and no others, except with the written consent of Duke Energy:

1. The parties in this case;
2. Members of the legal or support staff of a party's attorneys[.]²

On October 26, 2012, plaintiffs' counsel was set to depose Patrick Sheldon at defense counsel's office. Plaintiffs' counsel intended to focus much of the deposition on matters raised in the personnel and investigation files from Duke Energy. Upon arriving at defense counsel's office, plaintiffs' counsel was informed by defense counsel that "he would not allow his client to answer questions relative to the Investigation file" and also that "the Confidentiality Agreement by and between [plaintiffs' counsel] and Duke Energy Corporation precluded use or sharing of any and all information from the investigation file."³ Due to this impasse, Patrick Sheldon's deposition was not taken.

The plaintiffs now move this court for an order compelling the defendant to respond to questions pertaining to information contained in the Duke Energy investigation and personnel files and for an award of sanctions, including attorney fees. The defendant moves the court for a protective order prohibiting the use of any information contained in the investigation file.

² Reply Memorandum , Exhibit.

³ Memorandum in Opposition.

LEGAL ANALYSIS

First, the court notes that counsel for both parties have apparently misread the confidentiality agreement between the McDowells and Duke Energy. The agreement clearly states that the plaintiffs may distribute the files and share information obtained from the files with any of the categories of persons listed, which includes such individuals as the parties in this case, members of the legal and support staff of a party's attorney, and the court. That same provision states that the information can be shared with those categories of persons "*and no others, except with written consent of Duke Energy[,]*" meaning that the written consent of Duke Energy is only required if the plaintiffs want to share the files with someone other than an individual who would fall under one of the listed categories.

As such, the confidentiality agreement would allow plaintiffs' counsel to distribute the documents to the defendant and his counsel. However, and importantly as it pertains to the present motions, there is nothing requiring plaintiffs' counsel to release the documents to the defendant that he obtained from a third party. Instead, plaintiffs' counsel may choose, as he did in the present case, to wait for counsel for the defendant to obtain the information from the third party himself.

Defense counsel makes much of the fact that Duke Energy indicated that it would not release the investigation file to him without a release and he requests a protective order preventing the use of the information in that file. However, this is a matter between Duke Energy and defense counsel, not between defense counsel and plaintiffs' counsel. Contrary to defense counsel's assertions, there is nothing before the

court indicating that the investigation file is a document that may not be used in this litigation without an executed authorization from Patrick Sheldon.

Based on this analysis, the court finds that there is no basis for a protective order under Civ.R. 26(C), which allows a court to “make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” for good cause shown. There has been no showing that a protective order is needed to protect the defendant from annoyance, embarrassment, oppression, or undue burden or expense as a result of any discovery that has been sought.

Discussion regarding the Duke Energy files began between defense counsel and plaintiffs’ counsel in April 2012. However, as of the present date, there has been no subpoena served upon Duke Energy by the defendant in an effort to obtain the investigation file, despite being aware that plaintiffs’ counsel was in possession of the file and would likely wish to depose the defendant on October 26th about information in that file.

Pursuant to Civ.R. 37:

“(A) Upon reasonable notice to other parties and all persons affected thereby, a party may move for an order compelling discovery as follows:

* * *

(2) If a deponent fails to answer a question propounded or submitted under Rule 30 or Rule 31, or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer or an order compelling inspection in

accordance with the request. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

* * *

(D) If a party or an officer, director, or a managing agent of a party or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion and notice may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (a), (b), and (c) of subdivision (B)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(C)."

The court finds that the defendant had no reasonable basis to refuse to answer questions pertaining to the information set forth in the investigation file. The defendant had approximately six month to obtain the file from Duke Energy and never served Duke Energy with a subpoena *duces tecum*. Any failure on Duke Energy's part to respond to such a subpoena would have allowed the defendant to seek a written ruling from this court regarding the third party's compliance with the order. Furthermore, the court finds no merit in the defendant's assertion that the information in the investigation

file cannot be used without a written authorization by the defendant, and there is nothing in the record to support such a contention.

CONCLUSION

The court finds that the motion to compel is well-taken and is hereby granted. The defendant is ordered to attend a deposition and answer questions pertaining to information set forth in the Duke Energy files, as well as any other relevant questions set forth by plaintiffs' counsel.

Additionally, the court finds that, pursuant to Civ.R. 37(D), an award of sanctions is appropriate in the present case. The parties are hereby ordered to conference and call the Assignment Commissioner (732-7108) within five days of the date of this decision in order to obtain a date for an evidentiary hearing on sanctions. The date of the hearing shall be within 30 days of the date of this decision. At that hearing, the court will take evidence to determine the appropriate amount of sanctions, including reasonable attorney fees, to be awarded.

The court finds that the defendant's motion for a protective order is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED: _____

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 28th day of December 2012 to all counsel of record and unrepresented parties.

Bailiff to Judge McBride