UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LINDA CHATMAN, as Special Administrator of the Estate of CEDRICK CHATMAN, deceased,	)	
Plaintiff,	)	Case No. 13 CV 5697
v.	)	
	)	The Hon. Robert W. Gettleman
THE CITY OF CHICAGO, a municipal corporation, LOU TOTH, KEVIN FRY, and others not presently known to Plaintiff,	)	Magistrate Judge Geraldine Soat Brown
Defendants.	)	

DEFENDANTS' REPONSE IN OPPOSITION
TO PLAINTIFF'S MOTION FOR RECONSIDERATION

Defendant City of Chicago, by its attorney, Stephen R. Patton, Corporation Counsel of the City of Chicago, and Defendant Officers Lou Toth and Kevin Fry, by and through one of their attorneys, Jill K. Russell, Assistant Corporation Counsel (collectively, "Defendants"), for their response to Plaintiff's Motion to Reconsider, hereby state as follows:

BACKGROUND

This case involves allegations of excessive force and wrongful death, as well as a *Monell* policy claim against the City and two individual Defendant Officers, Toth and Fry. These claims arise from an incident which occurred on January 7, 2013, wherein Cedrick Chatman was shot by a police officer shortly after exiting a vehicle which had just been hijacked in part of a robbery. This incident was captured on video by a P.O.D. camera as well as cameras at South Shore High School, and partially at a nearby liquor store. As a result of this incident, Mr. Chatman died.

Defendants seek to keep this material confidential prior to trial, as the material was produced in discovery, is not currently part of the record, and poses a serious risk of tainting a jury pool. Plaintiff seeks to vacate the confidentiality order immediately, and stated on the record that the reason for doing so is for Plaintiff to have a chance to tell her version of events to the media. This matter was referred to Magistrate Judge Brown who rejected Plaintiff's request, finding that *Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009) governed, and noting that the purpose of discovery is "not to try the case in the media or for whatever social concerns either side may have." *See* Transcript of Hearing, Docket No. 173, p. 18. Plaintiff has appealed Judge Brown's order and again represented to this Court that she intends to use the aforementioned video evidence to tell her story to the media.

STANDARD OF REVIEW

Plaintiff seeks to appeal Magistrate Judge Brown's order. Thus, the appropriate standard for review is pursuant to Federal Rule of Civil Procedure 72. Fed. R. Civ. P. 72 provides that, in non-dispositive matters, "[t]he district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law. When performing clear error review, the district court should not overturn a decision by the magistrate judge merely because the district judge would have independently come to a different conclusion from the one reached by the magistrate judge on the same set of facts." *See Olesky v. General Electric Co.*, 06 C 1245, 2013 WL 3944174, *7 (N.D. Ill. Jul. 31, 2013) (citing *Pinkston v. Madry*, 440 F.3d 879, 888 (7th Cir. 2006)). In other words, "if there are two permissible views, the reviewing court should not overturn the decision solely because it would have chosen the other view." *American Motors Corp. v. Great American Surplus Lines Insurance Co.*, 87 C 2496, 1988 WL 2788, *1 (N.D. Ill. Jan. 5, 1988).

This Court noted in its docket entry that it has withdrawn referral of this issue to Magistrate Judge Brown. It is unclear to Defendants whether the Court's withdrawal of the referral to Magistrate Judge Brown affects Judge Brown's order denying Plaintiff's Motion for Relief from the Protective Order or if the withdrawal of this issue operates solely going forward. Regardless of the standard applied, Defendants submit that good cause exists for the protective order to remain in place.

ARGUMENT

This Court requested that Defendants brief this issue, specifically addressing the case of *City of Greenville, Ill. v. Syngenta Crop Protection, LLC*, 764 F.3d 695 (7th Cir. 2014). In *Greenville*, the Court found that public access depends on whether a document influenced or underpinned a judicial decision. *Id.* at 698. In light of this decision, this Court has requested that the parties inform the Court whether the videotapes covered by the protective order will be used in future proceedings, other than trial. Defendants submit that such videos will not be used.

a. The video will not influence or underpin a judicial decision prior to trial.

i. *Summary judgment*

Defendants anticipate that Plaintiff may argue that it is necessary to file the videotape as part of their response to the motion for summary judgment, thus making it part of a judicial decision. However, as the *Greenville* court noted, while the fact of filing *may* support an inference of influence, the public has no right of access to documents which do not conceivably aid the understanding of judicial decisionmaking. *Greenville*, 764 F.3d at 698. In this case, even if Plaintiff were to file the video as evidence, it would not form the basis of any of this Court's decision because it does not address the issues raised in the Defendants' summary judgment motions.

As an initial matter, Defendant Officer Toth's motion for summary judgment is fully briefed. No party cited or attached the videos as evidence, and thus, they are not proper for the Court to consider. As a result, the videos cannot be a factor in the adjudication of Officer Toth's motion for summary judgment.

This Court will likewise have no reason to rely on any of the videos in its decision on the City's Motion for Summary Judgment. Indeed, the City made no mention of the videos in its memorandum or in its Local Rule 56.1 Statement of Facts, and Plaintiff has no reason to refer to it either in her response. *See* Docket Nos. 109, 110. The City has moved for summary judgment on Plaintiff's Wilful and Wanton Supervision/Wrongful Death Claim against it. *See* Docket No. 109. Notably, the City has not moved for summary judgment on the Wrongful Death Claim as it pertains to *respondeat superior* liability as to the alleged conduct of the Defendant Officers. *See id.* In support of its motion, the City argues that said claim against it should be dismissed because it is (a) duplicative, (b) barred by the Illinois Tort Immunity Act, and (c) not supported by the evidence in the record. *Id.* at pp. 5-12. The City's first and second arguments rely on case law and statutes, rather than evidence in the record, and therefore Plaintiff has no basis to rely on the videos in responding to these arguments. Furthermore, Plaintiff's Wilful and Wanton Supervision/Wrongful Death claim is premised on the City's supervision and retention of the Defendant Officers *prior* to the shooting incident. *Id.* at p. 3. The videos therefore have no bearing whatsoever on this claim or Plaintiff's response to the City's argument that the evidence in the record does not support this claim.

In its motion, the City further argues that any claim against any unknown officers or supervisors for alleged wilful and wanton conduct after the shooting incident is barred by the statute of limitations. *Id.* at pp. 13-14. Again, this is a purely legal argument and Plaintiff has no

reason to rely on the video to respond to this argument. Neither the Wilful and Wanton Supervision/Wrongful Death claim against the City itself nor Plaintiff's response to the City's motion for summary judgment has anything to do with the video evidence in this case. Accordingly, the videos will not play a role in a judicial decision prior to trial and the videos should remain confidential.

ii. *Motions in limine*

After discovery is closed, the only filings remaining in this case are the final pre-trial order and motions *in limine.* Defendants do not intend to file a motion *in limine* to prohibit these videos from being used at trial. Plaintiff has repeatedly claimed that these videos support their case. As a result, any attempt by Plaintiff to suggest that they are necessary for use in the motions *in limine* would be questionable at best.

iii. *Trial*

Defendants do anticipate the video will be used at trial and do not object to the release of the video after the jury is empaneled.

b. Even if Plaintiff were to file the video, it would not be sufficient to justify release.

Furthermore, even if the Plaintiff were to file the video, such filing alone would be unlikely to justify the release. Notably, "…the presumption of public access applies only to the materials that formed the basis of the parties' dispute and the district court's resolution'; other materials that may have crept into the record are not subject to that presumption." *Goesel v. Boley Int'l (H.K.) Ltd.*, 738 F.3d 831, 833 (7th Cir. 2013) (*quoting Baxter International, Inc. v. Abbott Laboratories*, 297 F.3d 544, 548 (7th Cir. 2002)). In this case, the videos, as discussed above, are not relevant to the disposition of the summary judgment motions or any other dispositive motions prior to trial. As a result, no public right of access should attach until trial (at

which point, the Defendants' concern for preserving right of access to a fair trial will have dissipated).

Additionally, even if this Court were to find the video relevant to the disposition of the litigation, that does not end the inquiry. As Justice Easterbrook recognized in *Greenville*, "[o]nce filed with the court… documents that affect the disposition of federal litigation are presumptively open to public view… unless a statute, rule, or privilege justifies confidentiality." *Greenville*, 764 F.3d at 697 (quoting *In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010)). In this case, the concern articulated by Defendants about their right to receive a fair trial is indeed codified in the Illinois Freedom of Information Act. The Act specifically exempts from disclosure those records which would "create a substantial likelihood that a person will be deprived of a fair trial or an impartial hearing." 5 ILCS 140/7(1)(d)(iii). As discussed below, Defendants have a legitimate concern that the release of this video would deprive them of a fair trial by substantially tainting the jury pool. While the Illinois Freedom of Information Act is not a federal statute, the concern codified in the act is one that should not be disregarded by the Court. In light of this concern, videos should not be released.

c. Judge Brown properly found that Defendants' had demonstrated good cause for a protective order.

In this case, Judge Brown entered a protective order prohibiting the release of the video prior to trial. This ruling was correct—it was neither clearly erroneous nor contrary to law. "Television indubitably has a much greater potential impact on jurors than print media." *In re NBC Universal, Inc.*, 426 F.Supp.2d 49, 58 (E.D.N.Y. 2006). "Voir dire would be an insufficient cure if a large segment of citizens in this district are exposed to the prejudicial information; exclusion of a considerable portion of the population would skew the panel, making it more difficult to find a cross-section of the community. *Jurors' assurances that they have not been*

influenced by media reports are not necessarily dispositive." *Id.* (emphasis added). And "[v]ideotapes are subject to a higher degree of potential abuse than transcripts. They can be cut and spliced and used as sound-bites on the evening news…" *Hobley*, 225 F.R.D. 221, 226 (N.D. Ill. 2004) (quoting *Felling v. Knight*, IP 01-0571-C-T/K, 2001 WL 1782360, *3 (N.D. Ind. Dec. 21, 2001); *see also Jones v. Clinton*, 12 F.Supp.2d 931, 934 (E.D. Ark. 1998) (detailing extensively potential problems in releasing video to media). In this case, the release of the video to the media would substantially impact Defendants' right to a fair trial. Notably, the video is grainy at best, and has no audio. Based on the different video clips, it is not clear which officer shot, nor when the shots were fired. Furthermore, the footage is low resolution, and, based on this resolution ***could not*** shed light on whether the turn at issue actually took place. These issues are best clarified through the forensic evidence of the decedent's wounds. However, forensics are not as easily explainable nor can they be spliced into simple clips like the video. The public may make assumptions based on the footage released without having the entire picture. Defendants are particulary concerned that members of the venire may be so affected.

This same issue was addressed extensively in *Whitaker v. Springettsbury Township*, 08 C 627, 2010 WL 1565372, *3 (M.D. Penn. Apr. 19, 2010). There, a member of the media wished to intervene and obtain the videotape in a fatal shooting case by a police officer which had been filed under seal in a motion for summary judgment. The Court there found that it would be inappropriate to broadly disseminate the video prior to the resolution of the case, because the release of that video could prejudice the parties to secure an impartial jury. The Court found that "the prudent course would be to deny [the request to release the video], at present, without prejudice to the renewal of the request following the conclusion of the proceedings when the risk of unfair prejudice would be greatly diminished." *Id.* The Western District of Louisiana

reached a similar conclusion, holding that the video of a fatal incident could not be released prior to trial because "[t]he graphic nature of the Video would most likely prejudice potential jurors who see the video on the local news against Wal-Mart, thereby affecting Wal-Mart's right to a fair trial." *Partin v. Wal-Mart Louisiana, LLC,* 09-2229, 2011 WL 441474, *2 (W.D. La. Feb. 1, 2011) (affirming issuance of protective order prohibiting Plaintiff from disseminating video to the media and quoting magistrate judge's opinion). In fact, "courts have repeatedly exercised their discretion by entering protective orders limiting pre-trial disclosure of such video taped discovery material in the pre-trial stages of litigation." *Whitaker*, 2011 WL 1565372, *3 (collecting cases).

Plaintiff claims that the fact that this video is of public importance should caution against the entry of a protective order. However, restricting public access to the video until the close of the proceedings strikes the proper balance between the need for public access to information with the need for a fair trial. Defendants are not arguing that this video may never be made public; rather, they merely seek to avoid the release of the video prior to the conclusion of the proceedings to avoid any prejudice on the jury pool. Courts have repeatedly found such a balance to be proper. *See U.S. v. Weed*, 184 F.Supp.2d 1166, 1176-1177 (N.D. Ok. 2002) (prohibiting release of videotape prior to trial to preserve right to fair trial and finding "the government's proposal that the tape be sealed until the jury in this case has been selected and sworn is narrowly tailored to protect its right to a fair trial); *see also Partin*, 2011 WL 441474 at *2 (affirming protective order prohibiting dissemination of video depicting fatality until after trial); *Whitaker*, 2010 WL 1565372 at *3 (sealing video of fatal shooting due to fair trial and privacy concerns until the conclusion of the proceedings); *In re NBC Universal*, 426 F.Supp.2d at 49 (denying media request for access to videos until the conclusion of the trial); *Paine v. City*

of Chicago, 06 C 3173, 2006 WL 3065515, *8 (granting protective order and prohibiting release of information that had fair trial and privacy implications); *Baker*, 2004 WL 2124787 at *4 (granting protective order prohibiting release of deposition transcripts prior to trial).

CONCLUSION

For the reasons set forth above, Plaintiff's Motion for Reconsideration should be denied.

Dated: December 23, 2015

Respectfully submitted,

/s/ Jill K. Russell
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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2015, I electronically filed the foregoing using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Jill K. Russell