

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

HEERY INTERNATIONAL, INC., A
GEORGIA CORPORATION, AND E.R.
MITCHELL & COMPANY, A GEORGIA
CORPORATION, D/B/A
HEERY/MITCHELL, A JOINT
VENTURE,

Plaintiffs,

v.

DEKALB COUNTY SCHOOL DISTRICT,
GEORGIA

Defendant.

Civil Action No. 07CV2532-3

**DEFENDANT DEKALB COUNTY SCHOOL DISTRICT'S
RESPONSE TO PLAINTIFFS' MOTION TO COMPEL TESTIMONY
AND CROSS-MOTION FOR A PROTECTIVE ORDER**

Defendant DeKalb County School District ("DCSD") hereby responds to Plaintiffs' Motion to Compel Testimony (the "Motion") and files its Cross-Motion for a Protective Order (the "Cross-Motion"). DCSD respectfully requests that the Court deny Plaintiffs' Motion, grant DCSD's Cross-Motion, and assess all costs incurred by DCSD in responding to Plaintiffs' Motion and preparing its Cross-Motion to Plaintiffs, pursuant to O.C.G.A. §§ 9-11-26(c) and O.C.G.A. § 9-11-37(a)(4).

INTRODUCTION

This case is about Plaintiffs' fraudulent billing to DCSD, breaches of their fiduciary obligations to DCSD, and fundamental failures to perform their contractual obligations by properly managing the SPLOST school-building programs, all of which resulted in DCSD losing tens of millions of dollars. Nevertheless, Plaintiffs on several occasions have focused their attention not on DCSD's case, but on individuals who work for DCSD.

First, Plaintiffs attacked DCSD's lawyers by filing two separate motions to disqualify them, which then spawned several other related motions. (*See, e.g.*, Pls.' Mot. to Disqualify; Pls.' Second Mot. to Disqualify; DCSD's Mots. for Protective Orders; Pls.' Mot. for a Protective Order; Pls.' Mot. to Strike; DCSD's Mots. to Strike.) Now, in this Motion, Plaintiffs have personally attacked Ms. Patricia Pope, DCSD's Chief Operating Officer, who is responsible for managing DCSD's SPLOST III school-building program, which is worth hundreds of millions of dollars. Plaintiffs have not attacked Ms. Pope because of what she did or did not do in connection with DCSD's construction program, what she said or did concerning Plaintiffs, or what she did or did not do in connection with this litigation. Instead, Plaintiffs have scoured Ms. Pope's personal marital history, dredged up her divorce, and magnified an alleged technical misstep in obtaining that divorce -- all in an obvious attempt to embarrass or intimidate Ms. Pope and DCSD. This attempted game of "gotcha" is the purported basis for this baseless Motion.

Under Georgia law, a party may not obtain discovery unless it is relevant to the issues in the litigation. The discovery Plaintiffs seek to obtain with their Motion is not. First, Plaintiffs themselves tacitly admit that the testimony has nothing to do with the substantive issues in this case. Second, the testimony is likewise irrelevant to the Ms. Pope's credibility. Plaintiffs' argument to the contrary is premised on nothing more than brazen mischaracterizations of Ms. Pope's deposition testimony and citations to a litany of irrelevant statutes. Accordingly, DCSD respectfully requests that Plaintiffs' Motion be denied.

Furthermore, to protect Ms. Pope from annoyance, embarrassment, oppression, and undue burden, DCSD requests that the Court enter an Order prohibiting any further attempts by Plaintiffs to obtain the testimony they seek in their Motion. Finally, DCSD requests that the

Court assess costs incurred by DCSD in opposing Plaintiffs' Motion and preparing its Cross-Motion to Plaintiffs, pursuant to O.C.G.A. §§ 9-11-26(c) and 9-11-37(a)(4).

RELEVANT FACTUAL BACKGROUND

Plaintiffs deposed Ms. Pope on November 13, 2007. During the deposition, Carl Anderson, the lawyer conducting the deposition on Plaintiffs' behalf, asked Ms. Pope whether her 2001 divorce was filed in DeKalb County. (Dep. of P. Pope at 32:16-17 (attached as Ex. A).) Ms. Pope responded that the divorce had been *filed* in DeKalb County, but that a "paperwork mix-up" had occurred that necessitated Ms. Pope re-filing the divorce paperwork at a later date. (*Id.* at 32:18-23.) Mr. Anderson then asked Ms. Pope, a layperson, to offer a legal opinion as to the finality of her divorce by asking whether she had a "final judgment." (*Id.* at 32:23-25.) Without offering such an improper legal opinion, Ms. Pope responded that she was in possession of a divorce decree, but that the Court was not because the "Clerk's office lost the decree the first time." (*Id.* at 33:1-8.) When Mr. Anderson attempted to revisit the subject of Ms. Pope's divorce several hours later, Ms. Pope's personal attorney objected to the questioning as irrelevant and intended to harass the witness and instructed Ms. Pope not to answer. (*Id.* at 212:23-215:5.) Mr. Anderson then ended the deposition. On December 11, 2007, Plaintiffs filed their Motion.

ARGUMENT

I. THE COURT SHOULD DENY PLAINTIFFS' MOTION BECAUSE THE TESTIMONY THEY SEEK IS NOT DISCOVERABLE.

A. Ms. Pope's Testimony Is Not Relevant To Substantive Issues In This Case.

Plaintiffs' Motion should be denied because the testimony they seek to obtain is not even tangentially relevant to the substantive issues in this case. Georgia law expressly limits the scope of discovery to matters that are relevant to the litigation. O.C.G.A. § 9-11-26(b); *Cartwright v.*

Midtown Hosp., 243 Ga. App. 828, 830 (2000). Accordingly, Georgia courts do not compel discovery relating to potentially embarrassing personal information when such information is not relevant to the substantive claims at issue in the litigation. *See, e.g., Anderberg v. Ga. Elec. Membership Corp.*, 175 Ga. App. 14, 16 (1985) (affirming denial of motion to compel discovery regarding irrelevant, personal information). The issues in this case pertain solely to Plaintiffs' fraudulent conduct and breaches of contract and fiduciary duty, none of which have anything to do with Ms. Pope's marital status. Indeed, Plaintiffs themselves tacitly admit that the testimony they are seeking is irrelevant to the substantive issues in this case. (*See* Pls.' Br. at 6 (limiting Plaintiffs' argument to Ms. Pope's "credibility").) Plaintiffs' Motion should therefore be denied.

B. Ms. Pope's Testimony Is Not Relevant To Her "Credibility."

Plaintiffs' attempts to manufacture a "credibility" issue with respect to Ms. Pope are unavailing. Plaintiffs' credibility argument has two purported bases, neither of which has any merit. First, Plaintiffs argue that Ms. Pope's credibility is in issue because she allegedly testified inconsistently regarding her divorce during her deposition. In fact, however, Ms. Pope's testimony about her divorce was as clear as her understanding and belief -- that she was divorced, a paperwork error occurred, and the problem was rectified in 2006. (*See* Ex. A at 32:18-33:8.) Indeed, Ms. Pope *volunteered* -- without being asked -- that a paperwork mix-up occurred in connection with her divorce. (*Id.* at 32:18-23.) When Mr. Anderson attempted to trap Ms. Pope by soliciting a legal conclusion regarding whether she received a "final judgment," Ms. Pope truthfully testified that she had a divorce decree in her possession, but that the Clerk of Court's office did not have the decree. (*See id.* at 32:23-33:8.) Plaintiffs' attempts to portray Ms. Pope's testimony as inconsistent ring hollow.

Plaintiffs also seek to create a “credibility” issue where none exists by citing a litany of Georgia statutes that have nothing to do with the issue at hand. For example, Plaintiffs discuss at length O.C.G.A. § 20-2-940, which discusses the grounds on which local school districts *may* terminate or suspend certain employees. (*See* Pls.’ Br. at 8.) Plaintiffs’ apparent rationale for this facially irrelevant discussion is that Ms. Pope may hypothetically have unintentionally misrepresented her marital status when she applied for her job with DCSD. (*See id.*) Plaintiffs adduce nary a shred of evidence supporting their theory, thus rendering it useless. Along the same lines, Plaintiffs cite (and mischaracterize) O.C.G.A. §§ 34-9-19 (discussing penalties for making false statements in an application for workers’ compensation benefits) and 34-9-291 (prohibiting a worker from obtaining benefits for occupational disease if the worker misrepresented his prior employment status). Despite discussing these statutes at length, Plaintiffs do not explain how they are even remotely relevant to Plaintiffs’ Motion, which Plaintiffs themselves admit “does not involve a claim for workers’ compensation benefits.” (*See* Pls.’ Br. at 10.)

Finally, Plaintiffs cite O.C.G.A. § 16-10-71, which creates the misdemeanor of false swearing, and argue that Ms. Pope may conceivably be guilty of such an offense. Once again, Plaintiffs’ argument is baseless. Ms. Pope has never been accused, arrested, or even questioned, much less indicted or convicted, of false swearing. Plaintiffs make no assertion to the contrary. The likely explanation for Ms. Pope never having been accused of false swearing (prior to Plaintiffs’ desperate mud-slinging) is that she did not commit the offense. Under O.C.G.A. § 16-10-71, a person commits false swearing when she *knowingly* and *willfully* makes a false statement when executing a lawful oath or affirmation. Plaintiffs have offered no evidence that Ms. Pope ever *knowingly* and *willfully* made a false statement to anyone about anything. Ms.

Pope, on the other hand, unequivocally testified in her deposition that a "paperwork mix-up" occurred during the processing of her divorce. Plaintiffs' unsupported conjecture that Ms. Pope may have violated O.C.G.A. § 16-10-71 simply does not amount to a legitimate credibility issue. Accordingly, Plaintiffs' Motion should be denied.

II. THE COURT SHOULD ENTER A PROTECTIVE ORDER AGAINST PLAINTIFFS BECAUSE THEIR TACTICS ARE DESIGNED TO HARASS MS. POPE.

Plaintiffs' persistent efforts to question Ms. Pope about the circumstances surrounding her divorce -- a matter that is both patently sensitive and patently irrelevant -- serve no purpose except to annoy, embarrass, oppress, and unduly burden Ms. Pope, whom Plaintiffs surely suspect will be a powerful witness against them at trial. Under Georgia law, courts may enter protective orders to prevent such vexatious tactics. O.C.G.A. § 9-11-26(c); *see also Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 812 (2001) ("[W]hen parties seek discovery of unprivileged but sensitive materials, the trial court must balance the requesting party's specific needs for the material against the harm that would result by its disclosure.").

Neither Plaintiffs nor the Court would derive any benefit from further questioning of Ms. Pope about her divorce. Ms. Pope, in contrast, would suffer significant embarrassment if Plaintiffs were permitted to continue their aggressive and unwarranted intrusion into her private life. Ms. Pope is a private citizen who is not a party to this litigation. She has never been accused of any crime or other misconduct in connection with her divorce. The Court should not permit Plaintiffs to inflict further injury on her in a desperate attempt to torpedo this litigation and evade liability for their misconduct. Accordingly, DCSD respectfully requests that the Court enter an Order prohibiting Plaintiffs from attempting to obtain from Ms. Pope -- by any means -- any information relating to her divorce.

CONCLUSION

For the foregoing reasons, DCSD respectfully requests that the Court deny Plaintiffs' Motion, grant DCSD's Cross-Motion, and assess all costs incurred by DCSD in responding to Plaintiffs' Motion and preparing its Cross-Motion to Plaintiffs, pursuant to O.C.G.A. §§ §§ 9-11-26(c) and O.C.G.A. § 9-11-37(a)(4).

Respectfully submitted, this 14th day of January, 2007.



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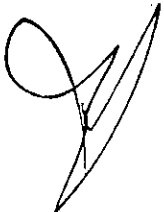
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