S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

TARA KATHERINE HAMED,

Plaintiff-Appellee,

v

WAYNE COUNTY, WARREN EVANS, and WAYNE COUNTY SHERIFF DEPARTMENT,

Defendants-Appellants,

and

REGINALD JOHNSON,

Defendant.

FOR PUBLICATION
May 16, 2006
9:00 a.m.

No. 256806
Wayne Circuit Court
LC No. 03-327525-NZ

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's order denying their motion to quash the depositions of Wayne County Executive Robert Ficano and Wayne County Sheriff Warren Evans. We reverse.

In August of 2003, plaintiff filed her complaint alleging that Wayne County Sheriff Deputy Reginald Johnson sexually assaulted her while she was in the Wayne County Jail. Plaintiff's claims included that Wayne County and the Wayne County Sheriff Department failed to implement or enforce proper training, disciplinary, investigatory, and operational policies, rules, or procedures designed to prevent sexual assaults against female inmates. At some point during the litigation, plaintiff noticed the discovery depositions of Wayne County Sheriff Warren Evans, and his predecessor Robert Ficano. Defendants moved to quash the notice of those depositions, arguing that their testimony would be irrelevant because Evans was not the Sheriff at the time of the sexual assault and Ficano did not have personal knowledge of the incident. Defendants attached Ficano's affidavit to their motion which indicated that (1) the Director of Jails was primarily responsible for formulating the daily policies for the jails, and (2) Ficano did not have any personal knowledge of the sexual assault at issue.

In plaintiff's response opposing defendants' motion to quash, she argued that Ficano was the Sheriff when Johnson was disciplined fourteen previous times and defendants refused to

produce details of the disciplinary charges which were directly reviewable and appealable to the Sheriff. Plaintiff also argued that a Departmental Communication authored shortly after the incident by a Commander was directed solely to Ficano and described Johnson's sexual assault in detail.[1] Plaintiff claimed that Ficano then issued several directives designed to prevent further sexual assaults, including (1) that surveillance equipment be installed or repaired, (2) that male deputies not be isolated with female inmates during the booking process, and (3) that all deputies report sexually harassing behaviors. Plaintiff further indicated that Ficano was directly notified by other sheriff departments of Wayne County's sexual harassment and other mistreatment of inmates. With regard to the deposition of Evans, plaintiff argued that he knew of sexual improprieties committed by male jail employees that occurred subsequent to plaintiff's assault which further supported plaintiff's claim that the Wayne County Sheriff Department knew of the pattern and practice of sexual harassment of female inmates. Plaintiff also claimed that Evans knew of or directed that several changes be made to policies and procedures related to inmates and that such information was relevant to this case.

Defendants' replied to plaintiff's response to their motion to quash, arguing that the Commander who authored the Departmental Communication did not send it to Ficano—it was only standard practice that it be addressed to the Sheriff.[2] Defendants further argued that plaintiff would not be unduly prejudiced if the depositions were not conducted, but that requiring the same would impose an undue burden on these high-ranking officials. Following oral arguments on the motion to quash, the trial court held that it was "satisfied that Wayne County's motion to quash the deposition [sic] should be denied." Thereafter defendants filed their application for leave to appeal to this court, which was granted.

Defendants argue that their motion to quash the contested depositions should have been granted because plaintiff did not make the required showing that the depositions of these high-ranking government officials are essential to prevent prejudice or injustice. After review for an abuse of discretion of this decision regarding discovery, we agree.[3] See *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000).

Michigan has long espoused a liberal discovery policy that permits the discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case. MCR 2.302(B)(1); *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). The purpose of discovery is to simplify and clarify the contested issues, which is necessarily accomplished by the open discovery of all relevant facts and circumstances related to the controversy. See *id*., citing *Domako v Rowe*, 438 Mich 347, 360; 475 NW2d 30 (1991). However, the court rules also ensure that discovery requests are fair and legitimate by providing that discovery may be circumscribed to prevent excessive, abusive, irrelevant, or unduly

[1] The Communication was attached to plaintiff's response to the motion to quash.

[2] The Commander's affidavit was attached to defendants' reply to plaintiff's response to the motion to quash.

[3] Because the trial court did not provide its reason for denying defendants' motion to quash, it is difficult to discern that "discretion" was exercised. Nonetheless, we must conclude on the record provided that the decision must be reversed.

burdensome requests. MCR 2.302(C); *Cabrera v Ekema*, 265 Mich App 402, 407; 695 NW2d 78 (2005); *In re Hammond Estate*, 215 Mich App 379, 386; 547 NW2d 36 (1996).

In *Fitzpatrick v Secretary of State*, 176 Mich App 615, 617-619; 440 NW2d 45 (1989), this Court addressed the issue whether a high-ranking public official could be compelled to give oral deposition in a matter in which he did not have personal knowledge. As a matter of first impression, this Court relied on MCR 2.302(C) and noted the considerations of courts in other jurisdictions faced with this issue, including that (1) permitting such depositions would interfere with official duties and thus was against the public interest, (2) generally such officials have little or no knowledge of the relevant facts thus depositions should not be compelled absent a showing of necessity, including to prevent prejudice or injustice, and (3) other discovery resources and mechanisms should be considered, such as deposing a lesser ranking official or submitting written interrogatories. *Id*. at 617-618. In accordance with these considerations, this Court held that the Secretary of State could not be compelled to testify because the deposition was not necessary to prevent prejudice or injustice; he had no personal knowledge of the disputed issues and other discovery resources and mechanisms were available to the plaintiff. *Id*. at 618-619.

Until now we have not had occasion to revisit the *Fitzpatrick* holding; however, upon doing so, we agree with and adopt its holding, albeit with clarification. High-ranking public officials may not be compelled to oral deposition unless or until a preliminary showing is made that the deposition is necessary to obtain relevant information that cannot be obtained from any other discovery source or mechanism, i.e., that such a proceeding is essential to prevent prejudice or injustice. The purpose of this heightened scrutiny is to strictly limit the intrusions that would burden the public official's efforts to advance the effective and efficient operation of the public agency.

Here, defendants argue that plaintiff failed to establish that either of the high-ranking officials possessed relevant information that could not be obtained through other discovery sources or mechanisms, such as by deposing lower ranking officials or by the submission of written interrogatories. In rebuttal, plaintiff appears to argue that defendants' failure to comply with numerous discovery requests have, in part, led to her seeking these depositions. Plaintiff also alleges that Ficano would have knowledge of the incident, knowledge regarding the policies that he purportedly instituted related to preventing further assaults on female inmates, and knowledge of Johnson's disciplinary history. Further, plaintiff claims, Evans would have knowledge that the conditions that led to plaintiff's sexual assault persist, resulting in other assaultive conduct.

To the extent that plaintiff is arguing that the depositions of Ficano and Evans should be permitted as a "discovery sanction," we reject that position. There are appropriate sanctions for the refusal to provide or permit discovery and for failing to comply with the trial court's orders. See MCR 2.313. Although it appears that plaintiff may have a legitimate complaint with regard to defendants' failure to properly or completely respond to her discovery requests, she must seek a remedy through the appropriate process. With regard to plaintiff's claims that Ficano and Evans are the only persons with certain relevant information and that their depositions are necessary to prevent prejudice or injustice, we disagree. Plaintiff has failed to establish that the information sought from the potential deponents cannot be obtained from any other discovery source or mechanism. For example, plaintiff has failed to show that lower ranking officials have been deposed, including the Wayne County Director of Jails, or that written interrogatories have

been submitted to Ficano or Evans. Unless or until plaintiff makes a preliminary showing that the requested depositions are necessary to prevent prejudice or injustice, these officials may not be compelled to oral deposition.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Henry William Saad