IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-CV-01430-PAB-MEH

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH SCOTT and
JO ANN SCOTT,

Defendants.

PLAINTIFF UNITED STATES' RENEWED MOTION FOR A PROTECTIVE ORDER

In accordance with Fed. R. Civ. P. 26(c), and pursuant to this Court's October 3, 2011 Order (Dkt. No. 90), Plaintiff the United States of America (the "United States"), through its undersigned attorneys, hereby moves the Court for a protective order to (1) maintain the confidentiality of identifying information of witnesses and victims identified or disclosed during this litigation; and (2) allow any witnesses or victims who were patients or patients' companions to remain anonymous in any public filings or proceedings. The United States certifies that, in accordance with D.C. Colo. L. Civ. R. 7.1, it has in good faith conferred with counsel for Defendant Kenneth Scott ("Defendant"),[1] but Defendant will not consent to the draft proposed protective order.

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[1] On October 19, 2011, the Court granted the Joint Motion for an Order to Enter Consent Decree Between the United States and Defendant Jo Ann Scott, filed on September 12, 2011 (Dkt. No. 67). (Dkt. No. 102) Accordingly, Defendant Jo Ann Scott is no longer a Defendant in this case.

I. BACKGROUND

This case involves allegations that Defendant has violated the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 ("FACE"), by using physical obstruction to intentionally injure, intimidate, or interfere with individuals because those individuals were or had been obtaining or providing reproductive health services at the Planned Parenthood of the Rocky Mountains ("PPRM").

The United States previously filed a motion for a protective order (Dkt. No. 45) and Defendant filed a brief in opposition ("Defendant's Response"). (Dkt. No. 80) Defendant also filed a separate motion for a protective order. (Dkt. No. 55) On October 3, 2011, the Court denied both motions without prejudice, stating that neither party had filed a proposed order with its motion,[2] and finding that "a blanket protective order consistent with Gillard v. Boulder Valley School District RE-2, 196 F.R.D. 382 (D. Co. 2000), would suffice to protect witness information from being disclosed to third parties and to ensure such information is used only for purposes of this litigation." (Dkt. No. 90) The Court's Order explained that it would allow the parties to submit for its consideration a proposed protective order consistent with Gillard. (Dkt. No. 90) Accordingly, the United States hereby submits this Motion and attached proposed protective order[3] for the Court's consideration.

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[2] The United States did send a Microsoft Word version of a proposed order to the Court at the time it filed its motion. See email from Je Yon Jung to Hegarty_Chambers@cod.uscourts.gov on August 2, 2011, attached as Exhibit 1.

[3] Attached as Exhibit 2.

II. ARGUMENT

The attached proposed protective order largely tracks the protective order in Gillard, per the Court's instruction. It is designed to allow the parties to designate witnesses and victims as confidential, thus ensuring that their identifying information be used only for purposes of this litigation, and not disseminated publicly, or otherwise used to harass, intimidate, or annoy those victims and witnesses. This is consistent with the intent of civil discovery, which is "a device to allow parties to obtain information for the purpose of preparing and trying a lawsuit. Consequently . . . a party has no right to make unrestricted disclosure of the information obtained through discovery." Gillard 196 F.R.D. at 387.

Notably, though, this proposed order differs from the Gillard order in two significant ways, each of which the United States will discuss below. First, the attached order contains a provision (paragraph 3) providing for victims or witnesses who were patients and companions of patients to be referred to in all public filings or proceedings as John or Jane Doe. This is not by any means a novel concept, and, in fact, the practice has been employed repeatedly in cases involving the highly sensitive and personal issue of abortion. For example, in Choice, Inc. v. Graham, 226 F.R.D. 545 (E.D. La. 2005), the plaintiffs moved for a protective order from having to disclose "the identity of the parties and witnesses who sought or obtained reproductive health services" as part of their Rule 26(a)(1) disclosures. Id. at 546. The court noted that the plaintiffs "complain that the defendant sought to obstruct their right to choose and seek abortion services, a quintessentially private matter." Id. at 548. Stating that, "by filing suit, [the plaintiffs] made revelations about their personal beliefs and practices which may invite a hostile reaction from the public," the Court found that, because of the privacy interests at stake and the "prospects of potential harassment or violence by the public," the "scale has been tipped against the customary

practice of judicial openness," and therefore ruled that the plaintiffs would be permitted to proceed with pseudonyms. Id.

As the Tenth Circuit has noted, the "use of pseudonyms concealing plaintiffs' real names has no explicit sanction in the federal rules . . . Yet the Supreme Court has given the practice implicit recognition in the abortion cases, Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), with minimal discussion." Lindsey v. Dayton-Hudson Corp., 592 F.2d 1118, 1125 (10th Cir. 1979). Surely, if *plaintiffs'* real names are permitted to be concealed because of the privacy interest implicit in abortion cases, then witnesses—who played no part in initiating litigation and merely agreed to serve as witnesses on behalf of the United States—should be afforded the same protection.

Indeed, courts have been cognizant of the distinction between parties and non-parties, when it comes to protective orders seeking anonymity. The Second Circuit has listed among the non-exhaustive factors courts should take into account, "whether the litigation involves matters that are highly sensitive and [of a] personal nature" and "whether identification poses a risk of retaliatory physical or mental harm to the . . . party [seeking to proceed anonymously] or even more critically, to innocent non-parties." Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 189-90 (2d Cir. 2008) (internal quotations and citations omitted).

Similarly, in Roe v. Aware Woman Center for Choice, Inc., 253 F.3d 678 (11th Cir. 2001), the Eleventh Circuit admonished the district court for not allowing the plaintiff to proceed anonymously, finding abortion to be "the paradigmatic example of the type of highly sensitive and personal matter that warrants a grant of anonymity." Id. at 685. Specifically, and most relevant to the issue here, the court stated,

> The only justification the defendants offer for stripping Roe of her privacy is the argument that they will not be able to adequately conduct discovery without knowing her true identity. However, that argument is eviscerated by Roe's offer to disclose her name to the defendants for discovery purposes on condition that they do not disclose it to the general public. That is a reasonable way to reconcile the competing interests, and the district court can enter an appropriate protective order.

Id. at 687. The subject of the Roe discussion was a party to the case, whereas the individuals to be covered by the proposed protective order here are third parties, whose privacy interests should be even greater, for they played no part in the decision to initiate litigation here and do not seek any personal gain from this lawsuit.

Furthermore, the provision in the attached proposed protective order allowing patients and their companions to remain publicly anonymous is especially important in light of recent events. Indeed, Defendant and his counsel have made it abundantly clear why this provision is needed: Defendant's brief in opposition to the United States' Motion for a Protective Order, filed publicly, identified by name one of the very witnesses for whom the United States sought anonymity—a reproductive health care patient. See Dkt. No. 80 at 5. As if such behavior was not egregious enough, Defendant's counsel, when contacted by attorneys for the United States, represented that she had indeed disclosed this witness' name intentionally, did not believe that doing so was problematic, and saw no grounds to consent to a motion to seal the document in which she had identified the witness. See electronic message from Rebecca Messall to Aaron Fleisher, September 27, 2011, attached as Exhibit 3. Although counsel refused the United States' request to seal the document, she eventually agreed to do so only after Magistrate Judge Hegarty called an emergency telephone conference of the parties to discuss the issue. (Dkt. No. 86) Counsel's public identification of this witness was especially outrageous given that the witness whose name was disclosed would not even have been a witness against her client,

Kenneth Scott, but rather would have testified against Jo Ann Scott. Counsel was fully aware of this fact when she disclosed this individual's name in her opposition papers to a motion for a protective order seeking to protect that witness' identity in public documents. This type of behavior demonstrates exactly why the attached proposed protective order is essential in this case.

The second way in which the proposed protective order here differs from the Gillard order is that here the burden of filing a motion to contest the designation of any witness or victim as confidential, after the parties attempt to reconcile their differences, falls on the objector, rather than the party seeking to maintain confidentiality. See paragraph 6 of the attached proposed order. Given that all of the witnesses for the United States are involved in providing or obtaining reproductive health services, and thus are subject to harassment if their identities are disclosed, and given Defendant's and his counsel's previous misconduct, the default assumption should be that, absent a compelling reason to allow for the public dissemination of their identities, their identities should not be publicly disclosed. Thus, it is appropriate for the party objecting to the confidential designation to have the burden of demonstrating why such designation is not warranted.

III. CONCLUSION

For the reasons stated above, the United States requests that the Court enter the attached proposed protective order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October _19_, 2011 the foregoing United States' Renewed Motion for a Protective Order was filed electronically using the CM/ECF system, which will provide notice of such filing to all registered parties, as well as mailed by first class mail to Terry Sullivan at 1526 East 35th Avenue, Denver, Colorado 80205, and Ernie Gero at 300 Scranton Street, Aurora, Colorado 80011.

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