

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED

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IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
FILE NO.: 08 CVD 12310

GARRY D. RENTZ AND DONNA A.
RENTZ AND KRISTA C. LISTER
Plaintiff,

v.

BRADLEY COOPER,
Defendant.

WAKE COUNTY C.S.C.

**MOTION TO SEAL TEMPORARY
CUSTODY ORDER
AND IN THE ALTERNATIVE
TO STAY PUBLIC FILING
AND DISSEMINATION AWAITING
APPELLATE REVIEW REGARDING
SEALING OF TEMPORARY CUSTODY
ORDER**

NOW COMES Defendant, by and through undersigned counsel, and respectfully MOVES this Honorable Court to Seal the Temporary Custody Order, or, in the alternative, to Stay Public Filing and Dissemination of the Temporary Custody Order in the above case awaiting Appellate Review of a denial to seal the Temporary Custody Order.

1. A temporary custody hearing is time-limited, and all issues cannot be fairly and fully addressed;
2. Due to the limitations on the parties' abilities to fully present their cases, the judicial findings of fact, conclusions of law, and decrees in a temporary custody order are non-prejudicial to the parties in a legal sense. However, the public dissemination of these judicial determinations based on that limited evidence will have serious actual prejudicial ramifications in future proceedings, both civil and criminal;
3. The death of Defendant's wife has given rise to the institution of this action and to criminal charges against Defendant;
4. The court's first duty is the fair administration of justice;
5. Courts must take steps that will protect their processes from prejudicial outside interferences, and neither prosecutors, defense counsel, accused, witnesses, court staff nor enforcement officers coming under jurisdiction of the court should be permitted to frustrate its function. Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).
6. In Sheppard, the United States Supreme Court held that the failure of the judge to protect the defendant from inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom deprived the defendant of a fair criminal trial consistent with Due Process.

7. In this case at hand, there has been substantial media coverage during the proceedings focusing on Plaintiffs' allegations that the defendant played a role in his wife's death:

- A. Multiple press conferences held by the Chief of the Cary Police, Chief Bazemore, and including the Plaintiffs;
- B. Posts of certain filed documents online, but not all filings;
- C. Dedicated web blogs where witnesses' and counsels' statements during hearings have been summarized and commented upon;
- D. Newspaper and news articles containing "leaked" misinformation which was overwhelmingly prejudicial to Defendant;
- E. Interviews and statements made by Plaintiffs' witnesses on news broadcasts, webcasts, and international media including Fox News, Today, Good Morning America and Nancy Grace;
- F. Cary police investigator Daniels publicly filing an affidavit regarding the defendant's cooperation with the investigation and claiming inconsistency of statements without providing any support for his statements;
- G. The Plaintiffs' filing a seven-hour video deposition of the defendant, prior to judicial determination on objections, which was provided to the public on the internet;
- H. Cameras and reporters at every entrance and exit of the courtroom during proceedings;

8. In Sheppard, like this case, suspicions were focused on Dr. Sheppard, the husband of the murder victim, based on the circumstances of her death. Furthermore, Dr. Sheppard made himself available for frequent and extended questioning early on in the investigation without the presence of an attorney, just like Mr. Cooper did in this case. Finally, Dr. Sheppard hired an attorney, as did Mr. Cooper, and both were then publicly criticized for "not cooperating" with the investigation. Dr. Sheppard was questioned for five hours in an inquest which was broadcast publicly. Mr. Cooper was questioned for seven hours in a deposition which was videotaped and the video was released in its entirety to the press and public at large via the internet. Dr. Sheppard's relationship with another woman was heavily emphasized, as was Mr. Cooper's marital indiscretion from several years ago. In Sheppard, misinformation, allegations and hearsay tending to incriminate Dr. Sheppard were ubiquitous in the media despite the fact that such evidence was not produced at trial. Similarly, the hearsay, gossip and incorrect statements about Mr. Cooper and the circumstances in this case have polluted every aspect of the public regarding this case. In Sheppard, discussions that took place in chambers between counsels and judge later appeared in newspapers. In Sheppard, both the prosecution and the defense issued public statements. Similarly, in this case, the defense has responded to the plaintiffs', witnesses' and police officials' continuous publicized attacks in the public forum to address them and rectify misinformation.

9. The Honorable Judge Sasser, though refraining from bearing witness to the media feeding-frenzy herself, is nevertheless aware of its existence as evidenced by comments in chambers.

10. Although most claims involving Due Process deprivations require a showing of prejudice, in Sheppard, the Court quoted Estes v. State of Texas, 381 US 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), stating " [A]t times a procedure involves such a probability that prejudice will result that it is deemed inherently lacking in due process." Sheppard at 352, 86 S.Ct. at 1517, quoting Estes at 542-43, 85 S.Ct. at 1632.

11. Due Process requires that the Defendant must receive a trial by an impartial jury free from outside influences, Sheppard at 362, 86 S.Ct. at 1522.

12. "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." Id.

13. In Sheppard, our United States Supreme Court reiterated its holding in Irvin v. Dowd, 366 US 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) stating that " '...with his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion...' " Sheppard at 351, 86 S.Ct. at 1516; quoting Irvin at 728, 81 S.Ct., at 1645.

14. In Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959), the Court set aside a criminal conviction where jurors were exposed to information that was not admitted at trial through media and press coverage. The Court held that " the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.'" Sheppard at 351, 86 S.Ct. at 1517, quoting Marshall at 313, 79 S.Ct. at 1173.

13. In Sheppard, our United States Supreme Court cited with approval the statement of Justice Black in In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955), stating "[O]ur system of law has always endeavored to prevent even the probability of unfairness." Sheppard at 352, 86 S.Ct. at 1517.

14. In Sheppard, our United States Supreme Court criticized the trial judge for failing to utilize means available to him to reduce the appearance of prejudicial material. The Court stressed that "the presence of the press...must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged." Id. at 358, 86 S.Ct. at 1520; The Court opined that the judge "...should have made some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion." Id. at 359, 86 S.Ct. at 1520.

15. In Sheppard, the Court noted that "Much of the 'evidence' disseminated...was clearly inadmissible," and further stated that "The exclusion of such evidence in court is rendered meaningless when news media make it available to the public." Id. at 360, 86 S.Ct. at 1521. The temporary custody order makes judicial determinations based on limited and incomplete evidence and without affording a full hearing on the merits. If

allowed to be publicly disseminated, the order will irreparably harm the defendant's opportunity to obtain a fair trial, and a fair permanent custody hearing.

16. "Premature disclosure and weighing of evidence may seriously jeopardize a defendant's right to an impartial jury." Sheppard at 361, 86 S.Ct. at 1521. *quoting Cf. Report of the President's Commission*, at 239, 240.

17. The Sheppard Court stated that "If publicity...threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel...accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function." Sheppard at 363, 86 S.Ct. at 1522 (*emphasis added*).

18. Sealing the Temporary Custody Order pending the resolution of the criminal trial is a narrowly-tailored remedy to protect the defendant's due process rights. Sealing the order will cause no prejudice to the Plaintiffs. It will not harm the minor children. It will not suppress the public's right to access public records any more than is necessary to uphold the defendant's Fourth Amendment right to Due Process, an impartial jury, and a fair trial. The resolution of the criminal trial will have a definite and strong effect on this court's future determination of permanent custody and on the future of the minor children.

19. Sealing of records may be authorized by statute, or required by compelling circumstances. The court may also order certain information be redacted from the records so as not to intrude on the public's right of access and still serve compelling governmental interests. 20 Am. Jur. 2d Courts § 30 (2008).

20. In Virmani v. Presbyterian Health Service Corp., 350 N.C. 449, 515 S.E.2d 675 (1999), the North Carolina Supreme Court held that "our trial courts always retain the necessary inherent power granted them by Article IV, Section 1 of the North Carolina Constitution to control their proceedings and records in order to ensure that each side has a fair and impartial trial. 'The paramount duty of the trial judge is to supervise and control the course of the trial so as to prevent injustice.' (*quoting In re Will of Hester*, 320 N.C. 738, 741, 360 S.E.2d 801, 804 (1987).) Thus, even though court records may generally be public records under N.C. Gen. Stat. § 132-1, a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public; the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government, and the General Assembly has no power to diminish it in any manner." Virmani at 463, 515 S.E.2d at 685. *quoting N.C. Const.* art. IV, § 1.

21. A court should exercise this necessary and inherent power "when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial." Virmani at 463, 515 S.E.2d at 685.

22. If the Temporary Custody Order is not sealed, Defendant will be irreparably harmed both in his criminal defense, and in his civil Permanent custody hearing. The public at large places great weight upon the findings and conclusions of our judiciary. This case is highly publicized, locally and has even received national and international attention. The posting of certain legal filings on internet websites has provided opportunity and ability for people outside of the Triangle Area, the state of North Carolina, and even the United States to comment and follow the proceedings. This is evidenced by plaintiffs' filing an affidavit from a Canadian citizen currently residing in Hawaii. The public at large contains the future jury pool. Dissemination of the Temporary Custody Order will clearly and obviously prejudice potential jurors and therefore will interfere with the defendant's right to a fair trial. The Temporary Custody Order must be sealed to protect the state's compelling interest in a defendant's right to a fair trial.

23. In Virmani, the North Carolina Supreme Court held that the public had a qualified right of access to civil court proceedings and records, and that the trial court may limit this right when there is a compelling public interest and the closure of the proceedings or sealing of documents is required to protect the countervailing public interest. Id. at 476, 515 S.E.2d at 693. The Virmani Court recognized that the protection of the proceedings and records related to the statutorily-protected medical peer review upheld a public interest in candid and honest medical peer reviews and this outweighed the qualified right of public access to the hearing, recordings, and transcripts.

24. The Virmani court reviewed other compelling public interests that would outweigh this qualified right of access by comparing to the holdings of the United States' Supreme Court where the Court made it clear that the public's right of access is forced to yield to the government's interests. One of the cases cited is Press-Enterprise Company v. Superior Court of California for the County of Riverside II, 478 U.S. 1 at 13-14, 106 S.Ct. 2735 at 2742-43, 92 L.Ed.2d 1 at 13-14, (1986) where the U.S. Supreme Court held that a criminal defendant's right to a fair trial is a compelling interest for which the public's right of access will yield provided the limitation is narrowly-tailored to serve the interest. Virmani at 480, 515 S.E.2d at 696. The Press-Enterprise II Court opined that at a preliminary hearing, a lesser standard may be used to determine whether to exclude the public because pretrial publicity could influence potential jurors. A defendant need only show that there is a "reasonable likelihood of substantial prejudice," rather than the "substantial probability test" used in First Amendment determinations. Press-Enterprise II at 13-15, 106 S.Ct. at 2742-44, 92 L.Ed.2d at 13-15.

25. A temporary custody hearing is a preliminary hearing. Sealing the Temporary Custody order is necessary to protect defendant from a substantial probability of substantial prejudice that public dissemination of this preliminary, temporary order would cause by influencing the potential jurors in the public at large. Sealing the Temporary Custody Order is a narrowly-tailored means to accomplish the compelling interest of a defendant's right to a fair trial.

**MOTION TO STAY PUBLIC FILING AND DISSEMINATION OF
TEMPORARY CUSTODY ORDER PENDING APPELLATE REVIEW**

NOW COMES Defendant, by and through undersigned counsel, and says that should his motion to seal be denied by this Honorable Court, Defendant hereby MOVES pursuant to Rule 62 of the North Carolina Rules of Civil Procedure that a temporary stay be granted to afford Defendant the right to appellate review and determination prior to the public dissemination of the Temporary Custody Order and respectfully shows the Court:

1. Once the Temporary Custody Order is entered as a public record, it will certainly be posted on the WRAL internet website, the NC News 17 website, the websleuth website, and countless others. It is also certain to be the subject of news articles and broadcasts. This is certain to happen because of the history in this case of how the media and press have focused on its proceedings, as well as the recent indictment of the defendant. Once this occurs, no appellate decision can undo the irreparable damage that will have been done.

2. The defendant's Due Process right to a fair trial and unbiased jury is a compelling state and government interest.

3. Defendant's right to appellate review of the court's decision will be completely lost if a temporary stay pending appellate determination is not granted.

4. Neither the plaintiffs nor the public will be prejudiced or harmed by a temporary stay while the court's decision is reviewed.

WHEREFORE, Defendant respectfully prays that the Court:

1. Order that the Temporary Custody Order be sealed and that its contents shall not be disseminated by the parties by any means.

2. In the alternative, grant defendant a temporary stay pursuant to Rule 62 to suspend the public filing and dissemination of the Temporary Custody Order for thirty days, or until Defendant is afforded appellate review of the denial of his motion to seal.

3. Grant Defendant such further and other relief as is just and proper.

This is the 3rd day of November, 2008.

Sandlin & Davidian, PA

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CERTIFICATE OF SERVICE

This will certify that the foregoing Motion to Seal Temporary Custody Order and In the Alternative To Stay Public Filing and Dissemination was served upon all parties by hand delivery, addressed to:

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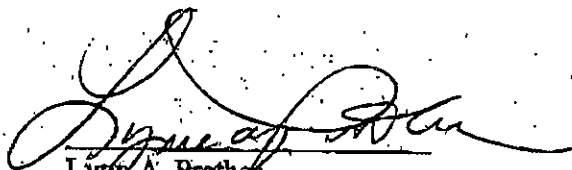
BY _____

WAKE COUNTY, C.S.C.

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This 3rd of November, 2008.



Lynn A. Frather
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