

IN THE CIRCUIT COURT, NINETEENTH
JUDICIAL CIRCUIT IN AND FOR ST.
LUCIE COUNTY, FLORIDA

CASE NO.: 562018CF003462A

DIVISION:

STATE OF FLORIDA,

Plaintiff,

v.

TANNER RAY DASHNER

Defendant.

RESPONSE TO AMENDED PETITION FOR GAG ORDER

John M. Phillips, Esq., and the Law Office of John M. Phillips, LLC, appears specially, and responds to Defendant Tanner Ray Dashner's Amended Petition for Gag Order as follows:

1. In Defendant Tanner Dashner's very cursory and brief Petition, unfavorable law is cited and few grounds are stated. It appears his counsel is seeking an excessively overbroad, highly irregular and entirely premature "gag" order, restraining free speech of every kind.

2. The primary basis for legal relief is:

"Rule 4-3.6 Trial Publicity

(a) Prejudicial Extrajudicial Statements Prohibited.

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should

know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

(b) Statements of Third Parties.

A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements that are prohibited under this rule."

3. This is a rule, which is self-governing it requires no order and no order can be granted under the alleged facts.

The Petition is Insufficient

4. Defendant does not state grounds upon which relief can be granted. It cites one post made by the undersigned's law firm on December 4, 2018, notably prior to Dashner's arrest.

5. It presents literally dozens of comments thereto by the general public made prior to the arrest. As such, no proceeding could have been effected.

6. There is no showing of requisite prejudice to Defendant Dashner.

7. There is no showing of a qualifying extrajudicial statement related to Defendant, Dashner.

8. There is no showing, and there can be no showing, of how such a statement could prejudice an arrest which had not even occurred at that time.

9. The relief requested by Defendant Dashner is to “all parties and their counsel, and those that are working in concert with their respective agents and employees either directly or indirectly with the parties and/or their counsel.” However, the Petition seems to extend to third parties. Attorneys for a victim, the Law Office of John M. Phillips, LLC, is not a Party, or a party’s counsel, and it is not working in concert with the agents or employees of a party of a party’s counsel. In fact, the State of Florida does not need involvement of the Estates of the victims, except for witness identification of the deceased, to prove its case. Because the firm’s posts are attached, we appear and respond.

The Relief Sought Does Not Apply to Private Attorneys of the Victims

10. As stated above, the relief requested is directed to “all parties and their counsel, and those that are working in concert with their respective agents and employees either directly or indirectly with the parties and/or their counsel.” Attorneys for a victim, the Law Office of John M. Phillips, LLC, is not a Party, or a party’s counsel, and it is not working in concert with the agents or employees of a party of a party’s counsel. In fact, the State of Florida does not need involvement of the Estates of the victims, except for witness identification of the deceased, to prove its case. The undersigned counsel shouldn’t even be involved, but because the firm’s posts are attached, we appear and respond.

11. We stringently object to any attempt at overbroad & ambiguous restraint of the victims when the criminal justice system gives them little to no voice in the criminal justice process.

The Relief Sought is Premature

12. Few cases have addressed this Rule and “gag orders,” as it relates to the relief sought. *In State of Florida v. Evans*, 2002 WL 32068319 (not reported in So.2d), the Florida Circuit Court, Second Judicial Circuit, Leon County, the Court had to examine the rights of media, the public and others in a very notorious case where Coy Evans was accused of first degree murder of a Tallahassee Police Officer. Despite it being a heavily reported media story, the Court recognized:

“Of course, the power of the court to enter such an order must be used sparingly and in a manner which insures the least infringement upon the freedom of the press.”

13. The *Evans* court also wisely noted:

“This case is in its very earliest stage. It is my experience that it will be as much as six months, probably more, before this case will be ready to go to a jury. Time and events will tend to dissipate any adverse impact of information that may have been improperly disclosed already. Of course, as the time for trial draws near, the media may choose to launch a new blitz of information and republish the articles attached to the defendant’s motion and in evidence. If that should occur, I would be forced to address the problem and will vigorously do so with the judicial tools available to me.”

14. This subject criminal case is of less public interest and similarly in early stages. Further, Defendant Dashner’s lawyer cites social media posts made in the earliest stages, before an arrest was made or shortly thereafter. We urge the court to consider the Court’s ruling in *Evans* and take a similar stance.

15. Further, most of the statements which are posted are by anonymous members of the public. They can never be gagged. Even in *Evans*, the notice was to, “The State Attorney and his staff and employees, state and local law enforcement agencies and their staff and employees, the Public Defender and her staff and employees,” parties and agents directly before it.

The Relief Sought is Overbroad

16. A gag order must be narrowly tailored to achieve the objective sought, namely, a fair trial. It must be narrowly tailored in both substance and duration, *Dippolito v. State*, 225 So.3d 233 (4th DCA 2017).

17. The Comment to the Rule urges that:

“It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression.” And further, “The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.”

18. Looking at *Dippolito*:

“the trial court prohibited “**[a]ll counsel in this case ...** from making any extrajudicial statement” reasonably expected to be publicly disseminated which specifically related to the following: (1) The evidence in this case or any party's view or opinion of the evidence in this case; (2) The facts of the case or any party's interpretation of the facts of the case, including any inferences that could be drawn from the

facts; (3) The motive or motivation of the State in prosecuting the case or the motive or motivation of the Defendant in pursuing any theory of defense; (4) Sentencing or punishment of the Defendant including any reference to the sentence imposed after the first trial, the Defendant's score on the Criminal Punishment Code Scoresheet, length of in-house arrest or punishment of the Defendant if found guilty; (5) Theories of the case by the State or the Defendant; (6) The first or second trial of this case, including the results of those trials; and (7) The disparagement of any attorney of record in this case."

19. According to the appellate court:

"Notwithstanding the topics prohibited by the preceding list, the trial court explained that attorneys were allowed to comment "generally on the progress of the case, procedural matters or rulings of the Court, provided the comments are consistent with the Florida Rules of Professional Conduct."

20. The restriction was limited to a few months before trial and only to the parties of the criminal case.

21. Indeed, the undersigned is a law firm, which represents one of the five deceased victims – the Estate of Alexis Chaney. She suffered a grueling death by fire. There has been no civil case filed, but we expect the evidence would show Mr. Dashner drove three times the speed limit while intoxicated over three times the legal limit. He was a threat at that time, was not arrested and also was driving with little to no insurance and repeatedly hurt people. Investigation was and is necessary. Witnesses, information, photographs and information about Defendant Dashner's accomplices or places he drank on the

evening in question are important. Gagging civil attorneys would destroy their right to a fair trial because it could not fairly investigate her case.

22. While the Florida Bar always has jurisdiction and Rule 4-3.6, governing trial publicity, is always a part of an attorney's duties, the victims and their attorneys are not subject to this Court's jurisdiction at this time. Even if they are subject to this Court's jurisdiction, Alexis Chaney and her Estate have an absolute right and legitimate interest in discovery from every available source and even using the media and social media to find witnesses or information.

Enforcement Would Create Legal Malpractice

23. Under Section 768.125, Florida Statutes, "Liability for injury or damage resulting from intoxication,"

"A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable for injury or damage caused by or resulting from the intoxication of such minor or person."

24. The Estate seeks evidence that Defendant Dashner was a habitual drunkard. This will take extensive research, investigation and calls for information. To disallow some level of select calls to the public (which would not otherwise interfere with the criminal trial) would cause the victim's lawyers to be exposed to malpractice. Same cannot be a burden on the victims. They had no

say in the cause of their deaths. Defendant Dashner did. Proper investigation thereof by the civil justice system is of equal importance.

The Relief Sought Would Violate the First Amendment

25. There were unqualified prohibitions laid down by the framers of the Constitution which were intended to give liberty of the press in the broadest scope that could be countenanced in orderly society. The Supreme Court has mandated that the freedom of discussion should be given the widest range of discretion possible compatible with essential requirement of fair and orderly administration of justice. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

26. Stated alternatively, the freedom of discussion should be given the widest range compatible with essential requirement of fair and orderly administration of justice, but it must not be allowed to divert trial from very purpose of court system to adjudicate controversies, both criminal and civil, in calmness and solemnity of courtroom according to legal procedure. *Id.*

27. Where there was 'no threat or menace to the integrity of the trial, ' (See *Craig v. Harney*, supra, 331 U.S. at 377, 67 S. Ct. at 1255), the U.S. Supreme Court has consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.

28. These rights extend to the ordinary citizen. It appears that Defendant Dashner takes exception to page after page of public commentary. There is literally no stopping the public from speaking and limited shuttering of the media.

29. The relief sought at this premature juncture seems to be aimed at any statement. It's unconstitutional.

30. Further, Defendant Dashner has failed to notice media, who has rights which could be hindered by the overbroad request for this Gag Order.

The Undersigned Firm also Represents Another Plaintiff in a Separate Incident where it Appears Dashner Untruthful

31. The Law Office of John M. Phillips represents Melanie Bowmaster. On September 28, 2018, she was struck as a pedestrian by Defendant Dashner while driving the same vehicle. Defendant Dashner claimed he had no insurance and otherwise sought to have Ms. Bowmaster proceed to take nothing based on an apparent misrepresentation.

32. Prior to that trial, Defendant Dashner was arrested in this matter. As such, he has not been able to appear and defend it and has failed to notify the apparent insurer. As such, Ms. Bowmaster has dismissed her small claims case and will shortly file it in the Circuit Court.

33. Discovery in that case will require some investigation, including requests for information related to the ownership of the subject vehicle. Apparently ownership of the subject vehicle was transferred days prior to this subject incident. Discovery about these issues must be allowed. Ms. Bowmaster is not a party or a victim to the subject case and has chosen her counsel who has a right to assist her fully and fairly.

Defendant's Cases Do Not Support Relief Requested

34. Defendant cites two cases. Neither stands for the proposition that the requested relief is appropriate.

Rodriguez ex rel. Posso-Rodriguez v. Feinstein

35. We first address *Rodriguez ex rel. Posso-Rodriguez v. Feinstein*, 734 So. 2d 1162 (Fla. 3d DCA 1999). A patient and her child brought a medical malpractice action against her doctor, alleging he failed to warn his patient not to become pregnant while taking a certain medication. The Circuit Court entered an order enjoining plaintiffs and their counsel from discussing issues in the case with the media without leave of court. The plaintiffs sought a writ of certiorari. The District Court of Appeal held that the order violated the plaintiffs' and counsel's First Amendment rights.

36. So in the first example Defendant Dashner cites, the Court quashed the lower Court's gag order. It is highly distinguishable in that the party sought to be gagged was an actual party and actual party's attorney.

37. The Court specifically stated:

“That this order is violative of the exercise of their First Amendment rights where the court made no findings that it was necessary to ensure a fair trial and where it was not narrowly tailored to preclude only extra-judicial statements which are substantially likely to materially prejudice the trial.”

38. Defendant, Dashner has neither requested nor addressed the fundamental requirement of law in his petition.

E.I. Du Pont de Nemours and Co. v. Aquamar, S.A. 33 So. 3d 839

39. This summary literally contains almost the entire opinion. Once again, it is unfavorable to the claimed position of Defendant Dashner and his attorney.

40. In a civil trial, the *Sun Sentinel* published an article, submitted by the President of the Florida Justice Reform Institute, criticizing the trial court's decision ordering a trial on damages only, following the striking of defendant E.I. DuPont de Nemours and Company's pleadings and the entry of a default against DuPont on the issues of causation and liability. On December 14, 2009, prior to the trial on damages, Aquamar, S.A. Molinos del Ecuador S.A., and Desarrollo Industrial Bioacuatico S.A., the Plaintiffs filed a Motion for Sanctions and Request for Court Order Enjoining DuPont from any further attempt to influence potential jurors, attributing the *Sun Sentinel* article to DuPont and its attorneys.

41. The trial court, sua sponte, entered a temporary injunction directed to all parties and their counsel, and those that are working in concert with their respective agents and employees either directly or indirectly with the parties and/or their counsel, consistent with 4.3-6 of the Rules Regulating the Florida Bar, not to participate, encourage, assist, or abet in the dissemination of any out-of-court publicity in this matter." DuPont appealed this order.

42. As in *Rodriguez*, the order on review was not supported by any showing that it was necessary to preclude a substantial likelihood of material prejudice to the trial of the case. Furthermore, there was no evidence presented

and there were no findings made that any out-of-court publicity posed a substantial and imminent threat to the fairness of the trial proceedings. This injunction was reversed and remanded.

Defendant's Pleading is a Sham

43. The undersigned, as noted, cannot move to strike Defendant Dashner's pleading as a sham because the Estate and its counsel are not parties hereto. Further, that is a matter in the civil rules, not the criminal rules.

44. However, as Defendant Dashner seeks to file statements of the undersigned's law firm and members of the public, while failing to meet literally ALL of the requisites of the law, while citing law which completely stands adverse to the Defendant's own position, that is the definition of a sham.

45. This Petition for Gag Order is due to be denied. The Court is respectfully requested to strike or seal the exhibits attached thereto, as it has no place in this Court.

WHEREFORE, Defendant Dashner's Petition for Gag Order is due to be denied or respectfully subjects this Court to an immediate appeal as an injunction to speech.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Brandon White, Esq., and Amber Moseley, Esq., Office of the State Attorney by e-mail to sa19service@sao19.org ; William Minton, Esq., The Florida Highway Patrol, at

williamminton@flhsmv.gov and Ashley N. Minton, Esq., Minton Law, P.A. at Ashley@MintonLawPA.com and Tiffany@MintonLawPA.com ; this **13th** , day of February, 2019.

Law Office of John M. Phillips, LLC

/s/ John Phillips

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