

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DONALD L. HILTON JR

§

VS.

§

NO: SA: 19-CV-00755-OLG

NICOLE PRAUSE and LIBEROS LLC

§

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION FOR PROTECTIVE
ORDER**

I. Introduction and Summary of the Argument¹

1. Defendant Nicole Prause falsely accused Dr. Hilton of “open sexual harassment”, “stalking”, “cyberstalking” and falsifying academic credentials. She used these false accusations to try to get Dr. Hilton removed from his academic appointment with UT Health, she went after his medical license, and she attempted to get two different academic journals to retract the articles Dr. Hilton authored. Because none of her accusations are true, Dr. Hilton filed suit for defamation.² Dr. Hilton’s Amended Complaint includes allegations that Dr. Prause has a pattern of making false allegations against people who disagree with her on the issue of whether pornography can become addicting. Plaintiff has identified nine (9) other individuals who have come forward with sworn declarations stating that Dr. Prause made completely false accusations

¹ Before getting to the substance of Defendants’ Motion, Plaintiff feels compelled to point out the opening lines of the introduction to Dr. Prause’s Motion, wherein Dr. Hilton is described as “a neurosurgeon, anti-porn activist and religious author having self-published one book entitled, *He Restoreth my Soul: Understanding and Breaking the Chemical and Spiritual Chains of Pornography Addiction Through the Atonement of Jesus Christ.*” (Doc. 40 at p. 1). Why do Defendants’ papers refer to Dr. Hilton as merely a “religious author”? Why not reference his substantial scientific publications in the peer-reviewed literature? Why bring Dr. Hilton’s religion into the argument at all?

² In this litigation, Dr. Prause has effectively admitted that Dr. Hilton never sexually harassed her, never stalked her, never cyberstalked her, and never falsified his academic credentials. Rather, Dr. Prause seems to be arguing that she was justified in making these false accusations because Dr. Hilton supposedly exaggerated her connection with the pornography industry in his public speeches. Dr. Hilton did not misrepresent Dr. Prause’s cozy connection to the pornography industry, but even if he had, such would not excuse Dr. Prause’s false and malicious accusations against him.

against them solely because they disagreed with her on whether pornography can be addicting.³ These other complaints have been specifically mentioned by the Court when describing what Dr. Hilton's case is about (Doc. 36 at p. 2).

2. Dr. Hilton has propounded requests for production, which included requests #25-34. These requests, which are quoted below, seek documents relating to the nature of the false accusations Dr. Prause made against these nine (9) individuals. In response, Dr. Prause filed a Motion for Protective Order seeking to avoid producing any of the requested documentation. In her motion, Dr. Prause makes two arguments. First, she argues that evidence about similar, false accusations will not ultimately be admitted at trial. Thus, she argues, the documents are not even discoverable. Second, she makes a non-specific argument about the burdens of producing these documents. Both arguments are without merit.

3. Dr. Hilton responds by stating that these other false accusations are highly relevant to his case because they show Dr. Prause's intent to defame, they reveal her motive, and they show actual malice. They are also relevant to Dr. Hilton's punitive damage claims. Moreover, at this stage in the litigation, the Court should not be assessing the *admissibility* of these other incidents. Rather, the Court should be addressing the much lower threshold applicable to the *discoverability* of such incidents.

4. Plaintiff also notes that while the Court has not explicitly ruled on the issue presented by Defendants' Motion, the Court has already commented on this issue when it was raised in the first

³ Defendants' moving papers question why the nine (9) corroborating witness declarations were attached to Plaintiff's Complaint – suggesting that Dr. Hilton is attempting to make a public spectacle of this case. While Plaintiff's specific legal strategies are privileged, Plaintiff will state that, at the time the case was filed, the Plaintiff did not know whether the heightened pleading requirements of the TCPA would be applied, and any prudent Plaintiff will attach evidence of his *prima facie* case to his Complaint when there is a possibility of a TCPA challenge.

status conference held on September 20, 2019. When counsel for Dr. Prause argued that the nine (9) other false accusations were not relevant to this case, the Court indicated that, rather than address the issue at this stage of the litigation, the issue would undoubtedly be subject to a Rule 403 analysis immediately before trial. Plaintiff submits that the Court was correct. The information is discoverable, and the Court can address the admissibility of these other false accusations when the evidence can be viewed in its complete context.

5. Finally, Plaintiff submits that the discovery requests are carefully tailored to meet the specific needs of the case. Plaintiff submits that the document requests are proper the way they were initially worded. However, in the spirit of compromise, Dr. Hilton is willing to limit the scope of these document requests to the following matters: (1) all documents showing what Dr. Prause actually said to the relevant government, school or other organizations with whom she filed/sent her complaints against the individuals named and (2) any documents Defendant plans to use to explain why such complaints were appropriate. In other words, Dr. Hilton is not asking Dr. Prause to look through the thousands of social media posts wherein she has falsely accused and defamed these other individuals. Rather, she only needs to produce (1) the complaints she actually sent against the identified individuals and (2) any documents she plans to use in her defense of her case.⁴

II. The Specific Discovery Requests Challenged by Defendants

6. Defendant has challenged requests for production #25, #27, and #28-33. Each of these requests seek specific documentation about the false accusations Dr. Prause made against other individuals who have also come forward to demonstrate that Dr. Prause's *modus operandi* is to

⁴ Plaintiff offered this limitation in the "meet and confer" conversation, but Defendant wanted to challenge any production of documents related to any other false accusations.

falsely accuse people of serious personal misconduct because they disagree with her about whether pornography is addicting. She does this to punish her critics and to shut down academic debate.⁵

The specific requests for production that Defendant has challenged are quoted below.

REQUEST 25:

All documents reflecting communications between you and Stanford University (or anyone affiliated with Stanford) that relate to or mention Dr. John Alder. This includes anything relating to your complaints to Stanford that Dr. Alder stalked you or your Title IX complaint against Dr. Alder.

REQUEST 26:

All documents reflecting communications between you and the Oregon Board of Psychology (or anyone affiliated with that board), Washington University PD, University of Wisconsin – La Crosse, Southern Oregon University and ESSM- European Society for Sexual Medicine that relate to or mention Gary Wilson. This includes anything relating to your complaints to said organizations regarding misconduct supposedly committed by Mr. Wilson. This request also seeks all documents relating to any written or oral complaints you made to any other organization (including any police department, the FBI, journal, or any other organization) wherein you have claimed that Gary Wilson has engaged in improper conduct or where you claim that his website or written materials contain inaccurate information.

REQUEST 27:

All documents reflecting communications between you and the Washington State Department of Health (or anyone affiliated with the state of Washington) and the National Association of Social Workers that relate to or mention Staci Sprouse. In this regard, please also produce any posts on Facebook or other social media that you authored wherein you mention Staci Sprouse.

REQUEST 28:

All documents reflecting communications between you and the California Psychology Board (or anyone affiliated with the State of California) that relate to or mention Linda Hatch. This request includes anything relating to your complaints you made to this Board regarding misconduct supposedly committed by Ms. Hatch.

REQUEST 29:

All documents reflecting communications between you and the University of Southern Mississippi (or anyone affiliated with this University), American Psychological Association, Sexual Addiction and Compulsivity Journal and Taylor & Francis that relate to or mention

⁵ Interestingly, Plaintiff's request #26 and #34 contain similar requests for documentation, but they were not challenged by Defendants.

Bradley Green. This request includes anything relating to your complaints you made to these entities regarding alleged misconduct, falsifying data, lying, unethical behavior that was supposedly committed by Dr. Green. This request also includes any communications of any kind relating to any complaint you have filed or made against Dr. Green.

REQUEST 30:

All documents reflecting communications between you and the Missouri Attorney General's office (or anyone affiliated with the Missouri Attorney General's office) that relate to or mention Laila Mickelwait and/or Exodus Cry. In this regard, please also produce any posts on Facebook, Twitter, Instagram or other social media that you authored wherein you mention Laila Mickelwait and/or Exodus Cry.

REQUEST 31:

All documents reflecting communications between you and the Washington State Department of Health (or anyone affiliated with the Washington State Department of Health) that relate to or mention DJ Burr. In this regard, please also produce any posts on Facebook, Twitter, Instagram or other social media that you authored wherein you mention DJ Burr.

REQUEST 32:

Any documents, letters, posts, or other communications in your possession custody or control that relate to whether the International Institute for Trauma and Addiction Professionals (IITAP) engaged in any kind of misconduct. This includes all documents you have that relate to your complaint against this organization

REQUEST 33:

All documents reflecting communications between you and Long Island University (or anyone affiliated with this University) that relate to or mention Geoff Goodman, PhD. This request includes anything relating to your complaints you made to this University regarding alleged misconduct, or unethical behavior that was supposedly committed by Dr. Goodman.

7. Plaintiff notes that these requests are very specific. This is no vague fishing expedition. Plaintiff is not asking about unknown false accusations Dr. Prause made against unnamed people. We know exactly who she falsely accused, why she did it and the organizations to whom Dr. Prause made the false accusations. However, while these nine (9) witnesses have each been informed of the general substance of the false accusations Dr. Prause made against them, and they have been required to defend against such false accusations, for the most part, the witnesses do not

have actual copies of the complaints Dr. Prause sent to the respective government and/or academic organizations. This is similar to Dr. Hilton's situation. The Texas Board of Medical Examiners would not provide Dr. Hilton with a copy of Dr. Prause's sexual harassment complaint against him. The Board merely informed him of the nature of the accusation made and invited him to respond. Dr. Hilton had to get the actual complaint from Dr. Prause in discovery. Therefore, Plaintiff needs to obtain the documents confirming exactly what Dr. Prause said when she made the other false accusations. Of course, if there are documents relating to these accusations that Dr. Prause is going to use as part of her defense, she must produce them. Indeed, these documents should have been produced as part of Defendants' initial disclosures.

III. Defendant has not shown that she is entitled to a Protective Order.

8. Federal Rule of Civil Procedure 26 governs the scope of permissible discovery, providing that:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

FED.R.CIV.P. 26(b)(1).

9. Significantly, as the party resisting discovery, Dr. Prause has the burden of proving that the documents requested are *not* discoverable. *Sec. & Exch. Comm'n v. Brady*, 238 F.R.D. 429, 435 (N.D.Tex. 2006)(the party resisting discovery bears the burden of establishing lack of relevance, specifically by demonstrating the requested discovery either does not come within the broad scope of relevance under Rule 26(b)(1) or is of such marginal relevance the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure).

The rules of broad discovery available under Rule 26 also apply to document requests under Rule 34. *See Transcor, Inc. v. Furney Charters, Inc.*, 212 F.R.D. 588, 591 (D.Kan. 2003).

10. Dr. Prause has not met her burden. Rather, she spends the bulk of her argument suggesting that there is no possibility that the evidence regarding these nine (9) other false complaints will ever be admissible at trial. This is wishful thinking on the part of Dr. Prause – especially at this stage of the litigation. The evidence will likely be admissible to help establish that Dr. Prause did not believe that she had been sexually harassed or stalked, but that her intent was to punish and silence Dr. Hilton. Thus, the evidence will likely be admissible to prove intent, malice, and knowledge of falsity. As one example, Dr. Prause may now be attempting to claim some strange and previously unheard of definition of “sexual harassment” where she conflates alleged defamatory statements made about her with sexual harassment. These prior false complaints may show how Dr. Prause has used the term “sexual harassment” and similar terms in the past. Additionally, depending on the contents of Dr. Prause’s deposition, these other false complaints may be admissible as impeachment evidence. Most certainly, these prior false accusations will be relevant on the issue of punitive damages.⁶

⁶ Depending on the facts of the case, prior, similar incidents may be admissible for a number of reasons. *Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070, 1082 (5th Cir. 1986) (Evidence of similar accidents occurring under substantially similar circumstances may be probative); *Leon v. FedEx Ground Package System, Inc.*, 313 F.R.D. 615 (D.N.M. 2016) (collecting authorities to show that “substantial similarity” rule applies outside of products litigation). *Roque v. City of Austin*, 2018 WL 5848988 (W.D. Tex. Nov. 7, 2018) (Discovery of similar incidents permitted because they were “highly relevant” in suit involving police misconduct).

11. However, the broader point is that it is premature for the Court to make the admissibility determination at this stage of the litigation. Even if the court ultimately determines that the evidence is inadmissible (which Plaintiff submits would be the wrong evidentiary ruling), the documents would nevertheless be discoverable. As Rule 26 makes clear, “Information within this scope of discovery need not be admissible in evidence to be discoverable”.

12. Defendant does not cite any cases where discovery of other, similar incidents was prohibited. Quite the contrary. In *Merrill v. Waffle House, Inc.*, 227 FRD 475, 477 (N.D. Tex. 2005), a case cited in Footnote 13 of Dr. Prause’s brief, the court found that discovery of prior incidents of sexual harassment was proper. Indeed, the *Merrill* court even ordered the production of confidential settlement amounts because, at the very least, these prior settlements were potentially relevant to the plaintiff’s punitive damage claim. In the present case, the need for discovery is far more compelling than it was in the *Merrill* case.

13. Dr. Prause’s claim that the document requests at issue create an undue burden is also grossly exaggerated – especially in light of the fact that the Dr. Hilton is happy to limit his document requests to the actual complaints Dr. Prause made against the named individuals plus any documents Dr. Prause plans to use in her defense of the case that may explain or mitigate her actions. There is no need for Dr. Prause to hunt through thousands of documents unless she wants to do so as part of her defense of the case.

14. It seems that Dr. Prause’s real problem flows out of the fact that she falsely accused more than a dozen people of sexual harassment, Title IX violations, academic fraud and similar personal misconduct. She did this because, like Dr. Hilton, these people disagree with her about whether pornography can be addicting. Dr. Prause and her counsel now have to determine how they want to defend this case, and if she has documents she plans to use in such defense, she will have to

produce them. With Dr. Hilton's proposed limitation of the scope of his document requests, the only affirmative documents Dr. Hilton is seeking relating to these similar incidents are the complaints themselves, which is not a burdensome request by any standard.

15. Dr. Hilton also notes that Dr. Prause has been the party who has made this case so time consuming and expensive. Dr. Prause has filed motion after motion, has sought extensions and delays, and has filed a brief at virtually every conceivable stage of this young case. Dr. Hilton is not complaining about it, but he does point out that Dr. Prause's claims of undue burden and expense ring hollow in light of the litigation posture she has taken thus far. Additionally, Dr. Hilton points out that he has no plans to notice the depositions of any of these other victims because their declarations explain the gist of what happened to them. Dr. Prause is not required to depose them, and if she is correct in arguing that these witnesses truly have no relevant information that will be admissible at trial, then she will suffer no prejudice if she does not depose them. Of course, Dr. Prause is welcome to depose these witnesses, and she is welcome to produce documents explaining her actions, but if she does, she cannot then complain that Dr. Hilton is making the case too burdensome or expensive.

IV. Conclusion

16. The documents requested are clearly discoverable. Moreover, in an effort to avoid unnecessary time and expense, Dr. Hilton has voluntarily limited the scope of his document request in a way that is more than fair to Dr. Prause. Thus, the Motion for Protective Order should be denied.

Respectfully submitted,

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[CERTIFICATE OF SERVICE ON NEXT PAGE]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this instrument has been forwarded, in accordance with the Federal Rules of Civil Procedure on the 26th day of December, 2019 to:

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Wilson Elser Moskowitz Edelman & Dicker LLP
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Via CM/ECF



Daniel W. Packard