

APPENDIX F

**IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA, ex rel: ROBERT BAUCHWITZ, M.D., Ph.D.	:	CIVIL ACTION
vs.	:	
WILLIAM K. HOLLOMAN, et al.	:	NO. 04-2892

PHILADELPHIA, PENNSYLVANIA

October 27, 2015

BEFORE HONORABLE TIMOTHY J. SAVAGE, J.

HEARING

APPEARANCES:

FOR THE

**PLAINTIFF: DAVID L. FINGER, ESQUIRE
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FOR THE

DEFENDANT: BALLARD SPAHR LLP
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[2] (The Court began the proceedings at 10:45 a.m.)

THE COURT: Good morning. I apologize for the delay. As you all know, I had a matter that was somewhat extended beyond what we anticipated. Please be seated.

This is the matter of United States of America ex rel: Robert Bauchwitz versus William K. Holloman, Civil Action 04-2892.

We're here today on a motion for access to court reporter's original stenographic hearing records. Before that we have a motion for pro hac vice.

MR. THOMAS SULLIVAN: Yes, Your Honor, Tom Sullivan presenting David Finger, and I presented a motion for Mr. Finger yesterday. He's very experienced in these types of access cases. That is why the client chose Mr. Finger. He has in-depth experience with broad issues, and I think he brings a special insight and expertise to this case, and I think he'll be a benefit to the client and to the court in this matter.

THE COURT: You know that personally?

MR. THOMAS SULLIVAN: I do. I read the cases, and I've worked with him before.

THE COURT: Good. All right, we'll grant [3] the motion.

MR. THOMAS SULLIVAN: Thank you, Your Honor.

MR. FINGER: Thank you, Your Honor. Pleasure to be before the Court. I thank the Court for granting my admission. This is an unfortunate and unusual matter, where there was a matter before Your Honor some time ago. We're here about a specific hearing where there is no transcript, no court reporter's notes. The information that my client got from the clerk's office is that in attempting to burn a disc, and I have the most general language to interpret from, there was an undefined malfunction. So there's no explanation for the absence of notes.

So our concern is, it may be that in the end there's nothing there. But the question is, if there was some data recorded, the stenographer uses the machine to record data, then some recording medium that is transferred over can be transferred over to the disc. But if that recording medium still exists – certainly advances in technological knowledge – to create an opportunity to do some forensic examination to see if that information is still available and can be recreated.

So I do not think that what we're asking here [4] is particularly either cumbersome or inappropriate. We just want a chance to see – to have a forensic person look at it and try to recover it. I think that is in the interest of the courts generally, if there is a transcript

to be recovered, and be part of the public record, then we should do that.

Even if, in the normal circumstances, this data, this raw data, might be considered the property of the court reporter, nonetheless, in a circumstance where there are no notes, transcripts or notes, the Court should have the authority to have that raw medium produced and analyzed. It is quite common I'm sure – I don't have to explain to Your Honor the interest of public access to judicial records. This is a natural extension of that. We are just trying to fill a vacuum that, for whatever reason, has been created.

So what we're asking of the Court is to allow us to have access to that device. If there is some argument that maybe something is in there that is confidential, we haven't had a response yet so we don't know what their position is. Certainly, we would agree to have an independent technologist look at it, and then can present it to Your Honor and a determination can be made based upon that. But all we're trying to do right now is to fill the gap that was, for whatever reason, [5] created, if that can still be done.

THE COURT: What factors must I take into consideration?

MR. FINGER: The only factors you need to take into consideration is that there is a public presumption of public access. If there is a countervailing argument to be made why, that doesn't necessarily mean the entire transcript, if it can be created, needs

to be sealed. It can be redacted. That public presumption recognized by the Third Circuit seems to be fairly strong.

The Court need not consider as a factor motive if it's a public right of access that belongs to everybody, regardless of whether it belongs to everybody's motive, or the passage of time, the public right of access exists in perpetuity from the beginning of its existence to the future. Individuals may have no interest in it, but the public at large. If one person has some interest in it, then that person's rights still exist.

As I said, the only other factors that the Court need to consider is if there is a compelling interest, the other side might say as to why that is – why this particular document has to be sealed in part or in whole. But we're not there with that at this point. [6] We're simply saying, let's see if we can recreate it and then make that determination.

THE COURT: Is there any concern that we have to balance that interest, weighing that interest itself to determine whether or not it's a compelling interest? And do we weigh that against the burden of the cost of complying with your request?

MR. FINGER: As far as the burden of costs, Your Honor, my view is that there is theoretical and practical. Theoretical view is that the Court has an obligation to maintain these records. Then I suggest that the Court has an obligation to do what it can do to make sure it does maintain these records.

As a practical matter, if it would turn out that there would be some extraordinary or some highly unusual cost, then the Court might determine that Dr. Bauchwitz has to assume some or all of that cost. But the cost involved is no different than any cost to the Court when there has to be transcripts made.

THE COURT: I agree with that. We're talking about a ten year old hearing. We're talking about the absence of the normal recordation.

MR. FINGER: The absence of the normal recordation – I'm not ascribing fault to anyone, but it's certainly not the fault of Dr. Bauchwitz.

[7] THE COURT: It's not mine.

MR. FINGER: It's a judicial officer. It may not be his fault, either. We don't know what the cause of the problem was. It may be pure mechanical error that nobody is at fault. I'm not trying to ascribe fault to anyone. But the problem is, how does the Court remedy something that denies Dr. Bauchwitz something which he might otherwise have a right to?

THE COURT: Let me ask you this. You're talking about a hearing on October 17, 2005; am I correct?

MR. FINGER: Correct.

THE COURT: What was the topic of that and the content of that hearing?

MR. FINGER: I do not know that, Your Honor. I suspect –

THE COURT: Shouldn't we have to determine whether or not it's significant and has any relevance to anything?

MR. FINGER: The only thing – again, no, Your Honor, because right now what we're talking about –

THE COURT: So it doesn't matter how insignificant the proceeding may have been; it doesn't matter whether it had anything to do with whether it [8] affected anybody's rights?

MR. FINGER: Your Honor, it was a transcript of a judicial hearing.

THE COURT: I understand. But I'm talking about trying to balance. I mean are we going to incur a great deal of expense to find out what happened that may have been insignificant and has no bearing at all? That's what I'm talking about.

MR. FINGER: I understand. But the problem is putting the cart before the horse. We don't know – I'm sorry, let me be clear. If it is a judicial proceeding to which judicial right attaches, that, however it is interpreted as to what the effect it has on the participants is less important, I respectfully submit then we need to insure public confidence –

THE COURT: I don't disagree with that. I'm saying, is there a balancing test we have to do at some point in time? Tell me what happened at the hearing.

MR. FINGER: Your Honor, I do not know, but I believe –

THE COURT: Would you have not inquired of your client as to what he needed it for?

MR. FINGER: No, I deliberately did not do that because –

[9] THE COURT: You're not giving me any context.

MR. FINGER: His motive of why he wants it is entirely irrelevant. That is not –

THE COURT: Well, we have the interest of the public, correct? What is the interest of the public in this case?

MR. FINGER: The interest –

THE COURT: In this hearing.

MR. FINGER: In this hearing?

THE COURT: Of October 17, 2005. What's the public interest?

MR. FINGER: The public interest is not limited to the events of that day. The public interest is in knowing that if there is a judicial proceeding overseen by a judicial officer, a judge and the interest – that the entire interest to the right of access is to the insure –

THE COURT: Mr. Finger, I don't disagree with you. If we were talking about something that happened a year or two ago, I wouldn't hesitate, all right?

I wouldn't care what the content of the hearing was because you're right, the public would have a right to have access. But when we're talking about a ten year old hearing that we don't even know means anything to [10] anybody – because that's what you're telling me, you don't know. You just say the public is entitled to it. No other inquiry is necessary is your argument. Am I correct? I want to understand it.

MR. FINGER: Correct. But if I may add one sentence to that.

THE COURT: You can add two.

MR. FINGER: You're very kind. Thank you, Your Honor. If I didn't know – if it happened a year ago, and I didn't know, Your Honor, said no problem. But the fact that my ignorance plays out longer over the years doesn't change that. So –

THE COURT: It goes to what I'm talking about in weighing of all factors. You only want to say that the public is always entitled to it. We do know this is a key case under seal; do we not?

MR. FINGER: Yes, Your Honor.

THE COURT: Was the seal lifted?

MR. FINGER: It was lifted in part. Several documents are still under seal. Motions were to extend the deadline under seal, to extend the government investigation. The rest of it was unsealed.

THE COURT: My recollection is, did the government interview the client?

MR. SULLIVAN: Before the October hearing, [11] Your Honor, the United States declined. So at the time of the hearing, we declined that everything was still under seal.

MR. FINGER: I respectfully suggest, Your Honor, when the government declined, it's at least as important to the public's interest as when they take the case.

THE COURT: Well, they did, but they did it before the hearing we're talking about. We are not saying that they are not entitled to it.

MR. FINGER: No. I don't want to repeat myself. Your Honor's time is valuable. Unless Your Honor has any other questions for me –

THE COURT: My time is no more valuable than yours and your client's and the public's. Take all the time that you need.

MR. FINGER: Thank you, Your Honor. Again, but the point I'm making is very simple. As the right attaches, and as the – there should have been – there is a right to a transcript. There should have been a transcript.

THE COURT: Why don't you tell me what the content is?

MR. FINGER: I wish I could, Your Honor. I could ask my client right now, if you would like me to.

[12] THE COURT: Let me ask you this, why does he want it?

MR. FINGER: Again, he may want it for personal interest. He may want to write a book one day. His interest is irrelevant, Your Honor, as I say.

THE COURT: I'm looking at – your client, who was a party in this action, is representative of the public, correct? That's it. There's no other public requesting this information, correct?

MR. FINGER: There are no other parties before the Court, Your Honor.

THE COURT: I could have somebody come in here from a news media and make a motion. There's no other parties. They are not parties. But there's nobody seeking it other than your client, Dr. Bauchwitz?

MR. FINGER: Correct, Your Honor.

THE COURT: What for?

MR. FINGER: Again, Your Honor, I don't know and I don't – I'm standing on the fact that it's irrelevant because the rights of the media are no greater than the rights of the public.

THE COURT: You can't give me a specific public interest, just a general public interest?

MR. FINGER: No, that is not correct, Your Honor. We did make a statement in our papers talking [13] about the False Claims Act. When there is a claim of public access our entitlement is to special considerations by the Court because the public is the true party in interest. I can say there's a general right of action.

This is not a slip and fall case. These are actions alleging misuse of government money. It's not a question of whether someone can bring a suit. It's a question of how these cases are being treated. For example, why did the United States decline the case?

THE COURT: I ask all the time and they never tell me.

MR. FINGER: I am sure that is true, Your Honor, but that doesn't mean that the public can't at least look at the transcript and understand the process.

THE COURT: It is very clear, if I recall from my opinion, that I talk about the government's declination. Have you bothered to read them?

MR. FINGER: I did see that, Your Honor. However, the right –

THE COURT: You saw the opinion?

MR. FINGER: Yes, I did. Your Honor, but the public is not limited to the Court's opinions. The underlying arguments, the underlying facts, the process that leads to the result is as important as the result.

THE COURT: What does the statute say?

[14] MR. FINGER: Which statute, Your Honor?

THE COURT: That provides for the –

MR. FINGER: The statute talks about – you’re talking about the initial sealing part of it? It allows it for, I think it was 90 days at a minimum, and the government can ask for extensions. It doesn’t necessarily explicitly state automatic unsealing. In this case I believe there was a specific motion asking the Court to unseal it.

THE COURT: Is there any requirement that the government has to explain its reasons for declining or the Court intervening?

MR. FINGER: I do not recall that, Your Honor. Nonetheless, I would suggest that makes it even more important that the public be able to, by looking at the record –

THE COURT: Do you think this October 17th hearing had anything to do with the government not intervening?

MR. FINGER: I have no idea, Your Honor. I haven’t seen it.

THE COURT: You have no idea. Now, let’s come to the other problem. You attach to your motion a letter from the supervisor of the court reporters – and the letter was dated September 20, 2012. There was a [15] representation in that letter that the equipment that the reporter had used malfunctioned. It did not have a working copy of the disc on which the hearing is recorded.

Further, that the court reporter's files in storage do not contain his notes, and he cannot explain the absence of the notes.

What is it that we can do?

MR. FINGER: That's a practical question. The question is, does the court reporter, who I understand is retired, have the original medium under which he put down his typing?

THE COURT: Those are his notes, his notes. Correct?

MR. FINGER: I don't know that.

THE COURT: That's what she's saying. The notes were then deposited into the clerk's office, and the clerk's office can't explain where they are. That's what Ms. Carr wrote.

MR. FINGER: If what Ms. Carr wrote –

THE COURT: How can I order the production of something that does not exist or is inexplicably missing? Would you like me to order that there be a further search to determine whether there exists any medium from which we can get a transcription of the [16] hearing?

MR. FINGER: Yes, Your Honor.

THE COURT: That's what you're asking me?

MR. FINGER: From my understanding, if the machine or the storage medium in the machine that the court reporter used is not in existence, he doesn't have it, the clerk's office doesn't have it, and there's no transcript, there's nothing else, then there's nothing Your Honor can do. I agree. But I don't understand that. I mean –

THE COURT: I will try to inquire as to whether or not there is something, if I grant your motion.

MR. FINGER: I understand that. That's all we want, Your Honor. If there is a medium that can be examined to see the notes; however, if a transcript can be exhumed from the storage medium, that is what we want. If there is nothing in existence any more –

THE COURT: Are you suggesting that it's buried?

MR. FINGER: I'm sorry, Your Honor, but my speech was figurative, not literal. If a transcript can be restored or recovered from the storage medium, then that's all we are trying to achieve.

If Your Honor ultimately determines that there [17] is nothing in existence any more, nothing can be done, then that's the end of it.

THE COURT: Mr. Grugan, what's your position? Are you just observing?

MR. GRUGAN: Your Honor, I don't know if we have an interest in this, but I do agree as a practical

matter there ought to be some balancing. I have yet to understand why exactly it is, other than to vindicate an academic interest, why we are here.

THE COURT: Mr. Fingers tells us that's enough.

MR. GRUGAN: Your Honor, I don't see how that could possibly be enough; otherwise, historians can come in to compel the records that go back 60 years for examination.

THE COURT: Anything else?

MR. FINGER: Your Honor, I do agree with what Your Honor said, that academic interest is enough. I would give one example – and I realize it's somewhat far removed. But in the past decade there was an access case where people tried to get access as to Martin Luther King's assassination. That was 30, 40 years ago. They didn't get it for another reason, but it wasn't because of untimeliness, and academic interest always exists.

[18] Thank you, Your Honor.

MR. GRUGAN: Your Honor, clearly –

THE COURT: He said that in the context of the balancing.

MR. FINGER: I understand. Thank you.

MR. GRUGAN: But, again, I think the Court's point there has been there is no articulation of any public interest other than Dr. Bauchwitz's own

personal interest relating to the substance of this hearing.

THE COURT: Anything else?

MR. FINGER: Nothing else, Your Honor.

THE COURT: You had enough time to address this issue?

MR. FINGER: Yes, thank you very much, Your Honor.

THE COURT: That concludes this hearing. Thank you.

(The Court adjourned the proceedings at 11:20 a.m.)
