

**Court of Appeals, State of Michigan**

**ORDER**

John Doe 1 v Department of Corrections

Docket No. 323867

LC No. 13-001196-CZ

William B. Murphy, C.J.  
Presiding Judge

David H. Sawyer

Mark T. Boonstra  
Judges

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The Court orders that the stay imposed by this Court's October 10, 2014 order is VACATED.

Pursuant to MCR 7.205(D)(2), in lieu of granting the application for leave to appeal, the Court REMANDS. On remand, the circuit court shall amend its September 24, 2014 order to include within the terms of the July 23, 2014 Stipulated Protective Order the videos already produced in response to Request to Produce #29 of plaintiffs' March 6, 2014 Request to Produce Documents, as well as those videos requested but not yet produced.

Additionally, the court shall conduct an *in camera* review of the packet of materials defendants have submitted to this Court with their motion to seal and determine whether any specific pages in the packet fall within any of the statutory privileges provided under MCL 600.2157, MCL 333.18237, or MCL 333.18513. Parties may obtain discovery of any matter that is relevant and *not privileged*. MCR 2.302(B)(1). So, putting privileged material under a protective order is insufficient. The court shall set a reasonable time for defendants to present written arguments as to why specific pages within the packet are privileged and then give plaintiffs a reasonable time to respond. At its discretion, the court may allow for oral argument. Because the materials in defendants' packet are propounded as a representative sample of a larger group of documents, and because it is impractical for the court to review every contested document in the larger group, the court shall articulate rulings and explanations regarding the specific documents in the packet that shall be used as guidelines for the redaction of other documents in the larger group. In all other respects, the application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review.

The Court orders that the motion to seal the packet in this Court's file is GRANTED. This order has immediate effect. MCR 7.215(F)(2). We do not retain jurisdiction.

Boonstra, J. (concurring in part and dissenting in part). I concur with the majority to the extent that this Court's order directs the trial court on remand, and in granting the motion to seal portions of this Court's file. I respectfully dissent, in part, as follows. While I would not disturb the trial court's September 24,

2014 order to the extent that it requires the production of responsive documents for use in this litigation, I would direct the trial court to extend the restrictions of the existing stipulated protective order to apply to documents containing protectable information, rather than to categories of information that might be contained in the documents. I find it unworkable, ineffective to the objective of adequately safeguarding protectable information, and contrary to sound litigation management and the need for precision and certainty regarding the materials that are to be governed by a protective order, to subject (as the trial court's September 24, 2014 order does) only categories of information to a protective order, rather than the documents themselves. Further, I find the categories of information identified in the trial court's September 24, 2014 order unduly narrow and insufficient to adequately safeguard protectable information, and would additionally direct the trial court to extend the protective order to cover additional documents, including, but not necessarily limited to, PSIRs and other records protected under MCL 791.229, HYTA documents, investigation records, and critical incident reports. The trial court's order effectively puts the cart before the horse, by endorsing and giving legal effect to plaintiffs' stated position that documents should be produced first, in unprotected fashion, and, if appropriate, certain produced material could then later be subjected to a protective order. In my judgment, that procedure is contrary to logic and sound practice, and the trial court should instead err on the side of affording adequate safeguards from the outset, all while ensuring plaintiffs' receipt and use of responsive documents for purposes of this litigation, by extending the protective order as stated above, subject to any future adjustment that may become appropriate. While restrictions may easily be removed from documents that might ultimately prove not to warrant them, it is difficult if not impossible to effectively (and belatedly) impose warranted restrictions on protectable documents after they have been ordered produced without the protections they might ultimately prove to warrant. Because this Court's order does not additionally remand with the further direction stated above, I must respectfully dissent from this Court's order to the extent that it vacates the stay imposed by this Court, as well as in the denial of the application for leave to appeal. Given our Supreme Court's recent order directing this Court to consider as on leave granted the matters at issue in Docket Nos. 321013 and 321756, I additionally would order that this matter be consolidated with those matters on appeal. See *John Doe 1 v Dept of Corrections*, \_\_\_ Mich \_\_\_, \_\_\_ NW2d \_\_\_, WL 5373929 (2014).



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

NOV 04 2014

Date

  
Chief Clerk