

IN THE STATE COURT OF CHATHAM COUNTY  
STATE OF GEORGIA

2014 NOV 12 PM 4:52

RICHARD JONES and ELIZABETH )  
JONES, as the Administrators of the Estate of )  
SARAH ELIZABETH JONES, deceased, )  
 )  
Plaintiffs, )

*Brian K. Hart*

v. )

Civil Action No. STCV1400752

FILM ALLMAN, LLC; UNCLAIMED )  
FREIGHT PRODUCTIONS, INC.; )  
RANDALL M. MILLER; JODY SAVIN; )  
GREGORY L. ALLMAN; CHARLES BAXTER; )  
JAY SEDRISH; JAY SEDRISH, INC.; )  
MICHAEL LEHMAN; DON MANDRIK; )  
HILLARY SCHWARTZ; MIKE OZIER; )  
WME BI HOLDINGS, LLC; OPEN ROAD )  
FILMS, LLC; MEDDIN STUDIOS, LLC; )  
JEFFREY N. GANT; RAYONIER )  
PERFORMANCE FIBERS, LLC; )  
CSX TRANSPORTATION, INC.; AND )  
UNKNOWN CORPORTATIONS A – Z; )

**JURY TRIAL DEMANDED**

**DEFENDANT CSX TRANSPORTATION, INC.’S MOTION TO PROHIBIT FURTHER  
PUBLIC DISSEMINATION OF VIDEO AND PHOTOGRAPHIC EVIDENCE AND  
EXTRAJUDICIAL STATEMENTS AND SUPPORTING MEMORANDUM**

NOW COMES Defendant CSX Transportation, Inc. (“CSXT”) and hereby moves the Court to 1) prohibit any further public dissemination of video or photographic evidence adduced in discovery in this case, and 2) bar Plaintiffs’ counsel from making any further extrajudicial statements about the merits of the case or the evidence adduced therein, further showing the Court as follows:

**INTRODUCTION**

On October 31, 2014, the ABC News program 20/20 aired a segment on the circumstances surrounding the death of Plaintiffs’ Decedent (“Ms. Jones”). The segment included a heavily manipulated and wholly unauthorized version of proprietary video from the

CSXT locomotive involved in the incident at issue. CSXT had previously produced this video only to Plaintiffs, subject to the terms of 1) a limited use license required by the video software provider, and 2) the watermarked restrictions clearly depicted on the video itself. By allowing or facilitating the dissemination and broadcast of an altered version of the video on national television, Plaintiffs have demonstrably violated both.

CSXT recognizes that the tragedy at issue in this lawsuit has generated legitimate and widespread interest among the media and public. However, the manipulation and public dissemination of potential evidence prior to trial puts the integrity of the adjudicatory process and the parties' rights at unnecessary risk. For these reasons, CSXT respectfully asks the Court to prohibit Plaintiffs and any other party to this case from any further public dissemination of video or photographic evidence exchanged during discovery.

Further, based on highly prejudicial and misleading public statements made by Plaintiffs' counsel about CSXT's role in the incident and defense of the case, CSXT is further compelled, under Rule 3.6 of the Georgia Rules of Professional Conduct, to ask the Court to bar Plaintiffs' counsel from any further extrajudicial statements relating to merits of the case or the evidence.

### **BACKGROUND**

As the Court is aware, Ms. Jones died on February 20, 2014 while she and other members of the *Midnight Rider* film crew were filming a scene on a CSXT railroad trestle in Doctortown, Georgia. Despite the fact that CSXT had denied the film crew's request for permission to film on its property, members of the cast and crew, including Ms. Jones, were on the trestle filming a scene when, at approximately 4:30 p.m., a northbound CSXT train (the "incident train") entered the trestle and struck a bed that the crew had placed on the tracks. The debris from the bed struck and killed Ms. Jones.

Plaintiff requested that CSXT produce in discovery a copy of the locomotive digital video recording (“LDVR”) from the incident train, along with the LDVRs for other trains that traversed the trestle prior to the incident. In order to accurately view the data captured by LDVRs used on CSXT locomotives, it is necessary to use proprietary licensed software developed and owned by General Electric (“GE”), which is the manufacturer of many CSXT locomotives. GE requires the users of its LDVR software to purchase a license and abide by the terms thereof, which prohibit the altering of its data or dissemination to non-users. (The GE terms and conditions for the sale and use of its LDVR program are attached hereto as Exhibits “A” and “B,” respectively.)

After requesting and receiving proof that Plaintiffs had purchased the necessary license from General Electric, and pursuant to the terms thereof, CSXT produced to Plaintiffs on October 22, 2014 the LDVR data in its possession.<sup>1</sup> Embedded in the LDVRs produced by CSXT to Plaintiffs is a watermark (the “CSXT proprietary watermark”) that states: “This video contains confidential information belonging to CSX. Any unauthorized copying, distribution, manipulation or other use is strictly prohibited.”

Nine days later, on October 31, 2014, the 20/20 segment on the circumstances surrounding the death of Ms. Jones aired. Plaintiffs and their counsel were interviewed at length as part of the segment. The LDVR from the incident train was also broadcast during the segment. While CSXT cannot be certain of how the video was manipulated, or by whom, it appears that the video was initially recorded off a computer that was running the GE software, and that the

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<sup>1</sup> By separate email on the same date, CSXT reiterated to Plaintiffs’ counsel that, while CSXT did not object to Plaintiffs’ use of the LDVR in litigation, it expected Plaintiffs to abide by the terms of the GE license.

recorded version was then manipulated in multiple ways.<sup>2</sup> For example, during the broadcast the video was played in fast forward and in slow motion, the color and lighting of the video had been altered, and graphics had been embedded within the video. The CSX proprietary watermark is plainly visible during the segment.

## ARGUMENT

### **I. Under O.C.G.A. § 9-11-26(c), This Court May Limit the Dissemination of Information Adduced During Discovery, as Courts in Other Jurisdictions Have Done in Similarly High Profile Cases.**

This Court has the power to “control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto.” OCGA § 15-1-3(4). As such, and pursuant to O.C.G.A. 9-11-26(c), this Court may impose conditions on the discovery process whenever justice so requires, which includes the power “to fashion orders limiting the use of and the dissemination of records.” *Apple Inv. Properties, Inc. v. Watts*, 220 Ga. App. 226, 228 (1996). The Court’s powers to control discovery are to be construed broadly, and are not to be interfered with absent a clear abuse of discretion. *LN W. Paces Ferry Associates, LLC v. McDonald*, 306 Ga. App. 641, 646 (2010).

In cases that receive substantial media attention, particularly where one party invites or encourages such attention, courts have found that good cause exists for placing limits on the disclosure of discovery materials. For instance, in *Schoolcraft v. City of New York*, No. 10 CIV. 6005 RWS, 2013 WL 4534913, at \*4 (S.D.N.Y. Aug. 27, 2013), after denying the defendants’ application for a broad gag order, the court nonetheless issued a protective order preventing the plaintiff and his attorneys from disseminating to outside parties information obtained during

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<sup>2</sup> CSXT intends to promptly supplement this motion with additional evidence on the issue of the extent to which the LDVR video from the incident train has been altered.

discovery. In finding that good cause existed for such an order, the court noted that the plaintiff's counsel, in support of their claims, had issued multiple press releases and frequently posted on social media. *Id.* Given the attendant media attention, the court found that dissemination of materials exchanged in discovery prior to trial would "jeopardize the [defendants'] constitutional right to a fair trial."

Courts have also recognized that the public disclosure of videos produced in discovery poses unique risks to the right to a fair trial and, as a result, "courts have repeatedly exercised their discretion by entering protective orders limiting disclosure of such videotaped discovery material in the pre-trial stages of litigation." *Whitaker v. Springettsbury Twp.*, No. CIV.1:08-CV-627, 2010 WL 1565372, at \*3 (M.D. Pa. Apr. 19, 2010) (summarizing cases where courts have refused to permit public disclosure of videotaped discovery materials)<sup>3</sup>.

In *Whitaker*, the shooting of a man by a local police officer was captured by a video that the parties then exchanged during discovery. *Id.* While acknowledging the public's interest in the video's subject matter, the court granted the defendant's motion for a protective order to prohibit release of the video and denied a media member's motion to access the video, holding that it is a "fundamental truth that broad distribution of video-taped discovery materials can be particularly invasive of personal privacy, and may be subject to editing and manipulation in ways which are highly prejudicial." *Id.* It further noted that courts "have long recognized that '[v]ideotapes are subject to a higher degree of potential abuse than transcripts. They can be cut and spliced and used as 'soundbites' on the evening news . . . .'" *Id.* (quoting *Felling v. Knight*,

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<sup>3</sup> See e.g., *United States v. MacDougal*, 103 F.3d 651 (8th Cir. 1996) (refusing to release video); *Stern v. Cosby*, 529 F. Supp. 2d 4197 (S.D.N.Y. 2007) (same); *In re NBC Universal*, 426 F. Supp. 2d 49 (E.D.N.Y. 2006) (same); *Hobley v. Burge*, 225 F.R.D. 221 (N.D.Ill. 2004) (same); *Felling v. Knight*, No. IP 01-0571-CT K, 2001 WL 1782360 at \*3 (S.D.Ind. Dec. 21, 2001) (same); *Jones v. Clinton*, 12 F.Supp.2d 931 (E.D.Ark.1998) (same).

No. IP 01-0571-CT K, 2001 WL 1782360, \*3 (S.D. Ind. Dec.21, 2001). The court emphasized that the “dissemination or distribution of edited tapes can also prejudice the right to a fair trial, and result in annoyance, embarrassment, oppression, or undue burden or expense for parties . . . .” *Id.*

In analyzing the threat that the video posed to the fairness of the trial and the impartiality of potential jurors, the court held:

[I]t would be inappropriate to disseminate the video broadly, since the release of that video could prejudice the ability of the parties to secure an impartial jury. These concerns are heightened here, where the video may be subject to editing by third parties once released, editing which could dramatically, and inaccurately, shift perceptions of this episode in ways which would be highly prejudicial to the trial rights of the litigants.

*Whitaker*, 2010 WL 1565372, at \*3.

Particularly where video evidence depicts the actual events giving rise to the lawsuit, courts have held that pretrial dissemination of video evidence poses too great a risk of tainting the jury pool. For example, in *Partin v. Wal-Mart Louisiana, LLC*, No. CIV.A. 09-2229, 2011 WL 441474, at \*1 (W.D. La. Feb. 1, 2011), the court issued a protective order that prevented the plaintiff from releasing a video of the incident that was at the heart of the lawsuit and that had been obtained in discovery. The court noted that the graphical nature of the video would most likely prejudice potential jurors who see the video in the news against the defendant, thereby affecting the defendant’s right to a fair trial. *Partin*, 2011 WL 441474, at \*1. The court recognized that the public had an interest in the events at issue in the lawsuit but noted that the media had been able to issue several news reports about the events without the benefit of the video. *Id.* Moreover, the court noted that the plaintiff would not be prejudiced in any way by a restriction on the dissemination of the video.

Thus, these prior courts, when faced with high profile cases involving potentially important video evidence, took the limited measures necessary to safeguard the integrity of the trial. By seeking an order prohibiting further release to the public of video and photographic evidence adduced in discovery, CSXT is only asking this Court to do the same.

**II. The Further Manipulation and Public Dissemination of Video or Photographic Materials Exchanged in Discovery Would Needlessly Jeopardize the Integrity of the Case and Should be Prohibited.**

Within days of receiving the LDVR video from CSXT, Plaintiffs' counsel, either on their own or in concert with others, made a separate recording of the LDVR as it was played using the licensed GE software. Next, they either substantially altered the video or permitted others to do so. Then they permitted (if not facilitated) the altered version of the video to be broadcast on a national news program. By these actions, Plaintiffs' attorneys are in violation of both 1) the terms of the GE license that governs Plaintiffs' use of the LDVR, and 2) CSXT's restrictions clearly depicted in the proprietary watermark embedded in the LDVR.

CSXT does not assert that the LDVR from the incident train, even in its manipulated form, reflects adversely upon CSXT. It does not. However, the fact that Plaintiffs are willing to manipulate potential evidence, and violate the terms of their access to said evidence, solely in furtherance of their media strategy, poses an unnecessary risk to the integrity of this litigation going forward.

For example, there are other videos, in addition to many photographs, of both the incident itself and subsequent accident scene, some of which are highly probative of issues in dispute. If Plaintiffs' counsel remains free to alter this material as they see fit (or allow others to do so), and then publicly disseminates altered versions, the jury pool could easily become tainted with

misinformation. As such, the time to address this matter is now, before further and potentially irreparable damage is done.<sup>4</sup>

Any further dissemination of manipulated video or photographic material threatens to taint the jury pool with potentially inaccurate information and prejudice the parties' rights to a fair trial. Further, no harm will come to Plaintiffs if they are made to simply stop giving proprietary evidence adduced in discovery to the media. Therefore, CSXT respectfully asks that the Court prohibit Plaintiffs, and all other parties, from further manipulation or public dissemination of video or photographic evidence that has been or will be exchanged by the parties in discovery.

**III. Based on Their Past Public Statements, Any Further Extrajudicial Statements from Plaintiffs' Counsel Will Have a Substantial Likelihood of Materially Prejudicing the Trial, and Should be Prohibited.**

In addition to improperly disseminating altered video evidence to the public, Plaintiffs' counsel has also made highly prejudicial and inaccurate comments about CSXT that could only have been intended to influence the jury. CSXT does not seek to limit anyone's speech lightly, but if Plaintiffs' counsel is not constrained from further comment, there is a substantial likelihood that CSXT's fundamental right to a fair trial will be materially prejudiced.

**A. In Georgia, Lawyers May Be Restricted From Making Extrajudicial Statements to the Media that Carry a Substantial Likelihood of Materially Prejudicing the Trial.**

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<sup>4</sup> In fact, Plaintiffs have already violated the terms of their LDVR license a second time. In their recently filed motion to compel against CSXT, Plaintiffs attached a CD-ROM containing three LDVR clips from multiple CSXT trains in an MP4 format. The original LDVR files, however, are stored in a .vam format and the GE license clearly prohibits transferring LDVR files to a separate format, including a format that permits the files to be viewed without the requisite proprietary GE software. The issue is not merely technical. Part of the reason CSXT requires those seeking LDVR data to purchase and abide by the terms of the LDVR license is to prevent the alteration of evidence that often proves critical at trial. If Plaintiffs or others are free to manipulate the LDVR video for their own purposes, then the risk that this key evidence will be altered and made known to potential jurors becomes impermissibly and unnecessarily high.



Georgia’s standard for restricting extrajudicial comments by trial participants was first enunciated by the United States Supreme Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); see also *Atlanta Journal-Constitution v. State*, 266 Ga. App. 168, 168-69 (2004). In *Gentile*, the Court held that, when evaluating whether a limit on extrajudicial statements is warranted, a “substantial likelihood of material prejudice” standard applies, and that this standard “constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the States’ interest in fair trials.” *Gentile*, 501 U.S. at 1075. The Court further held that “[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.” *Id.* As a result, and as Georgia courts recognize, the U.S. Supreme Court “has placed an affirmative duty on trial courts to guard against prejudicial pretrial publicity.” *Atlanta Journal-Constitution*, 266 Ga. App. at 169 (internal quotation and citation omitted).

The *Gentile* standard “has been incorporated into Rule 3.6 of the State Bar of Georgia Rules of Professional Conduct,” which states in pertinent part as follows:

- a. A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a person would reasonably believe 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 in the matter.

*Atlanta Journal-Constitution*, 266 Ga. App. at 169. Therefore, pursuant to the Rule 3.6 standard, a court must find “that extrajudicial statements to the media will have a substantial likelihood of materially prejudicing the trial.” *Atlanta Journal-Constitution*, 266 Ga. App. at 170 (emphasis removed).

Here, based on improper public statements about CSXT that Plaintiff's counsel *has already made*, the risk of material prejudice if restrictions are not imposed warrants a restriction under the Rule 3.6 standard.

**B. Plaintiffs' Counsel's Prior Public Mischaracterizations of CSXT Warrant a Restriction on Any Further Extrajudicial Statements.**

On September 2, 2014, CSXT provided answers to Plaintiffs' Interrogatories (attached hereto as Exhibit "C"). In Interrogatory #6, CSXT was asked whether anyone other than Defendants caused the tragic incident at issue. In response, CSXT adopted the negligence allegations made against the codefendants, and further stated that:

It is unknown at this early stage in the formal discovery of this accident if there are any additional responsible parties. Further, it is presently unknown whether Sarah Jones had any connection or responsibility relating to the causation of the occurrence or the injuries or damages made the basis of this lawsuit based on, but not limited to, industry standards and safety procedures as well as reported information that she failed to drop equipment as instructed prior to the incident. It is further unknown whether Ms. Jones had actual or constructive knowledge of the potential for train activity at the time of the accident.

On September 4, 2014, *The Hollywood Reporter* published an article with the title "*Midnight Rider: Sarah Jones' Family Lawyer Blasts Train Track Owners*". (attached hereto as Exhibit "D.") The article attributed the following quote to Plaintiffs' counsel:

CSX's attempt to blame Sarah for causing her own death is, unfortunately, not surprising given the Defendants' behavior to date. The fact is, while the Defendants have differing accounts as to what happened on February 20th, one thing is abundantly clear — Sarah had no knowledge of the imminent danger awaiting her when she went to work that morning. To the contrary, she believed those in charge of the *Midnight Rider* production had taken the appropriate safety precautions and secured permission to film on the railroad tracks.

Plaintiffs' counsel was apparently referring to the standard comparative negligence defense raised in CSXT's Answer, but deceptively omitted the content of CSXT's sworn interrogatory answer addressing this issue. Not only did Plaintiffs' counsel have actual or constructive knowledge that his comment would have a substantial likelihood of prejudicing an adjudicative proceeding, that apparently was his intent in making the statement.<sup>5</sup> Further, the fact that "*The Hollywood Reporter*" printed the patently misleading statement without knowledge of the content of CSXT's Interrogatory Answers or Georgia law demonstrates the high risk of material prejudice to CSXT's right to a fair trial before an impartial jury.

For example, CSXT will continue to defend itself vigorously against the allegations that it is responsible for the tragedy at issue. If Plaintiffs' counsel remains free to publicly disparage, mischaracterize or editorialize about CSXT's role in the incident or its defense of the case, CSXT's right to a fair trial before an impartial jury will be in grave jeopardy. The time and place for Plaintiffs' counsel to present his claim against CSXT is to the jury at trial; not to the national media throughout the pretrial phase.

CSXT has always been a strong proponent of railroad safety and efforts to educate the general public on the hazards of trespassing on or around railroad tracks, including the work of Operation Lifesaver. CSXT does not seek to restrict in any way the ongoing discussion of film crew safety in light of this tragic accident, including public awareness of the "Slates for Sarah" campaign and other efforts to educate the film industry on the hazards of trespassing on railroad

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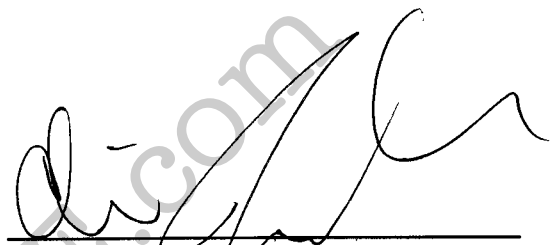
<sup>5</sup> While CSXT was concerned at the time by Plaintiffs' counsel's comments, it did not respond publicly, based on its desire to avoid any public comment on the merits of the case or the appearance that it was engaged in an extrajudicial attempt to influence the outcome of the case with a Savannah jury. Further, while CSXT considered bringing the matter to the Court's attention at the time, it chose to forego doing so in the hopes that it would prove to be an isolated incident. Now, however, in light of the troubling developments regarding the LDVR video, CSXT has no choice but to ask the Court to impose necessary and limited restraints on Plaintiffs' counsel's communications with the media.

property. To the contrary, CSXT seeks only the limited restraints necessary so that the prospective venire panel and jury pool are not unduly prejudiced against CSXT. To that end, CSXT hereby respectfully request an order prohibiting Plaintiffs' counsel from making any further extrajudicial statements regarding the merits of the case or commenting on the evidence.

### CONCLUSION

For these reasons, CSXT respectfully requests that its motion be granted in its entirety. For the Court's convenience, a proposed order is submitted herewith.

This 2<sup>nd</sup> day of November, 2014.



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