UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

ROY L. DENTON,	)	
	)	
Plaintiff,	)	
	)	1:07-CV-211
v.	)	
	)	Chief Judge Curtis L. Collier
STEVE RIEVLEY	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

Before the Court are numerous *pro se* motions filed by Plaintiff Roy L. Denton ("Plaintiff") (Court File Nos. 108, 113, 114, 115, 116, 117, 118, 119, 126). Defendant Steve Rievley ("Defendant") has filed a response to several of the motions (Court File Nos. 127, 128, 129, 130, 131, 132). As a preliminary matter, motions in limine generally serve as pretrial requests regarding evidentiary matters at trial. Matters regarding the proper meaning of relevant laws are better addressed in the form of jury instructions. The Court will address each of Plaintiff's motions in turn.

I. Motion for a Pretrial Conference

Plaintiff filed a motion for pretrial conference (Court File No. 117). As cause, Plaintiff states a jury trial in this matter is scheduled to begin on August 23, 2010. Pursuant to Rule 16 of the Federal Rules of Civil Procedure, and having appeared Mr. Roy L. Denton, *pro se*, for the plaintiff, and Mr. Ronald D. Wells having appeared as counsel for the defendant Mr. Steve Rievley, a Final Pretrial Conference was held on April 2, 2010 (Court File No. 92). The Court is not required to hold another pretrial conference upon scheduling a new trial and finds no need to do so in this case. Accordingly, the Final Pretrial Order entered on April 16, 2010 will govern the retrial of this case.

The Court, therefore, **DENIES** Plaintiff's motion for a pretrial conference (Court File No. 117).

II. Motions for Judicial Notice Pursuant to Rule 201

Plaintiff has filed three motions for judicial notice pursuant to Rule 201 of the Federal Rules of Evidence (Court File Nos. 108, 113, 116). Rule 201 states "a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonable be questioned." Fed. R. Evid. 201(a). It is mandatory for a court to "take judicial notice if requested by a party and supplied with the necessary information." *Id.* at 201(d). Nevertheless, as stated in the advisory committee's note (1972), "a high degree of indisputability is the essential prerequisite." In other words, the requests for judicial notice must meet the criteria outlined in Rule 201(a) in order for mandatory judicial notice under Rule 201(d) to apply. Here, all three of Plaintiff's motions for judicial notice fail to meet the requirements of Rule 201 (Court File Nos. 108, 113, 116).

A. Motion for Judicial Notice of Telephone Record

Plaintiff requests the Court to take judicial notice of the Sprint cellular telephone record allegedly belonging to Defendant pursuant to Rule 201 (Court File No. 108). This record does not contain the type of administrative facts appropriate for judicial notice. Rather, although Defendant provided the telephone record to Plaintiff through his attorney, the contents of the record could be subjected to reasonable dispute (*id*. at 1). As Plaintiff himself indicates, Defendant's name does not appear on the telephone record (*id.* at 2). In addition, while the Court might take judicial notice of the fact the record exists, it may not take judicial notice of the facts contained in the record. *See*

Sigler v. Am. Honda Motor Co., 532 F.3d 469, 476-477 (6th Cir. 2008) (holding while the trial court could take judicial notice of the fact a certain agency maintained medical records of retired United States military personnel, it could not take judicial notice of the contents of the medical records). Plaintiff should also note even if this record is determined to be a "public record," some public records are not subject to judicial notice. *See, e.g., Reeves v. Corr. Med. Serv.*, No. 08-13776, 2009 WL 3876292 at *2 (E.D. Mich. Nov. 17, 2009).

Furthermore, the Court construes Plaintiff's request for judicial notice as an attempt to offer a stipulation that the Sprint cellular telephone record identified as "Exhibit A" is a "true and correct copy of the telephone [] Steve Rievley . . . considers his 'personal' cell phone. . ." (Court File No. 108 at 2). According to ED.TN. LR 43.4, parties "shall confer with each other before offering a stipulation to the Court for consideration." Plaintiff and Defendant may wish to offer a stipulation regarding the telephone records, or Plaintiff may move to offer this record into evidence at trial. For the above-mentioned reasons, the Court **DENIES** Plaintiff's motion for judicial notice (Court File No. 108).

B. Motions for Judicial Notice of "Domestic Law" and "Probable Cause"

Plaintiff moves for the Court to take judicial notice of a domestic state law and the meaning of "probable cause" (Court File No. 113, 116). Under Rule 201, "judicial notice is generally not the appropriate means to establish the legal principles governing the case." *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002)*;see also United States v. Dedman*, 527 F.3d 577, 587 (6th Cir. 2008). Plaintiff states during the first jury trial, the Court declined to take judicial notice of a Tennessee state law (Court File No. 113 at 2). However, "state law is simply a matter for the judge to determine." *Dedman*, 527 F.3d at 587.

Plaintiff also requests judicial notice "regarding the explanation, meaning and application

of 'probable cause'" for the purpose of instructing the jury under Rule 201(g) (Court File No. 116). It is the province of the Court to first determine the relevant law and then instruct the jury how to apply the law to the facts. The Court will instruct the jury as to any legal definitions and relevant law. For the above reasons, these are not appropriate bases for judicial notice. Accordingly, the Court **DENIES** Plaintiff's motion for judicial notice of "domestic law" and "probable cause" (Court File No. 113, 116).[1]

III. Motion for Judicial Consideration Clarifying the Difference Between "Giving Consent And Objecting to a Search"

Plaintiff asks the Court to clarify the difference between a home owner "giving consent and objecting to a search" of his or her home (Court File No. 114). The Court will be in a better position to evaluate whether such a clarification is necessary when presented with the evidence at trial. If the court deems necessary, it will instruct the jury regarding such distinction in the jury instructions. The Court therefore **RESERVES** ruling on this motion (*id.*).

IV. Motion to Preclude Defendant from Relying on the Doctrine of "Common Authority"

Plaintiff requests the Court to preclude Defendant from relying on the doctrine of "common authority" (Court File No. 115). As cause, Plaintiff cites *Georgia v. Randolph,* 547 U.S. 103, 120 (2006), which states a "warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable . . . on the basis of

[1]Plaintiff may submit suggested charges to the jury pursuant to E.D.TN. LR 51.1. The Court will consider any suggestions and if necessary, take up further discussion at the time of the charge conference.

consent given to the police by another resident" (Court File No. 115 at 3). Reliance on *Randolph* is somewhat misplaced unless the jury determines Plaintiff "expressly refused to consent" while a third party gave consent to a search of the home. *United States v. Stanley*, 351 F. App'x 69, 72 (6th Cir. 2009). Whether Plaintiff expressly refused to consent while another party gave consent is a determination for the jury. Precluding reliance on the doctrine of "common authority" at this point is premature. The Court will take into consideration whether additional jury instructions on the doctrine of "common authority" is necessary and may address this issue at the charge conference. Accordingly, the Court **DENIES** Plaintiff's motion seeking to completely preclude Defendant from relying on the doctrine of "common authority" (Court File No. 115).

V. Motion in Limine and Objection Regarding Jury Instructions Concerning "Qualified Immunity"

Plaintiff objects to the doctrine of "qualified immunity" being a part of the jury instructions (Court File No. 118). Plaintiff cites a number of cases from other circuits as well as this Court's denial of Defendant's motion for summary judgment (Court File Nos. 51, 65, 118). Plaintiff's reliance on the denial of Defendant's motion for summary judgment is misplaced. A court will only enter a motion for summary judgment if it finds that a fair-minded jury could not return a verdict in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986); *Lansing Dairy, Inc. v. Epsy*, 39 F.3d 1339, 1347 (6th Cir. 1994). Once summary judgment is denied, the court may proceed with a trial on the issue. *See e.g., Hanson v. City of Fairview Park, Ohio* 349 F. App'x 70, 77 (6th Cir. 2009). In addition, the "legal question" of qualified immunity may be submitted to the jury if it is totally dependent upon which facts are accepted by the jury. *Miller v. Sanilac County & Jim Wagester*, 606 F.3d 240, 247 (6th Cir. 2010). The Court will instruct the jury

regarding the relevant law. Therefore, the Court denies Plaintiff's motion to preclude any mention of "qualified immunity" (Court File No. 118).

VI. Motion to Disqualify Attorney Ronald D. Wells

Plaintiff moves this Court to disqualify counsel for Defendant, Attorney Ronald D. Wells, because Plaintiff will list the attorney as a potential witness on the final witness list (Court File No. 119). In support of his motion, Plaintiff cites the Tennessee Rules of Professional Conduct, which this court, through ED. TN. LR 83.6, has adopted as its ethical rules. Rule 3.7(a) of the Rules of Professional Conduct states:

> A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case;
> (3) disqualification of the lawyer would work substantial hardship on the client.

Rule 3.7 "allows an attorney to function as both attorney and witness, assuming he is not a necessary witness." *Eon Streams, Inc. v. Clear Channel Commc'n Inc.*, No. 3:05-CV-578, 2007 WL 954181 (E.D. Tenn. March 27, 2007).

Because Plaintiff seeks to disqualify Attorney Wells, he bears the burden of proving counsel is a "necessary witness." *Id.* at *3. For a lawyer to be a necessary witness, his testimony must be relevant, material, and unobtainable elsewhere." *Rothberg v. Cincinnati Ins. Co.*, No. 1:06-CV-111, 2008 WL 2401190 at *2 (E.D. Tenn. June 11, 2008). Plaintiff argues Attorney Wells is a necessary witness because Defendant "has provided . . . an assortment of allegations, statements, events, responses, and testimony that appear to be contradictory with what [Defendant's] attorney . . . has presented on Defendant's behalf" (Court File No. 119 at 1). In response, Defendant argues

"Attorney Wells has no information concerning the events of the night in question except that which he has obtained through his client and through his own investigation," and therefore, "any potential testimony he could give is subject to the attorney-client privilege and work-product doctrine" (Court File No. 127 at 2).

Because Defendant asserts any testimony Attorney Wells could give is subject to privilege, this Court finds Plaintiff has failed to meet his burden of proof. Accordingly, the Court **DENIES** Plaintiff's motion (Court File No. 119).

VII. Motion to Exclude Witnesses and to Expand Rule 615

Plaintiff asks the Court to exclude all witnesses from the courtroom prior to their testimony pursuant to Rule 615 of the Federal Rules of Evidence (Court File No. 126). In addition, Plaintiff urges the Court to expand Rule 615 to "require[] every witness at the conclusion of their testimony [] to remain inside the courtroom or be placed in some other room under court officer supervision . . ." (*id*. at 1). The Court will comply with Rule 615 which states "at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." In fact, Defendant correctly notes "it is standard procedure for witnesses to remain outside the courtroom until the time of their testimony," and the Court will provide instructions to the witnesses regarding the matter (Court File No. 129 at 1).

However, in regards to Plaintiff's request that this Court expand Rule 615 and require every witness at the conclusion of his or her testimony to remain in the courtroom or other supervised room, this exceeds the authority of the Court. Therefore, the Court **DENIES** Plaintiff's motion (Court File No. 126).

SO ORDERED.

ENTER:

/s/
CURTIS L. COLLIER
CHIEF UNITED STATES DISTRICT JUDGE