
JOSHUA M. GREENBERG, DMD, and
SANDRA GREENBERG, as the
Administrators of the Estate of ELLEN
R. GREENBERG, deceased,

Plaintiffs,

v.

MARLON OSBOURNE, M.D., and
PHILADELPHIA COUNTY MEDICAL
EXAMINER'S OFFICE,

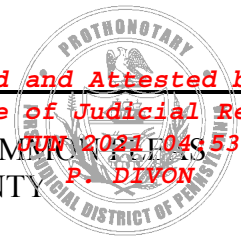
Defendants.

IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

CIVIL ACTION

October Term 2019
No. 01241

*Filed and Attested by the
Office of Judicial Records
04 JUN 2021 04:53 pm
P. DIVON*



ORDER

AND NOW, this _____ day of _____, 2021, upon consideration of
Plaintiffs' Motion to Compel and Defendants' Response thereto, if any, Defendants are hereby
ORDERED to produce to Plaintiffs within ____ days a copy of the video taken by Melissa Ware
of Ellen R. Greenberg's apartment and thereafter surrendered to the Philadelphia Police
Department;

It is further **ORDERED** that, if such video cannot be located in the possession, custody
or control of the Defendants, a person with knowledge shall, within ____ days, submit to this
Court, a sworn declaration confirming the video is not in the possession, custody or control of
the Defendants, attesting to all efforts undertaken by Defendants to locate said video, and
explaining how it came to be lost.

BY THE COURT:

, J.

Certification Due Date: 06/14/2021
Response Date: 06/21/2021
Case ID: 191001241
Control No.: 21061025

LAMB McERLANE PC

Joseph R. Podraza, Jr., Esquire (ID No. 53612)
William H. Trask, Esquire (ID No. 318229)
One South Broad Street – Suite 1500
Philadelphia, PA 19107
(215) 609-3170
(610) 430-8000

Attorneys for Plaintiffs

JOSHUA M. GREENBERG, DMD, and
SANDRA GREENBERG, as the
Administrators of the Estate of ELLEN
R. GREENBERG, deceased,

Plaintiffs,

v.

MARLON OSBOURNE, M.D., and
PHILADELPHIA COUNTY MEDICAL
EXAMINER’S OFFICE,

Defendants.

IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

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MOTION TO COMPEL

Plaintiffs, the Joshua and Sandra Greenberg, Administrators of the Estate of Ellen R. Greenberg, deceased (“Plaintiffs”), file this Motion to Compel Defendants to produce the video recording made by a third-party and provided to the Philadelphia Police Department, related to key claims and defenses in this action, and in support thereof, avers as follows:

1. The above action seeks mandamus and declaratory relief against the City of Philadelphia, Office of the Medical Examiner (“MEO”) and Dr. Marlon Osborne, the forensic pathologist who ultimately concluded, without a sufficient legal or medical basis, that the manner of Ellen R. Greenberg’s death was suicide, despite having been stabbed twenty times, including ten in the back of her neck and head.

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2. Among the key issues in this case concern whether Dr. Osborne has sufficient support—meaning 70% or greater certainty—for his finding of suicide: having initially determined on the basis of the medical evidence obtained at autopsy that Ellen’s death was a homicide, Osborne now claims reliance on information later obtained from police investigators concerning the state of Ellen’s apartment as the critical basis for his decision to revise Ellen’s manner of death to suicide.

3. Plaintiffs requested the production of all evidence, documents, recordings and the like related to Ellen’s death investigation. True and correct copies of the Plaintiffs Requests for Production of Documents are attached hereto as Exhibit “A.”

4. The Defendants eventually produced some documents from the Medical Examiner’s Office, including copies of scene and autopsy photographs, investigation and autopsy reports, and some correspondence between MEO personnel and the Greenberg family or their representatives.

5. A number of other items known to exist were not produced until specifically identified by the Plaintiff—and even then only under threat of court intervention—including copies of the 9-1-1 call recording and surveillance video depicting the lobby and other public areas of the apartment building where Ellen died.

6. The Plaintiffs have recently learned that the following morning, while forensic pathologist Dr. Marlon Osborne began his autopsy of Ellen’s body that would result in a finding of homicide, the PPD provided Melissa Ware, the manager of the apartment building where Ellen had died, with contact information for a crime scene cleaning service and authorized her to have the apartment cleaned and disinfected before conducting a homicide investigation.

7. Plaintiffs independently learned Ware had the presence of mind to film the apartment, its condition, and its contents before it was sanitized of all evidence and thereafter provided police investigators with her video recording.

8. Immediately upon learning of the existence of the videotape, Plaintiffs requested that the Defendants produce a copy.

9. The rules governing discovery in Pennsylvania provide

...a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party....

Pa. R.C.P. 4003.1 (a).

10. Video depicting the apartment, including evidence later relied upon to justify the very manner of death determination which is the subject of this lawsuit, is plainly relevant.

11. Defendants have not objected to Plaintiffs' request. Rather counsel for the Defendants advised that the video simply cannot be found.

12. But this is not the first time the Defendants have made such a claim with regard to video evidence. Previously, Plaintiff requested surveillance video from the lobby of the building where Ellen died, which the Defendants initially claimed did not exist in their files. Only after 11 months did the Defendants grudgingly locate and produce that video. See Email Threads Dated August 13, 2020 and January 25, 2021, copies of which are attached hereto as Exhibits "E" and "B," respectively.

13. Given that history, and the importance of the Ware video, Plaintiffs require more than the informal assurance of counsel that the video is not in the possession, custody or control of the Defendants.

14. For this reason, if indeed the video does not exist, Plaintiffs requested that Defendants, provide a sworn statement, prepared by the individual with knowledge, confirming that fact and attesting to the efforts undertaken in reaching that conclusion and explaining what happened to the videotape.

15. After initially agreeing to provide a sworn statement to that effect, the Defendants ultimately provided the same, informal assurance of counsel that was earlier shown to be unreliable. (*Compare* Ex. C, Email dated May 20, 2021, 12:11 PM (“I...will get you a sworn statement.”) and Ex. D, email dated May 25, 2021 (“There is no videotape in the Greenberg file...”).

16. Defendants must produce the videotape, and if the City has indeed lost it, someone with knowledge must be called upon to confirm it was lost, attest to any and all efforts undertaken in reaching that conclusion, and explain what happened to it.

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request that this Court order Defendants to produce a copy of Ware’s video or, in the incredible event this crucial evidence has been lost or destroyed, submit a declaration prepared by an individual with knowledge confirming the video does not exist, attesting to what efforts were undertaken to locate it, and explaining how it was lost.

LAMB McERLANE PC

By: /s/ Joseph R. Podraza, Jr.
Joseph R. Podraza, Jr., Esquire
jpodraza@lambmcerlane.com
William H. Trask, Esquire
wtrask@lambmcerlane.com
One South Broad Street, Suite 1500
Philadelphia, PA 19107
(215) 609-3170

*Counsel for Plaintiffs, Joshua Greenberg
and Sandra Greenberg, Administrators of
the Estate of Ellen Greenberg*

Dated: June 4, 2021

EXHIBIT A

Certification Due Date: 06/14/2021
Response Date: 06/21/2021
Case ID: 191001241
Control No.: 21061025

Joseph R. Podraza, Jr., Esquire (ID No. 53612)
William H. Trask, Esquire (ID No. 318229)
One South Broad Street – Suite 1500
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(610) 430-8000

JOSHUA M. GREENBERG, DMD, and
SANDRA GREENBERG, as the
Administrators of the Estate of ELLEN
R. GREENBERG, deceased,

V.

Defendants.

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DEFINITIONS

For the purpose of these Document Requests the following definitions apply:

A. “MEO,” shall at all times herein refer to Defendant the Philadelphia Medical Examiner’s Office, which maintained a business address at 321 University Avenue, Philadelphia, PA 19104 during the relevant period.

B. “Police Department” shall all times herein refer to the Philadelphia Police Department, headquartered at 750 Race Street, Philadelphia, PA 19106.

C. “Greenberg” shall at all times herein refer to Ellen R. Greenberg, deceased.

D. “Communication” means any oral, written or other exchange of words, thoughts or ideas to another person or entity, whether in person, in a group, in a meeting, by telephone, by letter, facsimile, email, text message, direct message, voicemail message, social media posting, or by any other process, electronic or otherwise. All written communications include, but not limited to, printed, typed, e-mailed, handwritten or other readable “documents” as that term is defined below.

E. “Document” is an all-inclusive term, referring to any writing or recorded or graphic matter however produced or reproduced. The term “document” includes, but not limited to, correspondence, memoranda, interoffice communications, minutes, reports, notes, schedules, analyses, drawings, diagrams, invoices, purchase orders, pleadings, questionnaires, contracts, bills, checks, drafts, diaries, logs, proposals, print-outs, recordings, telegrams, films, tax returns, and financial statements of any kind. The term “Document” includes all electronic data compilations and files, including email, text messages, public and private social media postings and messages, word processing documents, spreadsheets, and other forms of electronic or digital data, however stored or maintained.

F. The terms “referring to,” “relating to,” “pertaining to,” “in connection with” and “with respect to” should be read to include documents, communications, meetings and/or information that reflect, summarize, describe or relate to the matters that are the subject of these Requests. These terms shall mean regarding, in any way directly or indirectly, a document or a class of documents, event, act or occurrence and include, but are not limited to, compromising, constituting, analyzing, evidencing, comparing, discussing, showing, forming the basis of, containing, or supporting the event, act or occurrence.

INSTRUCTIONS

1. These Document Requests extend to all responsive documents in the possession, custody or control of the City of Philadelphia, including any department, division, or office thereof, and all documents produced in response to these Document Requests must be organized and labeled to correspond with the numbered paragraphs of the individual Document Requests. If there are no documents responsive to any individual Document Request, you must so state in writing.

2. All responsive documents in the form of electronically stored information (“ESI”), including emails, text messages and like documents, must be produced in native format, with all metadata preserved.

3. For any responsive document not within the possession, custody or control of the City of Philadelphia or any department, division, or office thereof, identify each such document individually, explain why the document is inaccessible, and further specify: (1) the document's present location; (2) the document's author, including present or last known address; (3) the document's date; (4) if applicable, the document's sender and recipient; and (5) if applicable, the date when the document was destroyed, lost or otherwise disposed of.

4. To the extent that you object to any specific Document Request, in whole or in part, on the grounds that the information sought is privileged or otherwise protected from discovery, you must respond to the portions of the request for which no privilege is claimed. With respect to that portion of the request for which privilege is claimed, identify: (1) the specific type of privilege, protection or statutory authority that you contend applies; (2) the facts that you rely on to support the privilege claim; (3) the form in which the allegedly privileged information exists (e.g., memorandum, letter, etc.); and (4) the document's subject matter. You must also identify the document's date, the name and address of the person who signed or prepared the document, the name(s) and address(es) of any person who received or reviewed the document, and the name and address of the person who now possesses the document.

5. These Requests for Production of Documents are deemed continuing in nature and call for prompt supplemental production whenever you receive or discover additional documents covered by these Requests for Production of Documents. You should promptly supplement your answers to these Requests for Production of Documents should you obtain documents different from or in addition to documents previously produced, upon the basis of which you know a prior response was incorrect or incomplete when made, or that a response, though correct and complete when made, is no longer true and complete.

6. Unless otherwise expressly stated, the Relevant Period of time to which these Requests for Production of Documents extends is from January 2011 to the present.

Document Requests

Defendant is requested to produce, in accordance with the above Definitions and Instructions, the following documents related to the January 26, 2011 death of Ellen R. Greenberg and any subsequent investigation thereof:

1. The entire MEO Investigative File related to the death of Greenberg, including all photographs.
2. The entire MEO Report related to the death of Greenberg including the entire ME's jacket, the Autopsy Report, photographs, the MEO findings, and toxicology findings and/or report.
3. Any and all crime scene investigation records of the MEO or Police Department related to the death of Greenberg, including reports, property receipts, logs, evidence records, findings, and photographs.
4. The complete Crime Scene Log created and maintained in connection with the Greenberg matter.
5. The complete Homicide Log reflecting any entry related to and/or concerning the Greenberg matter.
6. Any and all property receipts related to the death of Greenberg and/or the investigation thereof.
7. Any and all communications to, from, between, among or including any MEO employee, including emails, texts and other electronic communications, related to the death of Greenberg and/or the investigation thereof.
8. Any and all communications, including text messages, emails and other electronic communications, to, from, between, among or including any Philadelphia Police Department personnel, Medical Examiner's Office personnel, Lawrence Krasner, Esquire, the Philadelphia Police Commissioner, and any District Attorney's Office personnel, including without limitation, Guy D'Andrea, Esquire.

9. Any and all search warrants issued in connection with the death of Greenberg and/or the investigation thereof, together with any and all appurtenant affidavits of probable cause.

10. A copy of the recording of the call placed to 9-1-1 emergency dispatch by Samuel Goldberg on January 26, 2011 in connection with the Greenberg matter.

11. A detailed description of all fingerprint cards and analyses performed in connection with the Greenberg matter, including the results thereof.

12. Any and all DNA analyses performed in connection with the Greenberg matter, including any and all reports associated or prepared in connection therewith.

LAMB McERLANE PC

Dated: February 13, 2020

By: /s/ William H. Trask
William H. Trask, Esquire

CERTIFICATE OF SERVICE

I, William H. Trask, Esquire, hereby certify that a true and correct copy of the foregoing document was served this day *via* email on the person indicated below:

Ellen Berkowitz, Esquire
Senior Attorney
City of Philadelphia Law Department
1515 Arch Street, 15th Floor
Philadelphia, PA 19102-1595
ellen.berkowitz@phila.gov

(Counsel for Defendants)

LAMB McERLANE PC

Dated: February 13, 2020

By: /s/ William H. Trask
William H. Trask, Esquire

Joseph R. Podraza, Jr., Esquire (ID No. 53612)
William H. Trask, Esquire (ID No. 318229)
One South Broad Street – Suite 1500
Philadelphia, PA 19107
(215) 609-3170
(610) 430-8000

JOSHUA M. GREENBERG, DMD, and
SANDRA GREENBERG, as the
Administrators of the Estate of ELLEN
R. GREENBERG, deceased,

V.

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C. “Greenberg” shall at all times herein refer to Ellen R. Greenberg, deceased.

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F. The terms “referring to,” “relating to,” “pertaining to,” “in connection with” and “with respect to” should be read to include documents, communications, meetings and/or information that reflect, summarize, describe or relate to the matters that are the subject of these Requests. These terms shall mean regarding, in any way directly or indirectly, a document or a class of documents, event, act or occurrence and include, but are not limited to, compromising, constituting, analyzing, evidencing, comparing, discussing, showing, forming the basis of, containing, or supporting the event, act or occurrence.

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4. To the extent that you object to any specific Document Request, in whole or in part, on the grounds that the information sought is privileged or otherwise protected from discovery, you must respond to the portions of the request for which no privilege is claimed. With respect to that portion of the request for which privilege is claimed, identify: (1) the specific type of privilege, protection or statutory authority that you contend applies; (2) the facts that you rely on to support the privilege claim; (3) the form in which the allegedly privileged information exists (e.g., memorandum, letter, etc.); and (4) the document's subject matter. You must also identify the document's date, the name and address of the person who signed or prepared the document, the name(s) and address(es) of any person who received or reviewed the document, and the name and address of the person who now possesses the document.

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6. Unless otherwise expressly stated, the Relevant Period of time to which these Requests for Production of Documents extends is from January 2011 to the present.

Document Requests

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1. Any and all statements of any individuals recorded on form 75-483.
2. The complete 75-489 report.
3. The complete "H Record."
4. Any and all statements of any individuals recorded on form 75-48a.
5. The statement or statements of Samuel Goldberg.
6. Any and all completed 75-48 forms.
7. The complete PARS report.
8. Any and all documents or reports prepared by, or evidence examined or maintained by, RCF Labs including the RCF Report and cloned copies of the hard drives retrieved from any laptop computers in connection with the Greenberg matter.
9. Copies of all recordings of all radio dispatch communications and/or transmissions from all bands and all districts, including the citywide band and any private channel transmissions related to the Greenberg matter.
10. Copies of any and all surveillance videos retrieved from 4601 Flat Rock Road, Philadelphia, Pennsylvania in connection with the Greenberg matter.
11. Any and all data retrieved from and/or related to Greenberg's or Samuel Goldberg's key fob, including the dates and times of entry and exit to and from locked facilities or areas at 4601 Flat Rock Road, Philadelphia, Pennsylvania including the Greenberg residence, building, garage, gym/exercise facility and/or other facilities or areas with controlled, recorded or monitored access at the premises.
12. The knife recovered from Greenberg's body at 4601 Flat Rock Road, Philadelphia, Pennsylvania including precise measurements and other physical characteristics, as well as any blood, fingerprint, DNA or other analyses performed.

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LAMB McERLANE PC

Dated: February 14, 2020

By: /s/ William H. Trask
William H. Trask, Esquire

Certification Due Date: 06/14/2021
Response Date: 06/21/2021
Case ID: 191001241
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CERTIFICATE OF SERVICE

I, William H. Trask, Esquire, hereby certify that a true and correct copy of the foregoing document was served this day *via* email on the person indicated below:

Ellen Berkowitz, Esquire
Senior Attorney
City of Philadelphia Law Department
1515 Arch Street, 15th Floor
Philadelphia, PA 19102-1595
ellen.berkowitz@phila.gov

(Counsel for Defendants)

LAMB McERLANE PC

Dated: February 14, 2020

By: /s/ William H. Trask
William H. Trask, Esquire

Certification Due Date: 06/14/2021
Response Date: 06/21/2021
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EXHIBIT B

William Trask

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Monday, January 25, 2021 3:21 PM
To: Joseph Podraza
Cc: William Trask
Subject: RE: Additional Material -- MEO

Sure.
Still working on the tech issue, have two filings due today. My secretary is actually in the office tomorrow and I'm hoping (!) she can help with the video file.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>
Sent: Monday, January 25, 2021 3:17 PM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Cc: William Trask <wtrask@lambmcerlane.com>; Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: RE: Additional Material -- MEO

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Ellen:

Any update on when we may receive the video for the lobby? Also, we would like to proceed with depositions in February 2021. Initially, we would like to schedule the depositions for Drs. Osbourne, Emery, and Gulino. Can you inquire into their availability for a deposition? Thanks. Joe

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Tuesday, January 19, 2021 10:59 AM
To: Joseph Podraza <jpodraza@lambmcerlane.com>
Cc: William Trask <wtrask@lambmcerlane.com>
Subject: RE: Additional Material -- MEO

Can you call me? What file do you mean?
I have the video for the lobby in the format I received it in, and I'm sorry – converting it fell off my radar. Thank you for the reminder.

Ellen Berkowitz
Senior Attorney

Certification Due Date: 06/14/2021
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City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>
Sent: Tuesday, January 19, 2021 10:56 AM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Cc: William Trask <wtrask@lambmcerlane.com>; Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: RE: Additional Material -- MEO

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Ellen:

Hope all is well. It has been awhile since we last had contact. Has the file for Ellen been sent to you? Do you have the videotape of the lobby? We would like to complete these preliminary tasks before proceeding with depositions. Thanks. Joe

From: Joseph Podraza
Sent: Wednesday, December 23, 2020 1:37 PM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Cc: William Trask <wtrask@lambmcerlane.com>; Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: RE: Additional Material -- MEO

Ellen:

Thank you for the update. We will inquire about whether we will need access to the original slides. Please also identify the name of the neuropathologist mentioned in your below email and provide us with a copy of any document or the like memorializing any aspect of the neuropathologist's examination/evaluation. Also, a draft of the petition requesting extraordinary relief is attached. Please review and advise of any comments. We would like to file the document on Monday, 12-28-20. Thanks. Joe

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Wednesday, December 23, 2020 10:48 AM
To: Joseph Podraza <jpodraza@lambmcerlane.com>
Cc: William Trask <wtrask@lambmcerlane.com>; Colleen Davis <cdavis@lambmcerlane.com>; Eleanor N Ewing <Eleanor.Ewing@phila.gov>
Subject: Additional Material -- MEO

Hi –

I wanted to let you know that I got a call from the ME.

Prior to your filing the complaint, he'd received a query from the Greenbergs regarding analysis of the spinal cord. The ME's new neuropathologist examined the spinal cord and took slides. When Dr. Gulino sent me the file, he forgot to include these, as they weren't part of the original file. I will be forwarding the digital files to you. If you would like an expert to look at the original slides, that can be arranged – the ME's office has protocols for that.

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Let me know if you intend to file for more time.

Be safe and well, and happy holidays.

Ellen.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>
Sent: Monday, December 14, 2020 9:29 AM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Cc: William Trask <wtrask@lambmcerlane.com>; Colleen Davis <cdavis@lambmcerlane.com>; Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: RE: RCFL files

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Ellen:

Given your response below, are you agreeable to requesting an extension of the present case activity deadlines? If so, we can prepare the petition for joint submission once acceptable to you. Thanks. Joe

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Monday, December 7, 2020 11:01 AM
To: Joseph Podraza <jpodraza@lambmcerlane.com>
Cc: William Trask <wtrask@lambmcerlane.com>; Colleen Davis <cdavis@lambmcerlane.com>
Subject: RE: RCFL files

I have five agency appeals due in January and I doubt very much I can schedule Dr. Osborne (in Florida) and Dr. Gulino) this month, but I will reach out to them.

Still working on the tech issue, hoping to resolve today.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>

Sent: Monday, December 7, 2020 9:57 AM

To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>

Cc: William Trask <wtrask@lambmcerlane.com>; Joseph Podraza <jpodraza@lambmcerlane.com>; Colleen Davis <cdavis@lambmcerlane.com>

Subject: RE: RCFL files

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Ellen:

Hope all is well. Any update on the below file and/or videotape of lobby? Also, can you obtain dates in December 2020 for Drs. Osbourne and Gulino's depositions? If not possible this month, can you inquire when next year they each would be available for a full-day deposition? We also would like to schedule the depositions of Dr. Rorke-Adams and Sam Goldberg. Could you please provide dates when of your availability so we may plan around them? Thanks. Joe

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>

Sent: Monday, November 30, 2020 11:52 PM

To: Joseph Podraza <jpodraza@lambmcerlane.com>

Cc: William Trask <wtrask@lambmcerlane.com>

Subject: RE: RCFL files

Hi—

They have sent a file, but I can't see it – having technical difficulties. I've looped in the IT guy in the Law department and we're trying to get through that hurdle. If it is the right file, I will send it along.

I haven't forgotten about you.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>

Sent: Monday, November 23, 2020 1:26 PM

To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>

Cc: William Trask <wtrask@lambmcerlane.com>; Joseph Podraza <jpodraza@lambmcerlane.com>

Subject: RE: RCFL files

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Thanks Ellen. Joe

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>

Sent: Monday, November 23, 2020 1:24 PM

Certification Due Date: 06/14/2021
Response Date: 06/21/2021
Case ID: 191001241
Control No.: 21061025

To: Joseph Podraza <jpodraza@lambmcerlane.com>

Cc: William Trask <wtrask@lambmcerlane.com>

Subject: RE: RCFL files

Because of your questions I went back to PPD and I am working on it. Give me a little more time.
Thank you.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>

Sent: Monday, November 23, 2020 8:44 AM

To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>

Cc: William Trask <wtrask@lambmcerlane.com>; Joseph Podraza <jpodraza@lambmcerlane.com>

Subject: RE: RCFL files

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Ellen:

May we please receive clarification as requested below on the lobby videotape? Thanks. Joe

From: Joseph Podraza

Sent: Wednesday, November 18, 2020 2:49 PM

To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>

Cc: William Trask <wtrask@lambmcerlane.com>; Joseph Podraza <jpodraza@lambmcerlane.com>

Subject: RE: RCFL files

Ellen:

We know the videotape of the lobby exited and was seized by the PPD. Are they saying the videotape was destroyed, was it sent to AG, or otherwise disposed? Thanks. Joe

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>

Sent: Wednesday, November 18, 2020 2:42 PM

To: Joseph Podraza <jpodraza@lambmcerlane.com>

Cc: William Trask <wtrask@lambmcerlane.com>

Subject: RE: RCFL files

They checked again and do not have surveillance video from the building.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department

Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>
Sent: Wednesday, November 18, 2020 12:12 PM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Cc: William Trask <wtrask@lambmcerlane.com>; Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: RE: RCFL files

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Thanks Ellen. It is very important that we promptly obtain a copy of the videotape of the lobby. Our ability to proceed with depositions is directly impeded by our not having a copy of this videotape. Please let us know if there is anything we can do to help in this endeavor. Joe

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Wednesday, November 18, 2020 12:09 PM
To: Joseph Podraza <jpodraza@lambmcerlane.com>
Cc: William Trask <wtrask@lambmcerlane.com>
Subject: RE: RCFL files

As far as I know, Joe, I have all the materials gathered by the PPD. I requested their complete file and I believe they sent it. I have repeatedly asked them for various items, e.g., the videotape I thought you were requesting.

I wrote to my contact on November 5th and he has not responded. I will check back with him right now. I would note that PPD would not be able to authenticate lobby video, but if they have it – it is not in my materials – I will send it along.

Ellen.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>
Sent: Wednesday, November 18, 2020 11:12 AM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Cc: William Trask <wtrask@lambmcerlane.com>; Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: RE: RCFL files

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Certification Due Date: 06/14/2021
Response Date: 06/21/2021
Case ID: 191001241
Control No.: 21061025

Ellen:

I just read your below email. I am sorry but I do not understand what you are saying. Do you possess all the materials gathered by the PPD relating to Ellen Greenberg? Is the videotape somewhere other than in "the materials you received?" What materials have you received and from whom? Are you saying the videotape now does not exist? If it may be somewhere else or in the possession of someone else, then where and in whose possession? Has this person or entity been contacted in order to retrieve the videotape? These are just some of the questions that come immediately to mind after reading your recent email. The videotape is very important evidence which we have been requesting now for a considerable period of time. Please answer these questions and specify what is the present status of the videotape. Thank you. Joe

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Wednesday, November 18, 2020 10:08 AM
To: Joseph Podraza <jpodraza@lambmcerlane.com>
Cc: William Trask <wtrask@lambmcerlane.com>
Subject: RE: RCFL files

I don't see a videotape from the lobby in the materials I received.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>
Sent: Monday, November 16, 2020 2:55 PM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Cc: William Trask <wtrask@lambmcerlane.com>; Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: RE: RCFL files

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Ellen:

Could you please provide an update on the status of the lobby videotape? Thanks. Joe

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Thursday, November 5, 2020 2:54 PM
To: Joseph Podraza <jpodraza@lambmcerlane.com>
Cc: William Trask <wtrask@lambmcerlane.com>
Subject: RE: RCFL files

So this is lobby videotape, not crime scene videotape? I'll see what I can find out. (Will also check with D'Andrea, of course.)

Ellen Berkowitz
Senior Attorney

City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>
Sent: Thursday, November 5, 2020 12:54 PM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Cc: William Trask <wtrask@lambmcerlane.com>; Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: RE: RCFL files

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The ADA told the Greenbergs the videotape was reviewed and former ADA D'Andrea actually viewed the videotape of the lobby some time later. Joe

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Thursday, November 5, 2020 12:17 PM
To: Joseph Podraza <jpodraza@lambmcerlane.com>
Cc: William Trask <wtrask@lambmcerlane.com>
Subject: RE: RCFL files

Why do you think this?

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>
Sent: Thursday, November 5, 2020 11:32 AM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Cc: William Trask <wtrask@lambmcerlane.com>; Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: Re: RCFL files

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Ellen:

Why not? It was taken by the police. Has it been destroyed. Joe

Sent from my iPhone

On Nov 5, 2020, at 10:04 AM, Ellen Berkowitz <Ellen.Berkowitz@phila.gov> wrote:

There is no videotape.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Ellen Berkowitz
Sent: Thursday, October 29, 2020 1:03 PM
To: Joseph Podraza <jpodraza@lambmcerlane.com>
Cc: William Trask <wtrask@lambmcerlane.com>
Subject: RE: RCFL files

Let me check with the PPD guy again (he was supposed to get back to me) and I'll get back to you. He did not believe there was a videotape. However, please note that I would assert CHRIA for such a tape as well – I turned over the 911 call because that is clearly outside the meaning of “investigatory.”

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>
Sent: Thursday, October 29, 2020 8:09 AM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Cc: Joseph Podraza <jpodraza@lambmcerlane.com>; William Trask <wtrask@lambmcerlane.com>
Subject: Re: RCFL files

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Ellen:

Just wanted to follow up if there is any update on the videotape. Recognize you have a lot on your plate, so please let me know where things stand when you have a moment. Thanks. Joe

Sent from my iPhone

On Oct 13, 2020, at 3:53 PM, Ellen Berkowitz <Ellen.Berkowitz@phila.gov> wrote:

P.S. I am driving to Pittsburgh tomorrow and they are putting my mother in hospice, so my availability will be limited. I hope you understand.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Ellen Berkowitz
Sent: Tuesday, October 13, 2020 3:52 PM
To: Joseph Podraza <jpodraza@lambmcerlane.com>; William Trask
<wtrask@lambmcerlane.com>
Subject: RCFL files

The Justice Department has approved the release of the attached files from RCFL.

Thank you.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

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EXHIBIT C

William Trask

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Thursday, May 20, 2021 12:11 PM
To: William Trask
Cc: Joseph Podraza
Subject: RE: Ware's Video

The person who did the search was not available this week. I will be speaking with him on Monday, and will get you a sworn statement.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Ellen Berkowitz
Sent: Tuesday, May 18, 2021 5:43 PM
To: William Trask <wtrask@lambmcerlane.com>
Cc: Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: RE: Ware's Video

Noting that this was a supplemental request, I am happy to do that assuming that the person is around by Thursday. I've already reached out.

They haven't granted the extension yet, that I noticed?

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: William Trask <wtrask@lambmcerlane.com>
Sent: Tuesday, May 18, 2021 4:17 PM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Cc: Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: RE: Ware's Video

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Ellen,

We'd like to have a full accounting of the efforts that have been made to search for the Ware video, by whom, when, and the extent of the search. And we would like that person to complete a sworn statement as to this information. Please provide us with this information by COB Thursday. Thanks,

Will

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Friday, May 7, 2021 4:48 PM
To: William Trask <wtrask@lambmcerlane.com>
Cc: Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: RE: Ware's Video

There is only the surveillance video we provided.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: William Trask <wtrask@lambmcerlane.com>
Sent: Friday, May 7, 2021 3:34 PM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Cc: Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: Ware's Video

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Hi Ellen,

Can you update me on where things stand getting us the videotape?

Thanks,
Will

William H. Trask
LAMB MCERLANE PC
One South Broad Street
Suite 1500
Philadelphia, PA 19107
wtrask@lambmcerlane.com
(215) 609-3148

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EXHIBIT D

William Trask

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Tuesday, May 25, 2021 12:20 PM
To: Joseph Podraza; William Trask
Subject: video

Joe, Will,

There is no videotape in the Greenberg file, digital or otherwise, other than the surveillance footage we previously provided.

Ellen.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

EXHIBIT E

Certification Due Date: 06/14/2021
Response Date: 06/21/2021
Case ID: 191001241
Control No.: 21061025

William Trask

From: Joseph Podraza
Sent: Thursday, August 13, 2020 11:05 AM
To: Ellen Berkowitz; William Trask
Cc: Joseph Podraza
Subject: RE: Greenberg

Thanks. We'll take the lead in obtaining a copy of the FBI report for both of us and will keep you posted on our progress. In the interim, anything you can do to expedite our receipt of a copy of the videotape and 911 recording would be greatly appreciated. Joe

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Thursday, August 13, 2020 10:22 AM
To: Joseph Podraza <jpodraza@lambmcerlane.com>; William Trask <wtrask@lambmcerlane.com>
Subject: RE: Greenberg

You are welcome to request their file.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>
Sent: Thursday, August 13, 2020 10:07 AM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>; William Trask <wtrask@lambmcerlane.com>
Cc: Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: RE: Greenberg

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Understand. But I believe they would supply you with their file or, at a minimum, provide a copy of the FBI report if you requested it from them. Alternatively, the FBI Lab will supply a copy of its report to you upon request. Thanks. Joe

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Thursday, August 13, 2020 10:02 AM
To: Joseph Podraza <jpodraza@lambmcerlane.com>; William Trask <wtrask@lambmcerlane.com>
Subject: RE: Greenberg

The AG's office did not provide their file to me.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department

Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>
Sent: Thursday, August 13, 2020 9:43 AM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>; William Trask <wtrask@lambmcerlane.com>
Cc: Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: RE: Greenberg

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Ellen:

Thank you for your response. Please do whatever can be done to expedite our receipt of the discrete items identified in my below email. Also, we would appreciate if you would call the AG's office to obtain a copy of the FBI report for them in the event it is no longer in the possession of the PPD, MEO, or other City agency. Joe

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>
Sent: Thursday, August 13, 2020 9:38 AM
To: Joseph Podraza <jpodraza@lambmcerlane.com>; William Trask <wtrask@lambmcerlane.com>
Subject: RE: Greenberg

Hi – I am back in Philadelphia and digging out, and as soon as I have access to the files, I will begin sending them over. But I can't give you a date by which I'll be able to give you those particular items, because since they're on my computer it's not a matter of rummaging through folders – it's actually more difficult than if they were physical objects in labeled folders.. I'm not even sure if I have all of those items – the FBI reports may be in the possession of the AG (again, I don't know). While you have been patient, please understand that all of our cases have been pushed back.

Ellen.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

From: Joseph Podraza <jpodraza@lambmcerlane.com>
Sent: Thursday, August 13, 2020 9:10 AM
To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>; William Trask <wtrask@lambmcerlane.com>
Cc: Joseph Podraza <jpodraza@lambmcerlane.com>
Subject: RE: Greenberg

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Ellen:

Hope all is well. I email to request that you provide us with a date by which we may expect receipt of at least the videotape, the 911 call, and a copy of the FBI analysis of/report on the hard-drives of Ellen's personal and work laptops. I believe we have been very patient to date and reasonable in working with you on proceeding with discovery given the pandemic and your personal needs. However, it is very important that we now proceed promptly on receiving at least these very discrete discovery items. Thanks. Joe

From: Joseph Podraza

Sent: Monday, July 20, 2020 9:09 AM

To: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>; William Trask <wtrask@lambmcerlane.com>

Cc: Joseph Podraza <jpodraza@lambmcerlane.com>

Subject: RE: Greenberg

Ellen:

Any update on this? We are particularly interested in viewing the videotape, hearing the 911 call, reviewing the forensic lab report from the FBI lab to the PPD, and the PPD's docs. To avoid delay, we will treat these materials as confidential while we complete a protective order agreement. If possible could we pick up some or all of these materials this week? Thanks. Joe

From: Ellen Berkowitz <Ellen.Berkowitz@phila.gov>

Sent: Monday, June 29, 2020 5:53 PM

To: Joseph Podraza <jpodraza@lambmcerlane.com>; William Trask <wtrask@lambmcerlane.com>

Subject: Greenberg

Hi –

I hope you two are weathering this well.

I should in the not-too-distant future be able to send along materials from the ME's office, but I wanted to let you know that I am headed to Pittsburgh for a couple of weeks because my father is having heart surgery. I just wanted to let you know that, and ask for your continued patience.

Thank you.

Ellen.

Ellen Berkowitz
Senior Attorney
City of Philadelphia Law Department
Affirmative & General Litigation Group -- Pensions
1515 Arch Street, 15th Floor
Philadelphia, PA 19102
215-683-5253
215-683-5069 (fax)

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LAMB McERLANE PC

Joseph R. Podraza, Jr., Esquire (ID No. 53612)
William H. Trask, Esquire (ID No. 318229)
One South Broad Street – Suite 1500
Philadelphia, PA 19107
(215) 609-3170
(610) 430-8000

Attorneys for Plaintiffs

JOSHUA M. GREENBERG, DMD, and
SANDRA GREENBERG, as the
Administrators of the Estate of ELLEN
R. GREENBERG, deceased,

Plaintiffs,

v.

MARLON OSBOURNE, M.D., and
PHILADELPHIA COUNTY MEDICAL
EXAMINER'S OFFICE,

Defendants.

IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

CIVIL ACTION

October Term 2019
No. 01241

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL

Plaintiffs, Joshua and Sandra Greenberg, Administrators of the Estate of Ellen R. Greenberg, deceased ("Plaintiffs"), move to compel the Defendants to produce a critical videotape made by a third party or to produce a detailed affidavit of the efforts (if any) which have been made to locate, retrieve, and produce the requested videotape. The videotape is key to claims and defenses in this action, and its insufficiently explained spoliation while in the possession of the Defendants should result in severe sanction(s) against them. Moreover, as detailed below, the Defendants have been less than forthright in producing central discovery in this case, insisting they do not possess the requested evidence only to miraculously obtain and then produce it once threatened with court intervention. For these reasons, Plaintiffs request that this Court order the Defendants to produce the videotape or, in the alternative, produce a detailed

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Response Date: 06/21/2021
Case ID: 191001241
Control No.: 21061025

affidavit describing what efforts (if any) were made to locate the videotape and explaining what happened to it; and order a hearing to consider sanction(s) for the spoliation of this critical evidence should the status of the videotape continue to be insufficiently explained by the Defendants.

I. MATTER BEFORE THE COURT

The above action seeks mandamus and declaratory relief against the City of Philadelphia, Office of the Medical Examiner (“MEO”) and Dr. Marlon Osborne, the forensic pathologist who ultimately concluded, without a sufficient legal or medical basis, that the manner of Ellen R. Greenberg’s death was suicide. Ellen was stabbed twenty times, including ten in the back of her neck and head. At least two of the wounds to the back of her neck pierced her spinal column and brain. A pathologist with the MEO trained in neuropathology examined affected portions of Ellen’s preserved spinal column and testified under oath as to the absence of hemorrhage associated with at least one of the examined stabbing injuries. She further testified, based on her experience and training within reasonable medical certainty, that the most plausible explanation for the lack of hemorrhage is that this cut to the spinal column occurred after Ellen was already dead. This means not all of Ellen’s stab-wounds were self-inflicted and, by extension, that Ellen did not commit suicide, but was murdered.

Osborne, without having knowledge of the above medical conclusions later rendered by an MEO colleague trained in neuropathology, nevertheless initially correctly ruled Ellen’s death a homicide on the basis of his autopsy findings. Unfortunately, Osborne later changed his conclusion from homicide to suicide based on provably false information he was given by the police and other agency representatives. Osbourne testified he would agree Ellen’s manner of death cannot be suicide if, in fact, the information the police and others gave him was either false

or disputed. It bears repeating, Osbourne was never told that a colleague in the MEO believes, based on her subsequent examination, that some of the wounds were inflicted when Ellen was already dead and therefore necessarily inflicted by someone else.

Disturbingly, Plaintiffs have recently learned the Philadelphia Police Department (“PPD”) authorized the destruction of the crime scene prior to the start of their homicide investigation. Shockingly, before Osbourne finished the autopsy and concluded Ellen’s death was a homicide, the PPD allowed third-parties to have access to the crime scene without police escort AND authorized the scene to be cleaned by a crime-scene clean-up service recommended by the PPD to the apartment building manager. These third-parties removed laptops, cell phones, and other items from the premises while the cleaning service sanitized the crime scene before a forensic homicide examination could be completed.

Notwithstanding the PPD’s disturbing deviation from basic crime-scene protocols, Plaintiffs have independently learned a conscientious third-party building employee made a video recording of the scene prior to its being compromised as discussed above. Plaintiffs have further learned that this person was later required to turn her video over to the PPD. This video is among the only evidence depicting the state of the apartment where Ellen died and is crucial to opinions by Plaintiffs’ expert witness that Ellen’s death is a patent homicide and in assessing Osbourne’s decision to revise the manner of death from homicide to suicide.

Immediately upon learning of the video, Plaintiffs requested that a copy be produced. The City has not objected to the Plaintiffs’ request. Instead, the City has responded simply that the video cannot be located while ultimately shrugging off Plaintiffs’ requests for a sworn statement regarding efforts to find it. Importantly, many months earlier, Plaintiffs requested Defendants produce a copy of the videotape of the lobby of the building where Ellen was murdered. Like

here, the City did not object to the request, but instead represented they did not have it. Not accepting their response, Plaintiffs pressed Defendants for the lobby videotape, referring to record entries establishing the lobby videotapes were in Defendants' possession. Plaintiffs also demanded an accounting of the efforts made by Defendants or on their behalf to find the seized lobby videotape. When these actions by Plaintiff still failed to gain access to the lobby videotape or a detailed explanation of what happened to the videotape post-seizure by the PPD, Plaintiffs threatened to seek court-intervention. Miraculously, the Defendants found and produced a copy of the lobby videotape.

Like the lobby videotape, PPD seized the crime scene videotape taken by the third party employed by the landlord. The parties agree Plaintiffs are entitled to a copy of the crime scene videotape. Defendants' cryptic response that they cannot locate it is not enough. They should be required to produce the crime scene videotape or describe in detail why the videotape cannot be found, the efforts made to find it, and explain what happened to it. If the videotape is not produced, the Defendants should be required to suffer the consequences of the unexplained or insufficiently explained spoliation of this critical piece of evidence.

II. QUESTION PRESENTED

Whether the City of Philadelphia should be compelled to produce video evidence obtained by a third party depicting scene of decedent's death prior to its becoming irreparably compromised or, in the alternative, a detailed declaration by an individual with knowledge confirming the video does not exist and attesting to what efforts were undertaken to locate it and what happened to it.

Suggested answer: **Yes**

III. FACTUAL BACKGROUND

Responding to a 9-1-1 call on the evening of January 26, 2011, authorities discovered Ellen R. Greenberg's body, slumped on the kitchen floor of the apartment she shared with her fiancé, with a 10-inch knife in her chest. Failing to notice, among other things, the 10 stab-wounds to the back of Ellen's neck and head, and assuming Ellen had been locked in the apartment alone at the time of her death, scene investigators initially treated Ellen's death as a suicide.

The Plaintiffs have recently learned that the following morning, while forensic pathologist Dr. Marlon Osborne began his autopsy of Ellen's body, the PPD provided Melissa Ware, the manager of the apartment building where Ellen had died, with contact information for a crime scene cleaning service and authorized her to have the apartment cleaned and disinfected. PPD also authorized other third parties to enter the premises unescorted by a PPD member.

While the apartment was being sanitized and evidence—some of which was later surrendered to police—was being removed from the premises, Dr. Osborne completed his autopsy. Upon discovering numerous injuries overlooked by scene investigators—including the knife wounds to Ellen's spine and brain, a deep cut on the side of Ellen's head, and bruising all over her body, including on her head and wrists—he declared the manner of death a homicide. Unfortunately, by the time Dr. Osborne's findings triggered a formal homicide investigation and the PPD had obtained a warrant to enter the apartment to collect fingerprint, DNA and blood pattern evidence, the scene of the crime had been scoured and irreparably compromised.

After approximately two months, and after an unprecedented meeting with members of the MEO, PPD and District Attorney's Office, Dr. Osborne revised his initial manner of death

determination from homicide to suicide. Osborne has since confirmed his decision was based in large part on information presented by police investigators related to the scene of Ellen's death, including evidence that allegedly corroborated initial accounts of Ellen having been locked alone in the apartment at the time. Because this evidence, now discredited or placed in genuine dispute through discovery, was insufficient as a matter of law to support Osborne's suicide finding, Plaintiffs filed the instant suit compelling Osborne to amend, or the MEO to retract and replace, Ellen's death certificate to reflect a manner of death other than suicide.

In discovery, Plaintiffs requested the production of all evidence, documents, recordings and the like related to Ellen's death investigation. (True and correct copies of the Plaintiffs Requests for Production of Documents are attached hereto as Exhibit "A.") The Defendants eventually produced some documents from the Medical Examiner's Office, such as copies of scene and autopsy photographs, investigation and autopsy reports, and some correspondence between MEO personnel and the Greenberg family or their representatives. A number of other items known to exist were not produced until specifically identified by the Plaintiff—and even then only under threat of court intervention—including copies of the 9-1-1 call recording and surveillance video depicting the lobby and other public areas of the apartment building where Ellen died. Although Plaintiffs have every reason to believe additional discovery is being withheld, there has been no indication from the City what, if anything, exists in the City's files—no written responses to document requests, no objections, no privilege log—so as to enable the Plaintiffs to direct further, specific requests.

Despite the City's obfuscation, Plaintiffs independently learned the building manager who arranged to have the crime scene cleaned prior to the homicide unit's investigation had the presence of mind to film the apartment, its condition, and its contents before it was sanitized of

all evidence. Plaintiffs also understand the manager, Melissa Ware, thereafter surrendered her video recording to police investigators, among whom was Sergeant Timothy Cooney. Because the PPD allowed the crime scene to be cleaned before conducting their investigation, this video may be the only evidence capable of corroborating or refuting the only facts Osborne claims to have relied upon to support changing the manner of death to suicide. Given the importance Dr. Osborne has placed on police accounts of the state of the apartment in revising Ellen's manner of death from homicide to suicide, a video recording of the apartment, its condition and its contents captured before the scene was compromised is crucial to evaluating Dr. Osborne's revised finding, the central issue in this case.

Immediately upon learning of the existence of the videotape, Plaintiffs requested that they be provided with a copy. The Defendants do not object to Plaintiffs' request; rather counsel for the City has assured the Plaintiffs that no such video exists. Setting aside the unlikelihood that key evidence of this sort would have been lost or destroyed, this is not the first time the City has claimed materials requested by the Plaintiffs in discovery simply do not exist. In point of fact, and further illustrating the questionable reliability of the City's assurances, Defendants repeatedly claimed the lobby videotape initially requested in February 2020 did not exist before finally producing it the following year, but only after Plaintiffs refused, over the course of months, to accept the Defendants' assurances. (*See, e.g.,* Ex. B, Email Thread dated Oct. 13, 2020 to Jan. 25, 2021).

Given the importance of the evidence in both this case and the prior suicide finding, and considering the City's history of finding discovery materials long after repeatedly assuring Plaintiffs no such materials exist, the City's informal assurance through counsel is simply not acceptable. Therefore, Plaintiffs requested that Defendants provide a declaration prepared by the

individual with knowledge confirming the video does not exist and attesting to the efforts undertaken in reaching that conclusion. After initially agreeing to provide a sworn statement to that effect, the Defendants ultimately provided the same, informal assurance of counsel that was earlier shown to be unreliable. (Compare Ex. C, Email dated May 20, 2021, 12:11 PM (“I...will get you a sworn statement.”) and Ex. D, email dated May 25, 2021 (“There is no videotape in the Greenberg file...”). Plaintiffs now request that the video be produced or, in the alternative, that an individual with knowledge be directed to prepare a sworn statement confirming the video does not exist and attesting to what efforts were undertaken to locate it and what happened to it. Thereafter, depending on the Defendants’ response, a spoliation sanction hearing may be warranted.

IV. ARGUMENT

A. The City Does Not Dispute That the Video Recording Sought by Plaintiff Is Relevant to Key Claims and Defenses in This Litigation

Among the key issues in this case concern whether Dr. Osborne has sufficient support—meaning 70% or greater certainty—for his eventual, revised finding of suicide. Having initially determined on the basis of the medical evidence obtained at autopsy that Ellen’s death was a homicide, Osborne now claims reliance on information later obtained from police investigators concerning the state of Ellen’s apartment as the critical basis for his decision to revise Ellen’s manner of death to suicide.

The rules governing discovery in Pennsylvania provide

...a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party....

Pa. R.C.P. 4003.1 (a). Video depicting the apartment, including the very evidence later relied upon to justify the revised manner of death determination which is the subject of this lawsuit, is plainly relevant. The Plaintiffs served Defendants with two sets of requests for the production of documents on February 13 and 14, 2020, respectively. (Ex. A.) The Defendants never submitted objections or written responses to Plaintiffs' document requests. Instead, on October 9, 2020, Defendants produced some responsive documents consisting of records from the Medical Examiner's Office, including copies of scene and autopsy photographs, investigation and autopsy reports, and some correspondence between MEO personnel and the Greenberg family or their representatives. Other than the 9-1-1 call recording and lobby surveillance video that were eventually, grudgingly turned over, no other material requested by Plaintiffs the preceding February was produced. Although Plaintiffs have had every reason to believe additional discovery is being withheld, the City has never served written responses to the Plaintiffs requests, lodged objections, or provided a privilege log. Thus, there has been no indication from the City what, if anything, exists in the City's files to enable the Plaintiffs to direct further, specific requests.

No indication, that is, until Plaintiffs learned that Melissa Ware, the property manager overseeing the building where Ellen died, videotaped the scene and turned a copy over to Sergeant Cooney of the PPD. Immediately upon learning of the video's existence, Plaintiffs requested that a copy be produced. Defendants, for their part, claim to be unable to locate it.

But, as noted above, this is not the first time the Defendants have made such a claim, only to "find" the video after months of Plaintiffs' insisting it must exist and be produced. By way of illustration, Plaintiffs in February 2020 requested that Defendants produce the surveillance video depicting the lobby and other common areas of the apartment building where Ellen died. (Ex. A,

Plaintiffs Second Request for production of Documents, No. 10.) By the end of July, having received nothing in response to their document requests, Plaintiffs specifically inquired into the status of a few key items including the lobby videotape. (See Ex. E, Email Thread dated Jun. 29, 2020 to Aug. 13, 2020, at email dated July 20, 2020, 9:09 AM (“We are particularly interested in viewing the videotape...”). By November 2020, Defendants were insisting there was no videotape. (See Ex. B, Email Thread dated Oct. 13, 2020 to Jan. 25, 2021, emails dated Nov. 5, 2020, 10:04 AM (“***There is no videotape.***”); Nov. 18, 2020, 10:08 AM (“***I don’t see a videotape from the lobby in the materials I received.***”), and 2:42 PM (“***They checked again and do not have surveillance video from the building.***”). Eventually, PPD located and provided counsel with a copy of the video, which was ultimately produced, after some difficulty, at the end of January 2021. (Ex. B, emails dated Nov. 30, 2020, 11:52 PM (“They have sent me a file...”); Dec. 7, 2020, 11:01 AM (“Still working on the tech issue...”); Jan. 19, 2021 (“I have the video for the lobby...”); and Jan. 25, 2021, 3:21 PM (“Still working on the tech issue...”)).

The video Ware captured of the crime scene is a crucial piece of evidence, perhaps the only evidence that exists that can support or refute Dr. Osborne’s decision to amend his initial homicide determination. The suggestion that the video is missing or was never obtained is simply not credible. The video is a key piece of evidence, and only recording, depicting the state of the crime scene before it was compromised, and Ware not only described taking the video, but identified the officer with whom she had contact at the time she surrendered it. In addition to the video itself, the Defendants will have property receipts and evidence logs attesting to the chain of custody, including whether the video was given to the District Attorney’s Office or among the materials shared with the Attorney General’s investigators.

Plaintiffs do not lightly challenge the City's claim that it cannot be found, but given the history of similar claims by the Defendants as illustrated above, Plaintiffs require more than the mere informal assurance of counsel. For this reason, if indeed the video does not exist, Plaintiffs requested that Defendants, provide a sworn statement, prepared by the individual with knowledge, confirming that fact and attesting to the efforts undertaken in reaching that conclusion and explaining what happened to the videotape. After initially agreeing to provide a sworn statement to that effect, the Defendants ultimately provided the same, informal assurance of counsel that was earlier shown to be unreliable. (*Compare* Ex. C, Email dated May 20, 2021, 12:11 PM ("I...will get you a sworn statement.") and Ex. D, email dated May 25, 2021 ("There is no videotape in the Greenberg file..."). With the discovery period now coming to an end, Plaintiffs no longer have the luxury of waiting another 11 months while the videotape is grudgingly located. Defendants must produce it, and if the City has indeed lost it, someone with knowledge must be called upon to confirm it was lost and attest to any and all efforts undertaken in reaching that conclusion.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court order Defendants to produce a copy of Ware's video or, in the unlikely event this crucial evidence has been lost or destroyed, submit a declaration prepared by an individual with knowledge confirming the video does not exist, attesting to what efforts were undertaken to locate it, and explaining how it was lost.

LAMB McERLANE PC

By: /s/ Joseph R. Podraza, Jr.
Joseph R. Podraza, Jr., Esquire
jpodraza@lambmcerlane.com

William H. Trask, Esquire
wtrask@lambmcerlane.com
One South Broad Street, Suite 1500
Philadelphia, PA 19107
(215) 609-3170

*Counsel for Plaintiffs, Joshua Greenberg
and Sandra Greenberg, Administrators of
the Estate of Ellen Greenberg*

Dated: June 4, 2021

LAMB McERLANE PC

Joseph R. Podraza, Jr., Esquire (ID No. 53612)
William H. Trask, Esquire (ID No. 318229)
One South Broad Street – Suite 1500
Philadelphia, PA 19107
(215) 609-3170
(610) 430-8000

Attorneys for Plaintiffs

JOSHUA M. GREENBERG, DMD, and
SANDRA GREENBERG, as the
Administrators of the Estate of ELLEN
R. GREENBERG, deceased,

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MARLON OSBOURNE, M.D., and
PHILADELPHIA COUNTY MEDICAL
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IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

CIVIL ACTION

October Term 2019
No. 01241

ATTORNEY CERTIFICATION OF GOOD FAITH

The undersigned counsel hereby certifies and attests to communications with opposing counsel regarding the discovery matters contained in the foregoing motion, but despite best efforts have been unable to resolve the dispute.

LAMB McERLANE PC

Dated: June 4, 2021

By: /s/ Joseph R. Podraza, Jr.
Joseph R. Podraza, Jr., Esquire
jpodraza@lambmcerlane.com
William H. Trask, Esquire
wtrask@lambmcerlane.com
One South Broad Street, Suite 1500
Philadelphia, PA 19107
(215) 609-3170

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Control No.: 21061025

CERTIFICATE OF SERVICE

I, Joseph R. Podraza, Jr., Esquire, hereby certify that I served a true and correct copy of the foregoing pleading on June 4, 2021, by sending this paper to the Court's electronic filing system (EFS) website pursuant to Pa.R.C.P. 205.4(g) and Phila. Civil Rule *205.4(f), and by virtue of automatic electronic service by the Court to all parties who have entered their appearance on the Court's electronic docket:

LAMB McERLANE PC

BY: /s/ Joseph R. Podraza
Joseph R. Podraza, Jr., Esquire
jpodraza@lambmcerlane.com

Date: June 4, 2021

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