

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1868-21

AMERICAN ZURICH
INSURANCE COMPANY,
as subrogee of West Main
Street Urban Renewal, LLC,

Plaintiff-Respondent,

APPROVED FOR PUBLICATION

December 7, 2022

APPELLATE DIVISION

v.

MERIDIA DOWNTOWN URBAN
RENEWAL BOUND BROOK, LLC,
MERIDIA CONSTRUCTION
MANAGEMENT, LLC, and
CAPODAGLI PROPERTY
COMPANY,

Defendants-Respondents.

SOMERSET COUNTY
PROSECUTOR'S OFFICE,

Appellant.

Argued October 6, 2022 – Decided December 7, 2022

Before Judges Haas, Gooden Brown and DeAlmeida.¹

¹ Judge DeAlmeida did not participate in oral argument. He joins the opinion with counsel's consent. R. 2:13-2(b).

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-0527-20.

Jessica V. Henry argued the cause for appellant (Cleary Giacobbe Alfieri Jacobs, LLC, attorneys; Joseph DeMarco, of counsel and on the briefs; Jessica V. Henry, on the briefs).

Christopher Konzelmann argued the cause for respondent American Zurich Insurance Company (White and Williams LLP, attorneys; Christopher Konzelmann and William L. Doerler, on the brief).

Joshua A. Filzer argued the cause for respondents Meridia Downtown Urban Renewal Bound Brook LLC, Meridia Construction Management LLC, and Capodagli Property Company (Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys; Joshua A. Filzer and Jason R. Gosnell, of counsel and on the brief).

The opinion of the court was delivered by

GOODEN BROWN, J.A.D.

On January 12, 2020, a fire started at a construction site on property owned by Meridia Downtown Urban Renewal Bound Brook LLC (Meridia). Meridia had hired Meridia Construction Management LLC (Meridia Construction) and Capodagli Property Company (Capodagli) to construct an apartment building on the property. The fire spread and caused substantial damage to another property located across the street, where an apartment building was also under construction. That property was owned by West Main

Street Urban Renewal LLC (West Main) and insured by American Zurich Insurance Company (Zurich). Juan Padilla was arrested the following day for allegedly starting the fire. He was charged in a January 14, 2020 complaint-warrant with hindering apprehension, N.J.S.A. 2C:29-3(b)(4), and aggravated arson, N.J.S.A. 2C:17-1(a)(2), and subsequently indicted by a Somerset County grand jury.²

To recoup insurance benefits paid to its insured on account of the damage caused by the fire, Zurich brought a subrogation claim against defendants Meridia, Meridia Construction, and Capodagli. Among other things, Zurich alleged negligence on the part of defendants by failing to properly secure the construction site, which allowed Padilla to gain access to the property and start the fire. In an effort to obtain relevant information pertaining to the cause of the fire, the civil action parties first served a subpoena duces tecum on the Somerset County Prosecutor's Office (SCPO) and then moved to compel production of the SCPO's criminal investigative file.

Ultimately, in a January 3, 2022 order, the trial court rejected the SCPO's claim that the materials were confidential and privileged and ordered the SCPO to turn over (1) videos and photographs depicting events giving rise

² The indictment was not included in the record.

to its criminal prosecution; (2) Padilla's statement to the SCPO; and (3) witness statements or, in the alternative, witness contact information. By leave granted, the SCPO now appeals the January 3, 2022 order. Because the judge failed to properly balance the State's interest in an ongoing criminal prosecution against the civil parties' subordinate discovery interests, we reverse.

I.

As a result of the damage caused by the fire, Zurich paid its insured, West Main, \$4,169,139.84 to resolve the claim. On May 1, 2020, Zurich, as subrogee of West Main, filed a complaint, which was later amended, against Meridia, Meridia Construction, and Capodagli (collectively, defendants) seeking recoupment of the benefits it paid West Main. In the complaint, Zurich alleged that the fire started on defendants' property and spread across the street, "destroy[ing]" West Main's insured property. Zurich asserted that defendants breached their duty to exercise reasonable care by "failing to take appropriate measures to ensure that third parties could not enter the construction site" and "failing to properly secure the construction site."

In September 2021, defendants issued a subpoena duces tecum to the SCPO for "[t]he complete investigative file" related to the prosecution of Padilla. The SCPO moved to quash the subpoena, which motion was opposed

by defendants and Zurich. In addition, defendants cross-moved to enforce the subpoena and Zurich moved to compel production of the SCPO's investigative file.

In support of their opposition and cross-motion to enforce the subpoena, counsel for defendants submitted a certification stating that as a result of the SCPO's investigation of "[t]he cause and origin of the fire," the SCPO had "issued a July 17, 2020 report authored by Detective Jeffory Dockery." The Dockery report, which had been provided to the civil action parties, "concluded that the fire was an incendiary fire started by Padilla" and "indicate[d] that fencing only secured three of the four sides" of the site where the fire originated.

Defense counsel further asserted that "the report also reference[d] video evidence of the fire and . . . Padilla's . . . alleged access" to the site. The video evidence included "a patrol unit's camera and other cameras identified during the investigation" as well as video surveillance footage "from the nearby Farscella's Liquor Shop and United Fitness Gym depicting Padilla walking through the [site] and remaining in the area for approximately [thirty] minutes." In addition, defense counsel averred that "[t]he preliminary law enforcement incident report" issued in connection with Padilla's arrest

"indicate[d] that the offense/incident was recorded on (a) dash camera/MVR/DIVR; (b) surveillance cameras; and (c) a station house camera."

According to defense counsel, Zurich alleged in its "subrogation claim . . . that Padilla bypassed the [site's] perimeter fence and that [d]efendants were negligent in failing to secure the [site]." Defense counsel posited that because "[d]efendants maintain[ed] that the [site] was fully enclosed by perimeter fencing," the "issue in th[e] litigation [was] whether the fence was in place and how Padilla bypassed said fence to gain access to the [site]." Defense counsel averred that the SCPO had refused his request for "the video evidence" and "advised that discovery would be provided after the criminal case concluded." Defense counsel further stated that "[i]n an attempt to avoid unnecessary motion practice, [d]efendants [had] subpoenaed the video evidence from Farscella's Liquor and United Fitness," but "neither entity ha[d] copies of the videos."

In support of its motion to compel production of the SCPO's investigative file, counsel for Zurich certified that "[f]actual issues in the litigation include[d] whether fencing fully enclosed the building's perimeter, whether the fencing was intact when . . . Padilla gained access to the building, whether gates were locked, and how . . . Padilla bypassed the fence and gained access to the building." Counsel cited the Dockery report's conclusion that

Padilla intentionally set the fire based on "information gathered" from "witness accounts, patrol unit video, community video, building access, scene assessment and the fire dynamics principles of the available building components." Counsel asserted that because "[t]he [SCPO's] evidence include[d] video of Padilla which likely include[d] the perimeter fencing, scene photographs likely to show the fencing, and witness statements," the file materials were needed.

On October 29, 2021, the trial judge heard oral argument on all three motions — the SCPO's motion to quash defendants' subpoena, defendants' cross-motion to enforce the subpoena, and Zurich's motion to compel production of the SCPO's file. Following oral argument, the judge entered a November 1, 2021 order directing the SCPO to "provide an inventory of [the] discovery" contained in its file to the civil action parties and directing counsel to "confer" to try to reach an "agreement" regarding the release of any items. In the absence of an agreement, the judge ordered the parties to submit legal arguments to the court supporting their respective positions and directed the SCPO to supply the court with copies of the disputed "documents for in camera review."

Upon receipt of the inventory, Zurich requested production of all documents in the SCPO's file with the exception of medical records for a

firefighter injured during the suppression of the fire, psychological evaluations of Padilla, a map, and weather records. In response, the SCPO "denie[d the request," explaining that "[r]eleasing investigatory documents and witness statements for use in corresponding civil discovery encroache[d] upon the SCPO's interest in prosecuting an active and ongoing criminal matter." The SCPO asserted further that "neither party to the civil action ha[d] proffered any reason" to "pierce the confidential nature of the criminal proceedings."

In accordance with the November 1, 2021 order, counsel for the SCPO submitted a letter to the court further explaining the SCPO's refusal to turn over any materials in its investigative file. Counsel pointed out that "[t]he discovery inventory detailed 471 pages of documents, 6 CDs, 14 DVDs, and [1] . . . flash[]drive," and the civil parties "demanded" all but "seventy-seven . . . pages of documentation." Counsel also requested an extension of time to submit the disputed items to the court "for in camera review."

Zurich's counsel submitted a joint response to the court on behalf of Zurich and defendants. Counsel asserted that "[f]undamental issues in the case include[d] Padilla's pre-fire Facebook postings,^[3] Padilla's pre-fire activities,

³ In the affidavit of probable cause submitted in support of Padilla's complaint-warrant, the arresting officer identified several pre-fire "social media" postings in which Padilla made incriminating statements about starting

the means by which Padilla gained access to the construction site . . . [and] the interior of the building, Padilla's actions once he entered the building, . . . and the condition of the fencing both before and after police and fire personnel responded to the fire." Counsel asserted that "[t]he withheld materials [were] simply not a secret" because the SCPO had "produced its investigative file materials to Padilla's public defender." Counsel argued that the SCPO's claim that "the civil litigants 'repeatedly failed to establish any interest in the material'" improperly overlooked the "pending multi-million-dollar lawsuit where the [SCPO] has video, reports, and statements (including a [forty-one]-page statement from Padilla himself) directly related to the issues in the civil litigation."

The judge heard oral argument on January 3, 2022. In an oral opinion following the arguments, the judge rejected the civil parties' claim to the SCPO's entire investigative file but concluded that the civil parties "demonstrated good cause to [obtain] at least some materials" that could not be obtained "from an independent source." The judge acknowledged that the civil parties had to demonstrate "an extraordinary need" to "pierce the confidential nature of the criminal proceedings." The judge reasoned that the subrogation

a fire. However, according to the officer, Padilla denied being "in the area" in his "audio/video statement."

action was "a very serious civil litigation . . . dealing with . . . millions of dollars" and "the substantial nature of the civil litigation" outweighed the SCPO's "need for confidentiality" given that Padilla had already "been indicted and [was] awaiting trial." The judge explained that although the criminal investigation "ha[d] not been completed," the civil parties had "a very strong and . . . valid motivation" for seeking the materials because there were "millions of dollars at issue," and the materials in the SCPO's "possession . . . at least potentially shed light on issues of liability," including "property security, how exactly the fire was set, [and] what exactly happened."

As a result, in a January 3, 2022 order, the judge directed the SCPO to provide to the civil parties "any video and photographs taken in real time, that capture[d] the events giving rise to the criminal and civil cases," "a copy of any statement given by . . . Padilla," and "witness statement[s]" or, in the alternative, "the witness's contact information, including address and phone number." As to Padilla's statement, the judge was satisfied that "independent attempt[s] to obtain the . . . statement" were unsuccessful and accepted the civil attorneys' representation that Padilla's criminal attorney had refused to produce Padilla "for a deposition." The judge also entered "a [p]rotective [o]rder," requiring that all materials "be held in strict confidentiality" and "not . . . shared with any third party," and "vacated" the provision in the

November 1, 2021 order requiring the SCPO "to provide any of its file for in camera review." We granted the SCPO's motion for leave to appeal the January 3, 2022 order and for a stay pending appeal.

II.

"Generally, we accord substantial deference to a trial court's disposition of a discovery dispute." Brugaletta v. Garcia, 234 N.J. 225, 240 (2018). As a result, "[w]e will not ordinarily reverse a trial court's disposition of a discovery dispute 'absent an abuse of discretion or a judge's misunderstanding or misapplication of the law.'" Ibid. (quoting Cap. Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 79-80 (2017)). "As to issues of law, . . . our review is novo." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

The SCPO argues that the judge "abused [his] discretion" in compelling "overbroad production of contents of [its] file." It asserts that the civil action parties "failed to satisfy their burden" because they "did not establish that their interest in accessing the SCPO's file outweighed the State's paramount interest in preserving the integrity of an open criminal prosecution and its underlying evidential record."

New Jersey recognizes that law enforcement investigative materials are subject to "the general, common-law, qualified privilege, variously referred to as the 'official information,' 'governmental,' or 'executive' privilege." Loigman v. Kimmelman, 102 N.J. 98, 107 (1986); see also N.J.S.A. 2A:84A-27 (precluding disclosure of "official information" of the State when "harmful to the interests of the public"). The "qualified privilege" concerning access to criminal investigative materials "is premised upon the government's need to conduct such affairs with skill, with sensitivity to the privacy interests involved, and in an atmosphere of confidentiality that encourages the utmost candor." Loigman, 102 N.J. at 107.

Thus, to promote effective law enforcement, New Jersey has "'long treated the information [concerning criminal investigations] as confidential and privileged against disclosure, thereby protecting witness security, the State's relationship with its informants and witnesses, and other confidential relationships, among other things.'" State v. Marshall, 148 N.J. 89, 273 (1997) (quoting River Edge Sav. & Loan Ass'n v. Hyland, 165 N.J. Super. 540, 543-44 (App. Div. 1979)).

However,

[t]he privilege is not absolute And where there are present considerations of fundamental fairness or other considerations of a compelling nature such as outweigh the imperative of the interests of the

State in protecting and maintaining the confidentiality of the information, an exception is made and disclosure may be had.

[River Edge, 165 N.J. Super. at 544 (citing Roviaro v. United States, 353 U.S. 53 (1957), and State v. Oliver, 50 N.J. 39 (1967)).]

In River Edge, the plaintiff filed a civil complaint against the Attorney General and a deputy attorney general after a criminal investigation into the plaintiff resulted in the filing of no criminal or other charges. Id. at 545. We noted that "[i]n essence, the action against the state officials [sought] discovery" concerning the identity of a confidential informer, all communications between the informer and the state officials regarding the plaintiff, copies of all investigation materials obtained by the state officials about the plaintiff, and a transcript of the grand jury proceedings investigating the charges alleged against the plaintiff. Id. at 543.

We acknowledged the confidentiality of all the materials sought by the plaintiff because we recognized that "[t]he receipt by . . . law enforcement officials of information concerning the existence or occurrence of criminal activities is critical to the uncovering and the prosecution of criminal offenses, and is thus crucial to effective law enforcement." Ibid. We further explained that the privilege against disclosure served the State's interest in preserving "the flow of such information," and "in civil cases[,] . . . the interests of the

State in maintaining confidentiality 'are entitled to a greater degree of respect.'" Id. at 543-44 (quoting Cashen v. Spann, 66 N.J. 541, 556 (1975)).

Applying those principles, we concluded in River Edge that the complaint failed to set forth a cause of action warranting relief against the state officials because "we discern[ed] no compelling need . . . on the part of [the] plaintiff which would outweigh the possible harm to the interests of the State were disclosure of the[] various matters to be made." Id. at 544. We stressed that "[t]he fact that no criminal or other charges resulted from the State's investigation of th[e] matter [was] not at all of significance on the issue" because "even inactive investigatory files may have to be kept confidential in order to convince citizens that they may safely confide in law enforcement officials." Id. at 545 (quoting Koch v. Dep't of Just., 376 F. Supp. 313, 315 (D.D.C. 1974)).

In Cashen, the plaintiffs filed "a civil action for damages arising out of an allegedly illegal search of [their] home" by various law enforcement officers, which "failed to reveal any evidence" of criminal activity. 66 N.J. at 544. The plaintiffs sought to "compel discovery as to the identity of the informer" who provided "grossly erroneous" information to law enforcement, which was relied upon in preparing the affidavit to support the search warrant for the plaintiffs' home. Ibid.

The Cashen Court vacated our order directing disclosure of the identity of the informer and remanded for consideration of "all the facts bearing both on the possible unfairness to [the] plaintiffs of denying disclosure of the identity of the informer and the possible harm which may be inflicted on State interests by disclosure." Id. at 555. In that regard, the Court "emphasize[d] that in civil cases in which disclosure is sought not to aid in the defense of criminal charges, but for the purpose of asserting claims for money damages, the interests of the State in maintaining the confidentiality of the informer's identity are entitled to a greater degree of respect." Id. at 556.

In Greenspan v. State, the plaintiffs, Dr. Bernard Greenspan and his wife, sought "damages for wrongs alleged to have been the product of activities of agents of the State in investigating [Dr. Greenspan's] involvement . . . in the Medicaid program." 174 N.J. Super. 332, 333 (App. Div. 1980). "We granted the State's application for leave to appeal from an interlocutory order" that essentially required the State to give the plaintiffs the criminal investigation file on Dr. Greenspan "compiled by the State Attorney General's office and the New Jersey Division of Criminal Justice." Ibid.

We reversed the disclosure order, finding that "the trial judge overstated the 'need' of [the] plaintiff[s]" for the materials and "was mistaken in his confidence that the material sought could not be obtained from any other

source." Id. at 334. We recognized that "incursion into records of the nature of those sought . . . to be invaded [by the plaintiffs] risks the compromise of a vital public interest ordinarily protected by strict confidentiality." Ibid. (citing Nero v. Hyland, 76 N.J. 213, 226-27 (1978)). We thus warned that "[i]n civil litigation at least this step must not be taken except 'with caution and only with full appreciation of all the consequences,' and even then only after a judicious and painstakingly careful balancing of all the competing interests." Ibid. (citation omitted) (quoting Cashen, 66 N.J. at 557).

We pointed out that in balancing the competing interests, "a significant weight on the pan of this balance belongs to considerations respecting the nature of the need and the availability of the information from other sources." Ibid. We defined "[n]eed" as "impl[ying] essentiality," which is "more than desirability or convenience." Ibid. To find "essentiality," we explained that the materials sought must be "a sine qua non to the perfection of [the] plaintiffs' cause of action." Id. at 335 (emphasis omitted). Further, while "substantiality of the damages" is "also involved in the weighing process, . . . the presence of damages beyond minimal does not of itself demonstrate a need to invade a confidential public record." Ibid. (citations omitted).

As to the availability of the information from other sources, we explained that "the sensitive nature of the materials sought dictates that maximum effort must be made to obtain the materials from other sources before [the] plaintiffs be permitted to invade the archives of the State." Ibid. On that point, we expounded:

Any right [the] plaintiffs have results from a concept of fundamental fairness. That concept implies as well fairness to the public with its substantial interest in the confidentiality of the matters here involved and it is that concern which requires [the] plaintiffs first to do what they can to get the information from less intrusive sources. Nor should the burden be on the State to demonstrate that [the] plaintiffs can get the information from another source. It is [the] plaintiffs who must demonstrate that it is reasonably probable that the information cannot be otherwise obtained.

[Ibid. (citations omitted) (first citing Cashen, 66 N.J. at 555-57; and then citing State v. Boiardo, 83 N.J. 350, 356 (1980)).]

Applying these principles, we believe the judge mistakenly exercised his discretion by failing to judiciously and painstakingly balance the competing interests at stake. Compelling the production of the materials sought here risks compromising the vital public interest protected by the strict confidentiality that attaches to the criminal investigative file of an ongoing criminal prosecution. Critically, the materials sought do not form a part of the complaint upon which the civil action is based. Indeed, the judge found the

materials would be "extremely helpful, or potentially helpful to either the plaintiff or the defendants in connection with the civil action." While the materials may well enhance the preparation of the civil case, they are by no means the "sine qua non to the perfection of [the civil] cause of action" needed to establish the "essentiality" requirement. Greenspan, 174 N.J. Super. at 335 (emphasis omitted); see also Beck v. Bluestein, 194 N.J. Super 247, 261 (App. Div. 1984) ("[D]isclosure of information in the possession of law enforcement officials concerning . . . criminal activities . . . will not be allowed unless the need from the standpoint of essentiality is supported by detailed findings.").

Furthermore, although the judge repeatedly referred to the millions of dollars involved in the civil case, the presence of damages "does not of itself demonstrate a need to invade a confidential public record." Greenspan, 174 N.J. Super. at 335. Additionally, in ordering the disclosure of witness information, the judge failed to "[w]eigh the imperative of the interests of the State in protecting and maintaining the confidentiality of" witnesses who gave statements to the SCPO in connection with Padilla's arson prosecution. River Edge, 165 N.J. Super. 544. Rather, the judge merely concluded "that it [was] fair and appropriate and equitable that the [SCPO] . . . provide the information for the witness[es], [and] any contact information for the witness[es] so the civil [action parties] can perform [their] own investigation."

We are also not convinced that the civil action parties met their burden of demonstrating that at least some of the information could not be otherwise obtained. Indeed, much of the information sought was in the Dockery report, which had already been provided to the civil parties. The Dockery report delineated salient contents of the video evidence and expressly stated that the site was only secured by fencing on three sides. The Dockery report also included names of construction personnel who were interviewed about the condition of the construction site before the fire. There is no evidence in the record concerning the civil parties' efforts to obtain statements from the witnesses named in the report, or any consideration by the judge of the potential adverse impact on witness cooperation and trial testimony in the criminal case that could arise from subjecting witnesses to discovery practice in a civil action. Accordingly, we reverse the January 3, 2022 order and vacate the stay pending appeal.

Reversed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION