

Putting a Price On Secrecy  
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A federal judge in New Jersey is being asked to put a dollar figure on the penalty for a lawyer talking to the media about a case after agreeing not to do so.

Freehold Township has balked at paying its share of a \$327,500 civil rights settlement to a man arrested and jailed in a case of mistaken identity, *Edwards v. Freehold Township*, 07-Civ.-4763.

The town says plaintiff's lawyer Thomas Mallon violated a nondisclosure pact by talking about the September settlement in the press. Mallon says secrecy wasn't part of the deal.

It was Mallon who went back to court first, filing a motion to enforce the settlement on Dec. 8. He also asked for sanctions against Freehold.

Freehold's cross-motion, filed on Jan. 5, asks the court to deny Mallon's motion and "reduce the settlement sum" by an unspecified amount "as a consequence of the breach of the non-disclosure agreement."

It was a case of some notoriety that was covered in the *Asbury Park Press* and on the "CBS Evening News" when it was filed and when it settled.

Freehold police arrested Kerry Edwards on Oct. 30, 2006, thinking he was Rodney McFadden, who was wanted on several motor vehicle warrants. Despite their differences in appearance and Edwards' insistence that they had the wrong man, he was taken to Freehold police headquarters, fingerprinted and held for a month in the Monmouth County Jail.

He was released on \$10,000 bail on Nov. 29, 2006, still under McFadden's name, and then made a series of appearances on the McFadden warrants in Upper Freehold, Hamilton and Trenton municipal courts explaining in each case that he had been misidentified.

On Oct. 2, 2007, Edwards sued Freehold and Monmouth in federal court in Trenton for false arrest and imprisonment and for violation of his Fourth Amendment rights. Three weeks later, the

Asbury Park Press ran a front-page story about the case, headlined "Identity mix-up lands man in jail," and the "CBS Evening News" also did a piece on the case.

The case settled for \$327,500 at a conference with U.S. Magistrate Judge Tonianne Bongiovanni last Sept. 26. Monmouth County was to pay \$200,000 and Freehold \$127,500.

That day, Eric Nemeth, general counsel for the N.J. Intergovernmental Insurance Fund that covers Freehold, requested a "no chest-thumping" provision. But the parties disagree on whether he broached the issue while the deal was being hammered out thus making it part of the agreement or after it was concluded.

As Mallon tells it in court papers, the settlement was a done deal when Nemeth raised the issue of confidentiality, saying he wanted "non-chest-thumping" language in the release, without explaining what that meant.

Mallon says that neither Nemeth nor Freehold's lawyer Joseph Morris III suggested that such a provision was a condition of the agreement or assigned a value to it.

Freehold, in a certification filed by Morris, says the subject came up when Bongiovanni asked the parties whether they required any "special stipulations" as part of the settlement. Nemeth allegedly acknowledged that public entities cannot enter into confidential settlements but said he wanted Edwards and Mallon to "refrain from contacting any person or expounding on this case or the terms of settlement."

The no-chest-thumping provision was a "benefit of the bargain" and Freehold would not have agreed to settle if Mallon had objected, says Morris' certification.

Mallon admits that after he left the courthouse that day, he called Asbury Park Press reporter Jean Mikle, who was following the case, and told her about the settlement. Mikle wrote an article that appeared on the newspaper's Web site that night and in the paper the next day, headlined "Wrongfully jailed, Freehold man gets \$327,500 settlement." A Sept. 30 editorial called for a probe into what went wrong.

Mallon says Morris told him Nemeth was unhappy about the article but did not indicate that Freehold would not pay its \$127,500 share.

Freehold, on the other hand, saw it as a violation of the agreement.

Monmouth paid its \$200,000 but Freehold never sent a release.

At Mallon's request, Bongiovanni held a conference with him and Morris on Nov. 21, where it was agreed that the case would be reopened. Mallon says that at the conference, Morris asked to reduce Freehold's portion of the settlement by \$17,500, to \$110,000, but Mallon objected. Bongiovanni gave him until Dec. 12 to file a motion to enforce the settlement.

Mallon argues in his brief that not only was there no confidentiality agreement but that such agreements are generally disfavored, especially in a case like this, where the party seeking protection is a public entity subject to legitimate public scrutiny.

Freehold's cross-motion makes no mention of the Nov. 21 meeting. It characterizes what Nemeth asked for as a nondisclosure provision, rather than a confidentiality agreement, because the agreement and its terms would likely be available through a public records request. Mallon was obligated not to disclose the terms but simply to say that the case has been "resolved to his satisfaction," contends Freehold.

The amount to be paid by Freehold should be reduced because the New Jersey Intergovernmental Insurance Fund's standard settlement agreement contains a nondisclosure provision and a liquidated damages clause for breaching it, contends Freehold.

In reply papers filed Wednesday, Mallon says there was no mention of liquidated damages until the cross-motion, despite repeated phone calls to Morris to try to resolve the impasse.

He also wrote, "Edwards wanted to publicize his case from the outset for the express purpose of making sure this never happened to anyone else," but Freehold is now ducking responsibility for its actions "by hiding behind new contract language never seen, never contemplated, or agreed to by the Plaintiff."

Mallon, of Mallon Santora & Trager in Freehold, declines to comment on the dispute other than to say, "I'm just trying to get this guy paid."

Morris, of McElroy Deutsch Mulvaney & Carpenter in Newark, also declines comment. Nemeth, of Morristown, did not return a call.

Cynthia Scott, a spokeswoman for the Monmouth County Sheriff's Office, says "the Monmouth County correctional institution has taken action to ensure that this doesn't happen again."

The motions are returnable Jan. 20.