DELAWARE ABOTA PRESENTS DISCOVERY BEST PRACTICES

LIVE ONLY SEMINAR AT DSBA

SPONSORED BY DELAWARE ABOTA AND
THE DELAWARE STATE BAR ASSOCIATION

FRIDAY, JUNE 2, 2023 | 9:00 A.M. – 4:30 P.M.

6.0 hours of CLE credit including 1.0 hour of Enhanced Ethics for Delaware and Pennsylvania Attorneys

ABOUT THE PROGRAM

The American Board of Trial Advocates (ABOTA) is a national organization of trial lawyers and judges. Founded in 1958, ABOTA's primary mission is the preservation and promotion of the right to a jury trial in civil matters as guaranteed by the Seventh Amendment to the U.S. Constitution. Today, its membership consists of over 7,600 trial lawyers, representing equally the plaintiff and defense bars, as well as judges, from 96 chapters in all 50 states, the District of Columbia, and Puerto Rico. Founded in 1992, the Delaware Chapter of ABOTA currently has 32 members. ABOTA is an invitation-only organization. Perspective members must have at least 5 years of active experience as trial lawyers, have tried at least 10 civil jury trials to conclusion, and exhibit the virtues of civility, integrity, and professionalism.

Visit https://www.dsba.org/event/delaware-abota-presents-discovery-best-practices/ for all the DSBA CLE seminar policies.

Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

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CLE SCHEDULE

8:30 a.m. – 9:00 a.m. | Registration and Sign-in

9:00 a.m. – 10:00 a.m.

Expert Discovery and Expert Depositions

Timothy E. Lengkeek, Esquire
Young Conaway Stargatt & Taylor, LLP

Joseph J. Rhoades, Esquire
Rhoades & Morrow LLC

John D. Balaguer, Esquire
Balaguer, Milewski, & Imbrogno

10:15 a.m. – 11:15 a.m.

In-Person Depositions and Dealing with the Difficult Witness

Patrick G. Rock, Esquire
Heckler & Frabizzio, P.A.

Joseph W. Weik, Esquire
Weik, Nitsche & Dougherty

Randall E. Robbins, Esquire
Ashby & Geddes

11:30 a.m. – 12:30 p.m.

Digital Technology in the Courtroom (via video rebroadcast)

James Casey, Esquire
Ohio Chapter of ABOTA

12:30 p.m. –1:00 p.m. | Lunch (provided)

1:00 p.m. – 2:00 p.m.

As the Bench Sees It: Ethics & Professionalism in Discovery Practice

Magistrate Judge Sherry Fallon
U.S. District Court for the District of Delaware

Judge Paul Wallace
Superior Court of the State of Delaware

Judge Reneta Green-Streett
Superior Court of the State of Delaware

2:15 p.m. – 3:15 p.m.

Written Discovery and Document Production

Donald M. Ransom, Esquire
Casarino Christman Shalk Ransom & Doss, P.A.

Lawrance Spiller Kimmel, Esquire
Kimmel, Carter, Roman, Peltz & O'Neill, P.A

Matthew E. O'Byrne, Esquire
Casarino Christman Shalk Ransom & Doss, P.A.

3:30p.m. – 4:30 p.m.

Motion Practice – Discovery and Expert Disputes

Joshua H. Meyeroff, Esquire
Morris James LLP

Colleen D. Shields, Esquire
Eckert Seamans Cherin & Mellott, LLC

Thomas Paul Leff, Esquire
Casarino Christman Shalk Ransom & Doss, P.A.

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Expert Discovery and Expert Depositions

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Mr. Lengkeek represents people who have been injured or killed as a result of medical mistakes, auto or work accidents, or by defective products. He is currently President of the Delaware Chapter of the American Board of Trial Advocates. He has also served as President of the Delaware Trial Lawyers Association and as a state delegate and member of the Board of Governors of the American Association for Justice. He is a fellow of the American Bar Foundation and has been consistently recognized as a Super Lawyer by Philadelphia Magazine, Top Lawyer by Delaware Today, and has been listed in Best Lawyers since 2012. He graduated from the University of Delaware and Rutgers Law School, *cum laude*, where he was a moot court finalist and co-editor of the Rutgers Law Journal. He practices throughout the State of Delaware and is a partner in the law firm of Young Conaway Stargatt & Taylor, LLP.

JOSEPH J. RHOADES is the founder of the law firm Rhoades & Morrow LLC. He received his education at the University of Delaware (B.A.A.S., 1976) and the Delaware Law School of Widener University (J.D., Magna Cum Laude, 1981). He was a law clerk to the Honorable Henry R. Horsey, Supreme Court of the State of Delaware, from 1981 to 1982. He is a member of the American and Delaware State Bar Associations, the American Association for Justice, the Delaware Trial Lawyers Association, the Workers' Injury Law & Advocacy Group and the American Board of Trial Advocates. He is a Past President of the Delaware Trial Lawyers Association. He is a former member of the State of Delaware Workers' Compensation Health Care Advisory Panel, serving as the Panel's Chair, as well the State of Delaware Workers' Compensation Task Force. He is the Injured Workers' Representative on the State of Delaware Workers' Compensation Oversight Panel and is currently serving as the Panel's Chair. He is also the Vice Chair of the Delaware Superior Court Civil Rules Committee.

BALAGUER | MILEWSKI | IMBROGNO
trial lawyers

JOHN D. BALAGUER

Managing Partner

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Overview

John Balaguer has almost 40 years of experience defending complex tort cases and is one of the leading trial lawyers in the State of Delaware. John is frequently sought out by insurers as well as self insured institutions and individuals to handle matters involving intricate liability issues, catastrophic damages and cutting edge legal theories. He focuses his practice on healthcare litigation, particularly claims of medical negligence, as well as claims against non-medical professionals, product liability and premises liability matters. John also represents insurers in coverage disputes, including those alleging bad faith.

John’s depth of experience allows him to provide his clients with early and accurate damage assessments, access to leading experts in the field and a proven track record of success before juries, trial judges and administrative tribunals. John’s courtroom reputation also serves to facilitate successful alternative dispute resolution when trial is not the best option.

In addition to his extensive trial practice, John frequently appears in appellate matters before the Delaware Supreme Court.

As a result of his thorough knowledge of the Delaware state and federal courts, John also is often asked to serve as local counsel in high stakes insurance coverage and commercial litigation in Delaware.

John was the Managing Partner of the Delaware office of a large, regional firm for more than 25 years and served on the firm's operations and executive committees.

Practices

- Healthcare
- Catastrophic/Excess Liability
- Insurance Coverage and Bad Faith
- Professional Liability
- Appellate

Recognition and Involvement

John is a Fellow in the elite American College of Trial Lawyers, widely considered to be the premier professional trial organization in America. He has also been recognized as a Delaware "Super Lawyer" in a survey of his peers by Super Lawyers and as a "Top Lawyer in the State" by Delaware Today Magazine. John has been selected by his peers for inclusion in The Best Lawyers in America list in the practice area of Medical Malpractice Law - Defendants. John was also named by Lawdragon as one of its 500 Leading Litigators in America for 2023.

John served for 12 years in the Delaware National Guard, achieving the rank of Major. He has been a volunteer coach and judge for high school mock trial competitions in Delaware and Pennsylvania as well as a judge for the National High School Mock Trial competition. He serves on the Board of Trustees of the New Castle Presbytery of the Presbyterian Church (USA) and has served on the Board of Trustees of Trinity Presbyterian Church and as a member of the New Castle Presbytery's Permanent Judicial Commission. For a week each summer, John does volunteer emergency home repair with the Appalachia Service Project.

Bar and Court Admissions

- Delaware
- New Jersey
- Pennsylvania

Education and Memberships

Widener University School of Law, JD, with honors, 1985

University of Delaware, BA, 1981

American College of Trial Lawyers, Fellow (Delaware State Chair 2015-2016)

American Board of Trial Advocates, Associate

Defense Counsel of Delaware

Defense Research Institute

DELAWARE DEPOSITION CONDUCT

I. Consultation (Substantive) with Witnesses Prohibited

A. Consultation with a witness during breaks in a deposition is generally prohibited under the Delaware case law[1], and specifically prohibited by D. Del. LR 30.6 and Delaware's state court rules.[2]

1. Counsel cannot "coach a deponent off the record regarding deposition testimony already given or anticipated."[3]

2. Upon resuming a deposition after a break counsel can ask:

"A. Did you consult with your attorney, an employee of your attorney and/or agent of your attorney (hereinafter "said person") during the recess and/or continuance?

-If answer is "no," end questioning.

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[1] *Tuerkes-Beckers, Inc. v. New Castle Assocs.*, 158 F.R.D. 573 (D. Del. 1993); *Peter Kaltan Defined Contribution Plan v. Gulf USA Corp.*, C.A. Nos. 93-50-RRM, 93-69-RRM (Consol.), Order (D. Del. June 28, 1993).

[2] The District of Delaware Local Rules prohibit consultation. *See* D. Del. LR 30.6 ("From the commencement until the conclusion of deposition questioning by an opposing party, including any recesses or continuances, counsel for the deponent shall not consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given, except for the purpose of conferring on whether to assert. a privilege against testifying or on how to comply with a court order."). This rule, effective June 30, 2007, codified local practice.

The Superior Court, the Delaware trial court of general jurisdiction, prohibits consultation during deposition and during any recess which is less than five calendar days. *See* Del. Super. Civ. R. 30(d)(1) ("From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney(s) for the deponent shall not: (A) consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order, or (B) suggest to the deponent the manner in which any question should be answered. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion under paragraph (d)(3)."). *See also State of Del. v. Mumford*, 731 A.2d 831 (Del. Super. Ct. 1999); *In re Asbestos Litig.*, 492 A.2d 256 (Del. Super. Ct. 1985).

The Delaware Court of Chancery prohibits consultation. *In re Fuqua Indus., Inc. Shareholder Litig.*, 752 A.2d 126 (Del. Ch. 1999); *Cascella v. GDV, Inc.*, C.A. No. 5899, Letter (Del. Ch. Jan. 15, 1981).

[3] *Deutschman v. Beneficial Corp.*, C.A. No. 86-595-MMS, Memo. Op. (D. Del. Feb. 20, 1990).

-If answer is "yes," identify the person by name and proceed to question B.

B. Did you consult with said person regarding your deposition testimony either already given and/or expected or which may be anticipated to be given?

-If answer is "no," end questioning.

-If answer is "yes," proceed to question C.

C. Did you consult with said person, and/or did said person give you any instruction and/or advice, regarding how you should answer questions during the remainder of the deposition? (This question does not require deponent to reveal the substance of the conversation.)

-If answer is "no," end questioning.

-If answer is "yes," proceed to question D.

D. About what areas of your testimony already given and/or expected or which may be anticipated to be given did you consult with said person? (Deponent need only reveal the areas discussed, not the substance of the conversation.)."[4]

[4] *Id.*

II. **Deposition Conduct Generally**

A. Objections[5]:

1. Limited to 2- or 3-words (no lengthy discussion) and should not be argumentative. Objections should be limited to the word "Objection" and a brief identification of the grounds. For example, objections "as to form" should be stated as, "Objection, form."

2. Limited to objections permissible under the rules of evidence, involving the application of a privilege, or those that can be corrected immediately.

3. Should never suggest an answer or coach a witness.[6]

B. Counsel at deposition must be admitted *pro hac vice*.[7]

C. Counsel cannot coach or suggest answers to a witness.[8]

D. Counsel should not continually interrupt questioning.[9]

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[5] *Promos Tech. Inc. v. Freescale Semiconductor, Inc.*, C.A. No. 06-788 JJF (D. Del. Dec. 20, 2007) (finding that counsel obstructed questioning by the improper assertion of work product privilege and interposing numerous objections unsupported by the rules of evidence); *Tuerkes-Beckers, Inc. v. New Castle Assocs.*, 158 F.R.D. 573 (D. Del. 1993).

[6] *Paramount Communs. Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1993).

[7] *Id.; Hoechst Celanese Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 623 A.2d 1099 (Del. Super. Ct. 1991).

[8] Superior Court Civil Rule 30(d)(1)(B); *Tuerkes-Beckers, Inc. v. New Castle Assocs*., 158 F.R.D. 573, 574-75 (D. Del. 1993) ("The only objections that should be raised at a deposition are those involving a privilege against the disclosure of information or some matter that may be corrected immediately following the objection, such as an objection to the form of the question. Any statement of an objection should be concise, should not be argumentative, and should not suggest an answer or otherwise coach the deponent. . . . Objections as to the form of the question should be limited to the words 'Objection, form.' All other objections should be limited to the word 'Objection' and a brief identification of the ground, preferably in no more than three words."); *Benton v. Guitar Center, Inc.,* C.A. No. 3075-VCS, Transcript at 4 (Del. Ch. Sept. 7, 2007) (ordering that counsel send letter to disciplinary counsel and have counsel go over the rules where counsel's "behavior was entirely inappropriate. She gave repeated speaking objections, unduly lengthened the deposition, [and] obstructed the legitimate inquiries of counsel[.]").

[9] *In re Fuqua Indus., Inc. Shareholder Litig.*, 752 A.2d 126 (Del. Ch. 1999); *Paramount Communs. Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1993);

E. Counsel should not press questioner for time.[10]

F. Counsel cannot instruct a witness not to answer.[11]

- Unless:

  a. answering question would disclose privileged information (although still required to answer as to existence, extent, or waiver of privilege),[12] or

  b. counsel intends to promptly move to terminate or limit examination pursuant to prevailing rule of civil procedure (e.g. Fed. R. Civ. P. 30(d) or Del. Super. Ct. R. 30(d)(3)[13].

G. Counsel should excuse the witness from the room if they engage.[14]

H. Counsel must prepare a witness for Delaware deposition procedure.[15]

1. *Pro hac vice* admission has been revoked where witness misbehaves and counsel does not control it.[16]

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[10] *Cardinal Capital Management, LLC v. Amerman*, C.A. No. 19876 (Del. Ch. Hr'g Tr. Sept. 27, 2002).

[11] *Tuerkes-Beckers, Inc. v. New Castle Assocs.*, 158 F.R.D. 573 (D. Del. 1993); *State of Delaware v. Mumford*, 731 A.2d 831 (Del. Super. 1999).

[12] In relevant part, Superior Court Civil Rule 30(d) provides: "A person may instruct a deponent not to answer only when necessary to preserve a privilege, [or] to enforce a limitation on evidence directed by the Court . . . ."

[13] Superior Court Civil Rule 30(d)(3) provides that a party may move to terminate or limit the deposition "[a]t any time during the taking of the deposition . . . and upon a showing that the examination is being conducted or defended in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party . . . ."

[14] *Cf. Wilshire Restaurant Group, Inc. v. Ramada, Inc.*, 1990 Del. Super. LEXIS 383, at *6 (Del. Super. Oct. 12, 1990) (stating in response to counsels' bickering during deposition that Court "will not tolerate obstructive or offensive behavior" which serves to impede the progress of litigation).

[15] *See, e.g., ADE Corp. v. KLA-Tencor Corp.*, C.A. No. 00-892-### (MPT) (D. Del. Dec. 13, 2002) ("It is the responsibility of the party (especially its counsel) proffering the expert to ascertain the expert's preparedness and to educate the expert regarding the deposition process.").

[16] *Lendus, LLC v. Goede,* 2018 WL 6498674 at *9-10) (Del. Ch. Dec. 10, 2018) (referring attorney admitted *pro hac* to ODC for his behavior during a deposition and lack of candor to the court and awarding attorneys' fees and costs); *State v. Mumford*, 731 A.2d 831, 835-36 (Del. Super. Ct. 1999) (revoking *pro hac* after attorney failed to control witness).

2. Explain restrictions on your behavior to the witness.

3. Be sure the witness understands his/her responsibilities, including the responsibility to understand the question and allow time for any objections to the question.

4. Be sure 30(b)(6) witnesses are thoroughly familiar with designation and topics.

III. **Documents Reviewed by Witnesses**

A. In Federal court, a deponent need not identify "all documents" reviewed while preparing for the deposition.[17] One suggested alternative approach: first elicit specific testimony from witness, then ask whether that testimony was influenced or informed by any documents.

B. Before production of document will be ordered under Fed. R. Evid. 612:

1. Witness must have used document to refresh recollection;

2. Witness must have used document for the purpose of testifying;

3. Court must conclude that the production is necessary in the interests of justice.

C. Similarly, in State court cases counsel may ask a witness to disclose what documents he/she relied upon in giving deposition testimony when the circumstances suggest that the witness is not relying solely upon his/her recollection. Generally, a witness should not reveal whether the documents were selected by counsel, because it may be that counsel's selection of documents is protected by the work-product privilege. However, if the witness voluntarily discloses that the documents were provided to him by counsel, in the court's words, "so be it." Counsel is entitled to know what documents the witness relied upon, but counsel is not necessarily entitled to inquire as to the source of the reliance.[18]

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[17] *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985).

[18] *Kellner v. Interlakes (Canada) Realty Corp.*, C.A. No. 6683, Letter (Del. Ch. 1982).

Expert Discovery

I. What rules govern

Super. Ct. Civ. R. 26(b) (4),(5), and (6)

F.R.C.P. 26 (a)(2) and (b)(4)

Court scheduling order

II. What *must* be disclosed

Trial experts' identity and qualifications

Subject matter of testimony

Facts and opinions to which the expert will testify

Summary of the grounds for each opinion

Case list and compensation (F.R.C.P. 26(a)(2)(B)(v) and (vi))

III. How to disclose

Report (generally required in federal court) F.R.C.P. 26(a)(2)(B)

Magic words[1]

Disclosure

Interrogatory answers

Deposition

Duty to Supplement Discovery (Super. Ct. Civ. R. 26 (e); F.R.C.P. 26 (e)(2))

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[1] *O'Riley v. Rogers*, 69 A2d 1007 (Del. 2013) (medical expert opinion should be stated in terms of "a reasonable medical probability" or "a reasonable medical certainty."); *Moses v. Drake*, 109 A2d 562 (Del. 2015) (Doctor's opinion that it was "feasible" that plaintiff's complaints were causally related to the accident found to be legally deficient); *Li v. Geico Ins. Co*, 2019 WL 4928614 (Del. Super. Oct. 7, 2019) (Doctor's opinion that the future course of treatment "will depend" on flareup and, if so, plaintiff "may" need to resume acute conservative treatment found to be speculative.)

Full disclosure before trial is better for everyone

IV. What additional information may be requested

Further discovery by other means (Super. Ct Civ. R. 26(b)(4)(A)(ii))

Opinions of non-testifying experts—in exceptional circumstances[2]

IME/DME reports (Super. Ct Civ. R. 35; F.R.C.P. 35 (b)(1))

V. What information that is not discoverable

Drafts of reports and disclosures (Super. Ct Civ. R. 26(b)(5); FRCP 26 (b)(4)(B))[3]

Communications between counsel and expert, ***except*** those that:

relate to compensation; or

identify facts or data provided to the expert and *considered* in forming an opinion; or

identify assumptions provided to the expert and *relied* on in forming an opinion

Super. Ct. Civ. R. 26(b)(6); FRCP 26(b)(4)(C)[4]

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[2] *State of Del. Dept. of Transp. v. Figg Bridge Engineers, Inc.*, 2013 WL 5293549 (Del. Super. Sept. 19, 2013) (exceptional circumstances found where consulting expert collaborated extensively with testifying expert).

[3] *But see State Upon Rel. of Sec'y of Dep't of Transportation v. Melpar*, 2021 WL 5903311, at *9 (Del. Super. Dec. 9, 2021) (Communications between expert and party and draft expert reports authored *before counsel's involvement* found to be discoverable.).

[4] The theories or mental impressions of counsel disclosed in communications with experts are protected. The advisory committee notes accompanying the 2010 amendments to F.R.C.P. 26 state: "The addition of Rule 26(b)(4)(C) is designed to protect counsel's work-product and ensure that lawyers may interact with retained experts without fear of exposing these communications." *See Green v. Nemours Found.*, 2016 WL 4401043, at *1–5 (Del. Super. Aug. 17, 2016) (Since the additions of Rules 26(b)(6)(ii) and (iii) in 2010, "it is simply no longer true that everything given to the expert must be disclosed in discovery." Counsel's "Work Product Memorandum" and "Deposition Preparation Outline" provided to expert found not subject to disclosure.) *Cf. United States v. Veolia Environment N. Am. Operations, Inc.*, 2014 WL 5511398,

VI. Who covers the cost

The party seeking discovery is generally responsible to pay for time spent responding to expert discovery, beyond providing reports, disclosures or required case list and compensation information

Super. Ct. Civ. R. 26 (b)(4)(C);[5] F.R.C.P. 26(b)(4)(E)

VII. The role of expert depositions

Timing

Are they always necessary?

Objectives

- Learn
  - qualifications, bias, fact knowledge, opinions, bases, break away from the report or disclosure
- Fence
  - lock in the expert on scope and bases
- Fish
  - develop cross-examination for trial or settlement

Save something for trial

Deposition conduct

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at *5–7 (D. Del. Oct. 31, 2014), amended, 2014 WL 6449973 (D. Del. Nov. 17, 2014) (Rule 26(b)(4)(C)'s protection extends only to *communications* between a party's attorney and a testifying expert. Rule 26(b)(4)(C) does not erase the general rule that work-product protection is waived when material is disclosed to a testifying expert.) However, if such documents are withheld, a privilege log may be required. *Twitter, Inc. v. Musk*, 2022 WL 3656938, at *6 (Del. Ch. Aug. 25, 2022).

[5] *Reid v. Johnson*, 2009 WL 4654598 (Super. Ct., Dec. 3, 2009) (holding that the party seeking an expert deposition must bear the cost of the expert's time in deposition *and* the time taken to review material to *prepare* for the deposition up to the time taken to conduct the deposition itself, but not time conferring and preparing with retaining counsel.).

2016 WL 4401043
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Ariell GREEN, Plaintiff,
v.
The NEMOURS FOUNDATION, trading as Ai Dupont Hospital and Alfred I. Dupont Hospital for Children, Defendant.

C.A. N15C-03-208 CEB
|
Submitted: June 15, 2016
|
Decided: August 17, 2016

Defendant's Motion to Compel Production of Documents. **DENIED.**

Attorneys and Law Firms

Richard A. Zappa, Esquire, YOUNG CONAWAY STARGATT & TAYLOR LLP, Wilmington, Delaware. Attorney for Plaintiff.

John D. Balaguer, Esquire and Christine Kane, Esquire, WHITE AND WILLIAMS LLP, Wilmington, Delaware. Attorneys for Defendant.

BUTLER, J.

BACKGROUND

***1** This is a medical negligence action in which both parties have retained expert witnesses. The parties informed the Court that the experts are largely in agreement on the standard of care. The dispute is apparently factual: at what time did the plaintiff present to the emergency room, when was she seen, what symptoms did she display at that time, etc. Resolution of these hotly disputed facts largely determines the appropriate course of treatment as allegedly agreed upon by the experts.

The defense commenced a deposition of plaintiff's expert witness. Immediately prior to commencement, defense counsel was provided a binder of documents reviewed by the expert witness. Upon a cursory inspection of the binder, however, defense counsel saw the Table of Contents including an entry for a document entitled "Work Product Memorandum" and a second one entitled "Deposition Preparation Exhibits." Defense counsel pointed out the documents to plaintiff's counsel, who immediately sought retrieval of the binder from defense counsel. After some discussion, the attorneys agreed to copy the Table of Contents page and return the binder to plaintiff's counsel. Defense counsel then filed the instant Motion to Compel, seeking production of the disputed documents if the Court found that they contained discoverable materials after an *in camera* review. The Court has conducted an *in camera* review of the memorandum as well as the relevant law and is now prepared to rule.

The "Work Product Memorandum" is just that—a selective review of the discovery produced thus far and essentially an argument why counsel believes the facts show medical negligence. The "Deposition Preparation Outline" consists of several pages of what plaintiff's counsel believed were the likely questions the expert would be asked by defense counsel. It is noteworthy that the questions did not include proposed answers plaintiff's counsel would have liked to hear.

ANALYSIS

This dispute calls upon the Court to analyze Superior Court Civil Procedure Rule **26**(**b**)(**6**). This provision was added to our rules of civil procedure in 2014. This new provision protects **communications** in any form between an attorney and a "testifying" expert subject to three exceptions; opposing counsel may discover **communications** that:

(i) Relate to the compensation of the expert,

(ii) Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed, or

(iii) Identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed. [1]

Because this is a verbatim adoption of the federal provision as enacted in 2010, reference to the history of the federal amendment and federal decisions is highly persuasive in interpreting Delaware's rules. [2]

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***2** While this issue traces its lineage further back to at least 1947 and the U.S. Supreme Court's opinion in *Hickman v. Taylor*,[3] it is sufficient for our purposes to begin by considering the 1984 decision of the Third Circuit in *Bogosian v. Gulf Oil Corporation*.[4] In that case, the Third Circuit ruled that an expert retained by the plaintiffs to opine in an antitrust case could not be ordered to turn over correspondence with the attorneys that reflected the attorney's mental impressions and "core" work product.[5] The Third Circuit overruled the trial court's decision that the work product doctrine must give way to an unfettered right to cross examination of the expert as to all materials considered by the expert, regardless of its source.[6]

This was the state of the law until the federal rules were amended in 1993. In the 1993 amendments, the drafters initiated a requirement that any expert that will be testifying at trial provide a written report detailing "a complete statement of all opinions to be expressed and the reasons therefore" and "the data or other information considered by the witness in forming the opinions."[7] The drafters of the amendment made clear that it was intended to eliminate any claim of privilege: "Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed."[8] It would certainly appear that among the other purposes sought to be achieved, the rule change was intended to overrule the *Bogosian* decision.

In light of the 1993 amendments to the federal rule, many courts ruled that disclosure of attorney work product materials to a testifying expert constitutes a waiver of protection from disclosure to the opposing party.[9] But that viewpoint was by no means universal and some courts felt that notwithstanding the Advisory Committee's notes to the 1993 amendments, there remained a protection for attorney work product, even after being reviewed by an expert.[10]

The conflicting viewpoints in the circuits rendered the circumstances right for further clarification. And so it came to pass that in 2010 the rules were again changed, again quite dramatically. The point is that any decision interpreting the state of the law with respect to attorney-expert **communications** is a product of its times—decisions predating the 2010 amendment are of limited utility.[11]

The 2010 amendment to the federal rules rolled back the general theory of waiver of all privilege for materials shared with the expert. Instead, it endorsed a presumption of privilege except for those **communications** noted above: 1) all information concerning the expert's fee; 2) "facts or data" supplied by the attorney that were "considered" by the expert; and 3) "assumptions" supplied by the attorney that the expert "relied" upon.[12] According to the Advisory Committee, "the addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those **communications** to searching discovery."[13] Since the fee of the expert in this case is not at issue, it will not be discussed further. But "facts or data considered" and "assumptions relied on" require further study.

***3** The additions of Rules **26**(**b**)(**6**)(ii) and (iii) in 2010 were clearly intended to restrict the 1993 amendment eliminating any privilege for materials provided to the expert. It is simply no longer true that everything given to the expert must be disclosed in discovery—it is no longer true federally and because Delaware adopted the federal rule verbatim in 2014, it is no longer true in Delaware either.

The specific exceptions to the restrictions on disclosure are intriguing. While discovery may be had of "facts or data" provided by counsel and "considered" by the expert, only "assumptions" that are "relied upon" by the expert are discoverable.

These terms contain distinctions that matter. The rule requires disclosure of facts or other information "considered" by the expert. The term "considered" enjoyed a number of judicial interpretations, almost uniformly to the effect that material is "considered" if it was seen by the expert, regardless whether he relies upon it and indeed, even if he rejects it entirely.[14] Thus, experts have been deemed to have considered materials even when they have testified, under oath, that they did *not* consider the materials in forming their opinions.[15]

The second exception to non-disclosure applies to assumptions "relied" on by the expert. This provision makes its first appearance in the Rules in 2010 and, so far as we can determine, is bereft of decisions interpreting it. But the Advisory Committee enacting the rule said this:

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> For example, the attorney for a party may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert's conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception. [16]

So to the extent the attorney communicates with the expert his "assumptions" about the case—be they hypotheticals or other possibilities—these **communications** are privileged from disclosure unless the expert were to aver that he "relied" on the assumption as posited by the attorney.

While this may seem like semantics, it is more fair to the drafters to conclude that they were seeking to create a zone of **communications** between the attorney and the expert that were protected and the protections broadened the more the **communication** reflected the attorney's own thoughts and shrank when the **communications** were merely recitations of objective fact.

Thus, in deciding a motion to compel the production of attorney-expert **communications**, the Court must determine exactly what are "facts or data" that are "provided by the attorney?" In this case, the "Work Product Memorandum" contains some facts gathered from the depositions of witnesses or the hospital records assembled in a way that presents to the expert why the attorney believed negligence occurred. Do the "facts or data" so assembled represent material "provided" by the attorney, or are these facts or data provided in the discovery materials to which each side has full access? And if the facts or data are merely a selective reiteration of materials already made available to opposing counsel, must they nonetheless be turned over to counsel, for whatever use he might make of it? We think that the only way to answer these somewhat subtle questions is by reference to the policies sought to be achieved by the 2010 amendments, adopted by Delaware in 2014.

***4** The Advisory Committee tells us, "The exception applies only to **communications** 'identifying' the facts or data provided by counsel, further **communications** about the potential relevance of the facts or data are protected." [17] Here, the deposition testimony and other discovery material are included in the discovery binder provided to opposing counsel at the outset of the expert deposition. So there is no question but that all of the facts and data contained in the "Work Product Memorandum" are facts and data readily available by resort to the other materials in the binder.

As stated by the Ninth Circuit: "the Committee sought to balance the competing policy considerations, including the need to provide an adversary with sufficient information to engage in meaningful cross-examination and prepare a rebuttal, on the one hand, and the need to protect the attorney's zone of privacy to efficiently prepare a case for trial without incurring the undue expense of engaging multiple experts, on the other." [18]

The Ninth Circuit's analysis begs us to consider this question: what "meaningful cross examination" is there to be had of the expert if opposing counsel is given access to a memo explaining the factual reasons why the plaintiffs attorney thinks the defendant committed medical malpractice? The expert already insists that his opinions are his own and the facts and data he relies upon in making those opinions lie in the depositions and other discovery taken to date. The memorandum may prove that he had some help in coming to those conclusions, but what of that? The expert must defend his conclusions on their merits and cross examination. The fact that attorney work product asserts the same conclusion is essentially irrelevant. [19]

To suggest that this expert is but a pawn to Plaintiff's counsel because counsel "pitched" a theory of liability to the expert is to invade the province of protected **communications** and has the double trouble of suggesting this behavior is somehow unique to this case. The Court understands that discussions, emails, and meetings between experts and lawyers at which facts are discussed, theories are vetted, and assumptions are assumed is the stuff of the litigator's craft. The only thing unusual about this case is that the **communication** was in memo form and was inadvertently passed to opposing counsel. While that certainly takes this case out of the norm for such **communications**, we would do well to remember that Rule 26 protects all **communication**, in whatever form. A ruling requiring disclosure of this memorandum of plaintiff's counsel's recitation of otherwise available facts

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would necessarily mandate disclosure of all **communications** between counsel and a testifying expert in future cases. It seems to the Court that such a rule is exactly what the 2014 amendment to the Delaware Rules was intended to avoid.

***5** There may well be "facts or data" prepared by counsel or at his direction specifically for the edification of the expert witness. Such was the case in *Fialkowski v. Perry*, which involved a suit against a law firm by a former partner.[20] The plaintiff, at the direction of her litigation attorney, prepared a memorandum explaining the relevance of certain documents produced by the firm's Quickbooks accounting software.[21] The attorney forwarded the materials to an accounting expert who "considered" the materials, and then sought privilege from disclosure because it was either 1) attorney-client **communications** or 2) attorney work product.[22] The Court rejected both arguments and held that the memo contained facts or data that were actually created by the plaintiff and supplied to the attorney, and later to the expert.[23]

Likewise, it is not unusual for attorneys to interview fact witnesses that are never deposed. The substance of those interviews may well be transmitted to the expert who may consider them in formulating his opinions. Without disclosure, there would be no way for opposing counsel to cross-examine the expert on the facts revealed by the attorney. It makes good sense that such "facts or data" be made discoverable in that scenario.

The same considerations do not apply here. The memorandum in question is clearly intended to discuss the "potential relevance" of the facts or data located in various other documents in the expert's binder. The memo represents plaintiff's counsel's "pitch" to the expert in support of the conclusion that the defendant committed medical negligence. Counsel supports that pitch by reference to various facts and data as gleaned through discovery. The memo contains no facts or data not found elsewhere. Counsel's choice of which facts to highlight for the benefit of the expert represents counsel's "mental impressions" and work product. The "pitch" to the expert certainly does contain assumptions by counsel that may or may not be shared by the expert, but that is of no moment, since the expert has sworn that he did not "rely" on those assumptions.

CONCLUSION

On balance, the Court is convinced that plaintiff's counsel's "Work Product Memorandum" and "Deposition Preparation Outline" are not subject to disclosure to opposing counsel. Rather, they sit in that zone of materials that the drafters of Rule **26**(**b**)(**6**)(i)and (ii) intended to protect from disclosure in favor of promoting candid interchange between an attorney and retained experts. Those interchanges may take place by phone, by email, by face to face meeting, or, as here, by memorandum. Whatever the form, however, it is clear that the rules are intended to protect them from disclosure to opposing counsel.

IT IS SO ORDERED.

All Citations

Not Reported in Atl. Rptr., 2016 WL 4401043

Footnotes

1 Del. Super. Ct. Civ. R. **26**(**b**)(**6**).

2 *See Crumplar v. Super. Ct. of Del.*, 56 A.2d 1000, 1007 (Del. 2012) (relying on interpretations of federal rule where Delaware Superior Court Civil Rule "substantially parallels" the language of its federal counterpart).

3 329 U.S. 495, 512 (1947) (recognizing "the general policy against invading the privacy of an attorney's course of preparation").

4 738 F.2d 587 (3d Cir. 1984).

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5 *Id.* at 595.

6 *Id.*

7 Fed. R. Civ. P. 26(a)(2)(B) (1994).

8 Fed. R. Civ. P. 26 advisory committee's note to 1993 amendment.

9 *See, e.g., Regional Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 715 (6th Cir. 2006); *Fidelity Nat'l Title Ins. Co. of New York v. Intercounty Nat'l Title Ins. Co.*, 412 F.3d 745, 751 (7th Cir. 2005); *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370 (Fed. Cir. 2001).

10 *See, e.g., Krisa v. Equitable Life Assurance Society*, 196 F.R.D. 254, 260 (M.D. Pa. 2000); *Haworth, Inc. v. Herman Miller, Inc.* 162 F.R.D. 289, 292-96 (W.D. Mich. 1995); *All West Pet Supply Co. v. Hill's Pet Prods*, 15 F.R.D. 634, 638 (D. Kan. 1993).

11 *But see Yeda Research & Dev. Co., Ltd. v. Abbott GMBH & Co. KG.* 292 F.R.D. 97, 105 (D.D.C. 2013) ("Because the word 'considered' is unchanged, cases interpreting its meaning [before the 2010 amendments] remain valid.").

12 *See* Fed. R. Civ. P. 26(b)(4)(c).

13 Fed. R. Civ. P. 26 advisory committee's note to 2010 amendment.

14 *See, e.g., McCormick v. Halliburton Energy Servs. Inc.*, 2015 WL 2345310, at *2 (W.D. Okla. May 14, 2015); *Yeda Research & Dev. Co., Ltd.*, 292 F.R.D. at 105; *W. Res., Inc. v. Union Pac. R.R. Co.*, 2002 WL 181494, at *9 (D. Kan. Jan. 31, 2002); *Monsanto Co. v. Aventis Cropscience, N.V.*, 214 F.R.D. 545, 547 (E.D. Mo. 2002).

15 *See. e.g., Euclid Chem. Co. v. Vector Corrosion Techs., Inc.*, 2007 WL 1560277, at *6 (N.D. Ohio May 29, 2007); *W. Res., Inc.*, 2002 WL 181494, at *9; *Monsanto Co.*, 214 F.R.D. at 547.

16 Fed. R. Civ. P. 26 advisory committee's note to 2010 amendment.

17 *Id.*

18 *Republic of Ecuador v. Mackay*, 742 F.3d 860, 870-71 (9th Cir. 2014).

19 It is easy to envision a potentially embarrassing line of cross-examination of the expert as the "facts" pointed out by plaintiff's counsel are also recited by the expert in support of his conclusions. But beyond embarrassment, what more is accomplished? The Third Circuit recognized as much in its *Bogosian* opinion, saying "the marginal value in the revelation on cross examination that the expert's view may have originated with an attorney's opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product." 738 F.2d at 595. The *Bogosian* opinion, although vanquished in 1993, was essentially vindicated in 2010. Its evidentiary observation still makes good sense.

20 2012 WL 2527020 (E.D. Pa. June 29, 2012).

21 *Id.* *2.

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22 *Id.*

23 *Id.* at *4.

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2019 WL 4928614
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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Superior Court of Delaware.

Eric LI, Plaintiff,
v.
GEICO ADVANTAGE
INSURANCE COMPANY and
Robert Dejongh, Defendants.

C.A. No. N18C-02-160 ALR
|
Submitted: September 16, 2019
|
Decided: October 7, 2019

Upon Defendants' Motions to Strike Evidence Regarding Plaintiff's Possible Future Surgery **GRANTED IN PART**

ORDER

The Honorable Andrea L. Rocanelli

***1** This case involves two separate motor vehicle collisions, both involving Plaintiff Eric Li ("Plaintiff"). Defendants each filed motions to exclude testimony regarding Plaintiff's potential need for future surgery and treatment. Plaintiff opposes both motions. The Court has considered the parties' submissions; the Delaware Rules of Evidence; the facts, arguments, and legal authorities presented by the parties; and decisional law.

At the trial level, it is the role of the Court to perform a gatekeeping function with expert testimony.[1] The admissibility of expert testimony is governed by Delaware Rule of Evidence 702, which provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[2]

Delaware has adopted the *Daubert* standard to determine whether an expert has a reliable basis in the knowledge and experience of the relevant discipline.[3] Under this standard, the trial judge may consider the following factors: (1) whether the theory or technique has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether a technique has a high-known or potential rate of error and whether standards controlling its operation exist; and (4) whether the theory or technique enjoys acceptance within a relevant scientific community.[4]

In addition to the *Daubert* factors, Delaware requires the trial judge to consider an additional five-step test to determine the admissibility of expert testimony.[5] The trial judge must determine that:

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(1) the witness is qualified as an expert by knowledge, skill, experience, training, or education;

(2) the evidence is relevant;

(3) the expert's opinion is based upon information reasonably relied upon by experts in that particular field;

(4) the expert testimony will assist the trier of fact to understand the evidence or determine a material fact in issue; and

(5) the expert testimony will not create unfair prejudice or confuse or mislead the jury.[6]

"[Delaware's] case law is clear that 'when an expert offers a medical opinion it should be stated in terms of a reasonable medical probability or a reasonable medical certainty.' "[7] "A doctor cannot base [an] expert medical opinion on speculation or conjecture."[8] "A doctor's testimony that a certain thing is possible is no evidence at all"[9] because "[a] doctor's opinion about 'what is possible is no more valid than the jury's own speculation as to what is or is not possible.' "[10]

***2** In his first expert report dated October 31, 2017, Plaintiff's first medical expert witness, Dr. Ali Kalamchi, states that Plaintiff "*may* need periodic visits for evaluation *if* there is any change in his symptoms."[11] The first report also states that "[t]he major future cost *would be* related to surgical intervention *if* his symptoms became severe to require surgery."[12] In his second expert report dated February 22, 2018, Dr. Kalamchi states that the "[f]uture course [of treatment] *will depend on* flare-up, then he *may* need resumption of then acute conservative treatment such as physical therapy and medication."[13]

Plaintiff concedes that Dr. Kalamchi's opinions concerning the need for future surgery are not stated to a reasonable degree of medical probability.[14] Instead, Plaintiff argues that Dr. Kalamchi's opinions regarding the possibility of future surgery are admissible to support Plaintiff's claim that he will experience mental anguish over the future possible consequences of his injuries, including the possibility of future surgery.

In *O'Riley v. Rogers*, the Delaware Supreme Court held that the Superior Court abused its discretion by ordering a new trial after it had properly excluded medical expert testimony similar to Dr. Kalamchi's proposed testimony.[15] Prior to trial, the Superior Court excluded a medical expert's testimony that "it was *possible* that the plaintiff's permanent injury *might* improve *depending on* the results of further recommended testing."[16] The Superior Court initially found the testimony impermissibly speculative because the testimony addressed possibilities, not reasonable medical probabilities.[17] After the jury returned a verdict favoring the plaintiff, the defendant moved for a new trial.[18] The Superior Court granted the defendant's motion, concluding that the disputed testimony supported the depth and credibility of the expert's opinion on the permanency of the plaintiff's injuries.[19]

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The Delaware Supreme Court found that the Superior Court erred in ordering a new trial because the testimony was impermissibly speculative.[20] The Supreme Court found that the excluded testimony did not test the credibility of the expert's opinion but instead opined about the permanency of the plaintiff's injuries based on the treatment possibilities that a medical test might reveal.[21] Finding the Superior Court abused its discretion by ordering a new trial, the Supreme Court vacated the Superior Court's order granting the defendant's motion for a new trial and remanded the case with instructions to reinstate the original jury verdict.[22]

Similar to the testimony in *O'Riley*, Dr. Kalamchi's proposed testimony is not proper because it is speculative. Specifically, Dr. Kalamchi's statements opine about the possible courses of treatment and costs that might arise if now-unmet conditions are satisfied in the future. Such speculative medical expert testimony is "no evidence at all."[23]

Moreover, to the extent Plaintiff seeks to offer these statements to support his claim of mental anguish, the Court finds that the testimony would "create unfair prejudice or confuse or mislead the jury."[24] Dr. Kalamchi's testimony regarding the potential need for future surgery and treatment is therefore inadmissible.

***3** Defendant GEICO also objects to portions of proposed testimony by Plaintiff's second medical expert witness, Dr. Steven Diamond. In his narrative report dated December 8, 2017, Dr. Diamond states the following: "It has been suggested by orthopedic spinal surgery that [Plaintiff] *may* benefit, *if* his symptoms become more acute of a cervical surgical procedure to correct the defects found on MRI. I will leave this in the capable hands of Dr. Kalamchi to discuss with [Plaintiff]."[25] By his own words, Dr. Diamond does not intend to offer his own opinion as to Plaintiff's future need for surgery. In addition, these statements suffer from the same speculation defects as Dr. Kalamchi's statements. The Court therefore finds that Dr. Diamond's statements regarding the potential need for future surgery are inadmissible.

Finally, GEICO objects to the admissibility of Plaintiff's own testimony regarding his potential need for surgery. In his deposition, Plaintiff testified that his doctor told him that he "eventually ... need[s] a surgery."[26] Plaintiff further testified that he is "not ready" to undergo surgery because he is "not prepared" and is aware of "side effects for any surgery."[27] Unlike the doctors' testimony, Plaintiff's testimony is not offered as a medical expert opinion and does not speculate about the potential consequences of unmet conditions. Moreover, the Court finds that Plaintiff's testimony satisfies the relevancy test as to his mental anguish claim.[28] However, additional context is needed to determine the testimony's admissibility and therefore the issue will be addressed when raised at trial.

NOW, THEREFORE, this 7th day of October 2019, the Court rules as follows:

1. Statements by Drs. Kalamchi and Diamond regarding Plaintiff's future treatment and surgery are hereby excluded; and

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2. Testimony by Plaintiff regarding Plaintiff's future treatment and surgery shall be addressed at trial in consideration of, among other things, Delaware Rule of Evidence 403.

IT IS SO ORDERED.

All Citations

Not Reported in Atl. Rptr., 2019 WL 4928614

Footnotes

1 *Sturgis v. Bayside Health Ass'n*, 942 A.2d 579, 583 (Del. 2007).

2 D.R.E. 702.

3 *See M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 521 (Del. 1999) (adopting the *Daubert* standard as the correct interpretation of Delaware Rule of Evidence 702).

4 *Sturgis*, 942 A.2d at 584 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993)).

5 *Id.*

6 *Id.*

7 *O'Riley v. Rogers*, 69 A.3d 1007, 1011 (Del. 2013) (quoting *Floray v. State*, 720 A.2d 1132, 1136 (Del. 1998)) (quotation marks omitted).

8 *Id.*

9 *Oxendine v. State*, 528 A.2d 870, 873 (Del. 1987).

10 *O'Riley*, 69 A.3d at 1011 (quoting *Oxendine*, 528 A.2d at 873).

11 Def. DeJongh's Mot. to Strike Ex. B, at 2 (emphasis added).

12 *Id.* (emphasis added).

13 Def. DeJongh's Mot. to Strike Ex. C, at 2 (emphasis added).

14 Pl.'s Resp. to Mot. in Limine and Mot. to Strike 1.

15 *O'Riley*, 69 A.3d at 1008.

16 *Id.* (emphasis added).

17 *Id.* at 1009.

18 *Id.* at 1010.

19 *Id.*

20 *Id.* at 1012.

21 *Id.*

22 *Id.*

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23 *See Oxendine*, 528 A.2d at 873.

24 *See Sturgis*, 942 A.2d at 584 ("Before admitting expert testimony, the trial judge must determine that ... the expert testimony will not create unfair prejudice or confuse or mislead the jury."); *see also* D.R.E. 403.

25 *See* Def. GEICO's Mot. in Limine Ex. C, at 3 (emphasis added). In his response, Plaintiff does not raise any opposition to GEICO's objection to this portion of Dr. Diamond's report.

26 Def. GEICO's Mot. in Limine Ex. A, at 42:8–9.

27 *Id.* at 42:20–23.

28 *See* D.R.E. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

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109 A.3d 562
Supreme Court of Delaware.

Tricia MOSES, Plaintiff-below, Appellant,
v.
Aaron DRAKE, Defendant-below, Appellee.

No. 357, 2014
|
Submitted: January 14, 2015
|
Decided: January 27, 2015

Synopsis

Background: Lead motorist brought personal injury action against trailing motorist following rear end collision which resulted in pregnancy complications and child's premature birth. The Superior Court, Kent County, granted trailing motorist's motion for summary judgment based on legally deficient medical opinion, and lead motorist appealed.

Holdings: The Supreme Court, Valihura, J., held that:

Court did not have a reviewable record upon which it could determine whether lead motorist had demonstrated good cause for submitting treating physician's supplemental opinions after the deadline, and

use of term "feasible" was insufficient to meet standard of a "reasonable medical probability" or "reasonable medical certainty."

Affirmed.

***563** Court Below: Superior Court of the State of Delaware, in and for Kent County C.A. No. K13C-04-010 WLW
Upon appeal from the Superior Court. **AFFIRMED**.

Attorneys and Law Firms

William D. Fletcher, Jr., Esquire (argued), Schmittinger & Rodriguez, P.A., Dover, Delaware, for Appellant.

Arthur D. Kuhl, Esquire (argued), Reger Rizzo & Darnall LLP, Wilmington, Delaware, for Appellee.

Before STRINE, Chief Justice, RIDGELY and VALIHURA, Justices.

Opinion

VALIHURA, Justice:

Plaintiff-below/Appellant Tricia Moses ("Moses") raises two arguments on appeal. First, she argues that the January 15, 2014, medical opinion of her treating physician, Dr. Stephen Ogden ("Dr. Ogden"), was sufficient to deny Defendant-below/Appellee Aaron Drake's ("Drake") motion for summary judgment on the claim that the medical opinion was legally deficient. Second, she argues, in the alternative, that the denial of her motion to reargue was improper given Dr. Ogden's "clarifications" of his opinion on April 25, and May 14, 2014. We disagree and affirm the decisions below.

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I. FACTUAL AND PROCEDURAL HISTORY

On April 6, 2011, Moses and Drake were involved in a rear-end motor vehicle collision where Drake's vehicle struck Moses' vehicle. Drake pled guilty to a citation for following a motor vehicle too closely. At the time of the incident, Moses was 26 weeks pregnant. Due to her past medical history, Moses was in a program for high-risk pregnancies. After the motor vehicle collision between Moses and Drake, Moses delivered her child prematurely at 31 weeks. While Moses' complaint contained allegations of trauma-induced premature birth and trauma-induced mental and physical difficulties relating to the child, Moses did not oppose dismissal of all ***564** claims pertaining to the child in the proceedings below. Accordingly, Moses does not contend on appeal that the complications of her pregnancy or the premature birth of her child were proximately caused by the motor vehicle collision.

Due to the severe nature of the claimed injuries in Moses' complaint, it appeared initially that Drake may require multiple experts to address the various claims. Drake's counsel requested at least six months to prepare expert reports after Moses' expert reports were due.

On July 19, 2013, the trial court issued a full scheduling order that included a deadline for Moses to identify her experts and produce her experts' curricula vitae by November 29, 2013, and her experts' reports by December 31, 2013. On December 11, 2013, after Moses failed to meet the November 29, 2013, deadline, Drake filed a motion to dismiss. In response, Moses' counsel contacted Drake's counsel, and the parties agreed to a stipulation modifying the scheduling order and extending the expert disclosure deadlines. The stipulation was then approved by the Superior Court on December 18, 2013. Moses' new deadline to identify experts became December 31, 2013, and her experts' reports were due January 31, 2014.

On January 31, 2014, Moses produced a one-paragraph opinion from Dr. Ogden dated January 15, 2014. The opinion stated that:

> My former patient Tricia Moses was in a motor vehicle accident on 4/6/2011. She subsequently came to my office with complaints of back pain. She was treated with anti-inflammatory medication and Physical Therapy. It is *feasible* that the complaints she presented with are causally related to her motor vehicle accident and to the best of [*sic*] knowledge were not related to a previous injury or illness. Her injuries were treated with conservative measures and at the time I treated her no surgery was needed and no permanent impairment was sustained.[1]

On April 16, 2014, Drake filed a motion to dismiss on the basis that Dr. Ogden's opinion was legally insufficient because he used the word “feasible.” Drake argued that “feasible” does not meet the standard for reasonable medical probability because the dictionary definition is synonymous with “possible.” On May 1, 2014, Moses filed a response to Drake's motion to dismiss that included a clarifying statement from Dr. Ogden dated April 25, 2014, which stated:

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> To clarify my letter of January 15, 2014, since to the best of my knowledge, Trisha Moses' complaints of back pain were not related to a previous illness or injury, it is *more likely than not* that these complaints of back pain were causally related to her motor vehicle accident of April 6, 2011.[2]

The Superior Court, relying on our recent decision in *O'Riley v. Rogers,*[3] considered both of Dr. Ogden's statements and held that they were insufficient as a matter of law because the court concluded that a doctor's opinion must use the phrase "reasonable medical probability" or "reasonable medical certainty" to survive a motion for summary judgment.[4] The trial ***565** court observed that the deadline for expert reports had passed and held that Moses was "precluded from offering any other expert testimony."[5] Accordingly, the trial court granted Drake's motion for summary judgment on May 13, 2014.[6]

On May 20, 2014, Moses filed a motion seeking reargument. Moses argued that neither *O'Riley* nor any other source of Delaware law defines "reasonable medical probability." Moses argued that Dr. Ogden's April 25, 2014, supplemental report established a sufficient basis for his opinion beyond a mere possibility. In addition, Moses submitted another supplemental report dated May 14, 2014 (the day after the trial court granted Drake's motion for summary judgment). The May 14 report states:

> To further clarify my letter of January 15, 2014, since to the best of my knowledge, Trisha Moses' complaints of back pain were not related to a previous illness or injury, based upon reasonable, medical probability, these complaints of back pain were causally related to her motor vehicle accident of April 6, 2011.[7]

The trial court denied Moses' motion to reargue on June 10, 2014.[8] The court noted that Moses had two weeks before the expert disclosure deadline to attempt to cure Dr. Ogden's defective report after it has been created on January 15. The circumstances of the filings of the supplemental reports led the court to conclude that the clarifying statements were "nothing more than reactionary filings to the Defendant's motion and the Court's ruling."[9] The court stated that:

> [t]o consider these filings now would render the scheduling order—and the well-established practice of requiring a plaintiff to submit expert reports by a specific date early on the discovery process—meaningless. Further, to hold otherwise would prejudice a defendant's ability to defend their case, as they would be left guessing as to what the basis of an expert's opinion is up until the date of the expert's deposition, or even up until trial.[10]

For the reasons set forth below, we affirm the decisions of the trial court in granting summary judgment and denying reargument.

II. DISCUSSION

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A. The Trial Court Did Not Err in Granting Summary Judgment or Denying Reargument

1. Standard of Review

We generally review a trial court's grant of summary judgment *de novo*.[11] To the extent that the grant of summary judgment was based on a plaintiff's expert disclosure and report deadline ***566** not being extended, we review for an abuse of discretion.[12]

2. Analysis

Trial courts are not required to allow a plaintiff to supplement a previously submitted expert report after the expert report cutoff has expired if there is no good cause to permit the untimely filing.[13] Good cause is likely to be found when the moving party has been generally diligent, the need for more time was neither foreseeable nor its fault, and refusing to grant the continuance would create a substantial risk of unfairness to that party.[14]

Notably, Moses did not seek an extension to file expert disclosures and reports before the January 31, 2014, deadline had passed. Thus, the trial court did not have before it an application to consider extending the deadline to permit additional or supplemental expert submissions by Moses.[15] As a corollary, we do not have on appeal a reviewable record upon which we can determine whether Moses has demonstrated good cause for submitting Dr. Ogden's supplemental opinions after the deadline had passed. Accordingly, on this record we will not find that the trial court abused its discretion for not considering Dr. Ogden's supplemental reports after the stipulated expert disclosure and report deadline had expired.[16]

Thus, the question that remains is whether Dr. Ogden's use of the term "feasible" in his January 15 report was sufficient to constitute a "reasonable medical probability" or "reasonable medical certainty." In *O'Riley,* we stated that "[a] doctor cannot base his expert medical opinion on speculation and conjecture."[17] Our case law is clear that "when an expert offers a medical opinion it should be stated in terms of 'a reasonable medical probability' or 'a reasonable medical certainty.' "[18] Moses urges us to consider our decision in *Gen. Motors Corp. v. Freeman* where we acknowledged that a doctor's statements should be considered in the light of all of the evidence.[19] In answering this question, ***567** our recent decision in *Mammarella v. Evantash*[20] is illustrative.

In *Mammarella,* we reiterated the legal standard for an expert opinion,[21] and held that a doctor's trial deposition testimony was insufficient to establish causation, as was required to establish Mammarella's malpractice claim. Mammarella was diagnosed with Stage I, Grade III breast cancer consisting of a tumor eleven millimeters in diameter. Her medical negligence action involved, among other claims, a claim that Mammarella's doctors should have diagnosed the nodule discovered in her breast as cancer earlier, and recommended radiation instead of the more disabling chemotherapy treatments

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she ultimately underwent. To establish her claim, Mammarella needed to offer sufficient evidence for a jury to find a causal link between a six-month delay in her diagnosis and the fact that she had to undergo chemotherapy. Mammarella contended that one of her doctors, Dr. Biggs, told her that she would be eligible for radiation treatment if the tumor had been eight millimeters or less in size. Dr. Biggs was the only expert Mammarella designated to testify regarding causation. Dr. Biggs testified that he could not say that if a biopsy had been performed on the nodule six months earlier that it would have revealed Mammarella's breast cancer, because "[t]hat would be pure speculation."[22] Further, Dr. Biggs explained that eight millimeters was not a "bright line" cut-off measurement for determining whether chemotherapy is required or appropriate.[23] The trial court held that Dr. Biggs testimony did not provide a sufficient evidentiary basis for the jury to find that Mammarella's treatment options changed as a result of the alleged medical negligence; and we affirmed the judgment of the Superior Court.[24]

The *Mammarella* Court also considered an argument—one that the Court ultimately determined was waived on appeal—that, nevertheless, provides some guidance on the legal standard for expert opinions. At oral argument on appeal, Mammarella's counsel presented a recast version of certain language from Dr. Biggs' testimony. Dr. Biggs had stated, "I think looking back at our initial consultation note, I indicated that if the tumor was no larger than it appeared on ultrasound, which I think was, what, 8 millimeters, that I *would likely feel* that she would not take chemotherapy."[25] Relying on *Hugg v. Torres,*[26] Mammarella suggested that the word "likely" could be replaced with the word "probably." Mammarella argued that Dr. Biggs' statement was legally sufficient to show causation. ***568** The Court examined the expert's testimony to determine whether it could conclude to a reasonable medical probability or certainty that the doctor would have recommended radiation instead of chemotherapy had the tumor been diagnosed earlier. Given that the doctor's testimony did not provide sufficient evidence that the doctor's statement was one of a reasonable medical probability, the Court stated that even the recast testimony was not sufficient to establish the causation element of Mammarella's claim.

We find the same is true in this case. While our decisions in *O'Riley* and *Mammarella* strongly encourage medical experts to state their conclusions to a "reasonable medical probability" or "reasonable medical certainty," we allow trial courts to exercise some discretion to determine whether the opinion offered by an expert, when considered in light of all of the evidence, meets that legal standard. In this case, the trial court, in its order denying reargument, stated that "[w]hile Dr. Ogden did not necessarily have to state 'reasonable medical probability' in his January 15 report, he did have to provide something in the report to show that his opinion was based upon a reasonable medical probability."[27] Here, Moses provided no other affidavit, deposition or other evidence that the trial court could use to determine whether Dr. Ogden's use of the word "feasible" constituted a reasonable medical probability or certainty.

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Finally, and for many of the same reasons set forth above, we find no merit in Moses' second claim that the Superior Court abused its discretion when it refused to grant Moses' motion for reargument.

III. CONCLUSION

Based upon the forgoing, the judgment of the Superior Court is hereby AFFIRMED.

All Citations

109 A.3d 562

Footnotes

1 App. to Appellant's Opening Br. at A7 (emphasis added).

2 App. to Appellant's Opening Br. at A71 (emphasis added).

3 69 A.3d 1007 (Del.2013).

4 *Moses v. Drake,* 2014 WL 2119991, at *4 (Del.Super. May 13, 2014) [hereinafter *Moses I*].

5 *Id.*

6 *Id.* As clarified in its subsequent opinion denying Moses' motion for reargument, the trial court also based its May 13 ruling on the untimeliness of the April 25, 2013, report, stating that “[b]ecause Dr. Ogden's expert report was insufficient as a matter of law, and because the cutoff for Plaintiffs' expert report had already passed, the Court granted summary judgment on Trisha's claim to recover for her back pain.” *Moses v. Drake,* 2014 WL 4249784, at *2 (Del.Super. Jun. 10, 2014) [hereinafter *Moses II*].

7 App. to Appellant's Opening Br. at A97.

8 *Moses II,* 2014 WL 4249784.

9 *Id.* at *4.

10 *Id.*

11 *Gunzl v. Chadwick,* 2 A.3d 74 (Del.2010).

12 *Christian v. Counseling Resource Assoc.,* 60 A.3d 1083, 1086–87 (Del.2013) (“This Court reviews a trial court's decision refusing to modify a trial scheduling order for abuse of discretion.”).

13 *See Lundeen v. Pricewaterhouse Coopers,* 2007 WL 646205, at *2 (Del. Mar. 5, 2007); *Coleman v. PricewaterhouseCoopers, LLC,* 902 A.2d 1102, 1106–1107 (Del.2006) (affirming the trial court's denial of expert's untimely supplemental report); *Bell v. Fisher,* 2010 WL 3447694, at *6 (Del.Super. Aug. 30, 2010) (“[T]his Court's necessary reliance on dates and deadlines in a trial scheduling order would be undermined if experts could submit affidavits with new, expanded or amended opinions as part of the motion ... briefing process, thereby potentially requiring vacation of the existing trial scheduling order ... and allow subsequent discovery far past the deadline for [the] same.”).

14 *Coleman,* 902 A.2d at 1107 (citing 3 James Moore et al., *Moore's Federal Practice* § 16.14[1][b] (3d ed. 2004)).

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15 Even so, the trial court concluded that "no good cause exists for the April 25 and May 14 supplemental reports." *Moses II,* 2014 WL 4249784, at *4.

16 As noted above, in its Order denying reargument, the Superior Court clarified that it was not considering the April 25, 2014, report from Dr. Ogden due to its untimeliness.

17 *O'Riley,* 69 A.3d at 1011.

18 *Id.* (quoting *Floray v. State,* 720 A.2d 1132, 1136 (Del.1998) (footnote omitted) (citations omitted)).

19 *Gen. Motors Corp. v. Freeman,* 164 A.2d 686, 689 (Del.1960) ("It is a matter of general knowledge among those of us who are at all familiar with the testimony of physicians that at times one doctor will use words denoting 'possibility' while another may use words denoting 'probability' when actually they mean the same thing. We think that such testimony should be considered in the light of all the evidence, particularly where the injury occurred directly and uninterruptedly after the trauma.").

20 93 A.3d 629 (Del.2014).

21 *Id.* at 635 (noting that "when an expert offers a medical opinion it should be stated in terms of 'a reasonable medical probability' or 'a reasonable medical certainty' and [a] doctor cannot base his expert medical opinion on speculation or conjecture." (alternation in original) (quoting *O'Riley,* 69 A.3d at 1011)). This Court further noted that "[a] doctor's opinion about what is possible is no more valid than the jury's own speculation as to what is or is not possible." *Id.* (quoting *Oxendine v. State,* 528 A.2d 870, 873 (Del.1987) (internal quotations omitted)).

22 *Mammarella,* 93 A.3d at 632.

23 *Id.* at 633.

24 *Id.* at 636.

25 *Id.* (emphasis added).

26 1993 WL 189492 (Del.Super. May 21, 1993), *rev'd on other grounds,* 637 A.2d 827 (Del.1993).

27 *Moses II,* 2014 WL 4249784, at *4.

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69 A.3d 1007
Supreme Court of Delaware.

Scott O'RILEY, Plaintiff Below, Appellant,
v.
Shawn ROGERS,
Defendant Below, Appellee.

No. 444, 2012
|
Submitted: April 3, 2013.
|
Decided: June 19, 2013.

Synopsis

Background: Plaintiff driver, who was injured in auto accident, sued defendant driver. After the jury awarded the plaintiff $292,330, the Superior Court, Sussex County, granted defendant's motion for new trial, and plaintiff appealed.

Holdings: The Supreme Court, Steele, C.J., held that:

medical expert's testimony about the possible medical consequences electromyography (EMG) examination of plaintiff might reveal was not admissible, and

new trial was not warranted in personal injury case stemming from auto accident because trial judge's evidentiary ruling, excluding portions of medical expert's testimony, was correct.

Vacated and remanded.

***1008** Court Below: Superior Court of the State of Delaware in and for Sussex County, C.A. No. SO8C–07–020.

Upon appeal from the Superior Court. Judgment **VACATED** and **REMANDED.**

Attorneys and Law Firms

Edward C. Gill, Law Office of Edward C. Gill, P.A., Georgetown, Delaware for appellant.

Mary E. Sherlock, Weber, Gallagher, Simpson, Stapleton, Fires & Newby, LLP, Dover, Delaware for appellee.

Before STEELE, Chief Justice, JACOBS and RIDGELY, Justices.

Opinion

STEELE, Chief Justice.

In this personal injury action, a Superior Court judge *sua sponte* excluded a medical expert witness's testimony that it was possible that the plaintiff's permanent injury might improve depending on the results of further recommended testing. After the jury awarded the plaintiff $292,330, the defendant moved for a new trial. The trial judge granted the motion because he concluded that while medical experts must offer opinions with a reasonable degree of medical certainty, the disputed testimony addressed the expert opinion's depth and credibility. In the second trial, the jury heard the testimony and returned a $7500 verdict. Plaintiff appeals the judge's decision to grant a new trial. Because the Superior Court judge properly excluded the testimony initially, we hold that he abused his discretion when he

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ordered a new trial. Accordingly, we VACATE the Superior Court's judgment ordering a new trial, all subsequent rulings, and the second jury verdict and REMAND with instructions to reinstate the original jury verdict.

I. FACTUAL AND PROCEDURAL HISTORY

Defendant–Appellee Shawn Rogers's truck collided with Plaintiff–Appellant Scott O'Riley's truck on September 18, 2006. O'Riley injured his shoulder, elbow, hand, and neck in the collision. O'Riley's shoulder healed, but he continues to suffer from pain and numbness in his left elbow and hand. Dr. Paul Harriott, an orthopedic surgeon, treated O'Riley. Harriott recommended that O'Riley undergo an electromyography (EMG) examination because Harriott could not determine the source of O'Riley's radiating pain and numbness. O'Riley did not undergo the EMG test because he believed that he had exhausted his insurance benefits[1] and he ***1009** did not have the money to cover the test's cost.

O'Riley sued Rogers in the Superior Court. Harriott testified by video deposition as the principal medical expert concerning O'Riley's injuries. As part of his testimony, Harriott opined that O'Riley suffered from permanent elbow and left hand injuries. However, Harriott also testified that his permanency diagnosis would be more definitive if O'Riley underwent an EMG test.

On the first morning of the trial before jury selection, Rogers's counsel presented a motion in limine to exclude Harriott's testimony relating to whether O'Riley's injury was permanent. During the hearing on that motion, the result of which is not appealed, the Superior Court judge *sua sponte* questioned whether several of Rogers's counsel's crossexamination questions were proper. Ultimately, he ruled that crossexamination testimony must address reasonable medical *probabilities,* not *possibilities.*

Based on the trial judge's ruling, the parties agreed to strike certain portions of Harriott's testimony. The jury heard Harriott testify to the following during crossexamination:

> Q And you recommended an EMG to evaluate his left elbow?
>
> A Mostly for the nerve, the numbness in his hand, so to try to determine whether it was coming from his elbow or perhaps higher up from his neck.
>
> Q Were you recommending the EMG so you could try to make a more definitive diagnosis?
>
> A More definitive, and give him some possibility of definitive treatment, yeah.
>
> Q And it looks like you did not see or evaluate Mr. O'Riley from July 21, 2008 until June 10, 2009, is that correct?
>
> A That's correct.
>
> Q And today, you are still recommending an EMG test, is that correct?
>
> A Yeah, I think it's—you know, we can help individuals, sometimes you can't. But

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> certainly an EMG test is a minimally invasive test, it can offer a lot of information, I still think it would be a good thing because possibly the idea would be maybe we can help with the numbness in his hand.
>
> ....
>
> Q Would the results of the EMG test govern your treatment protocol?
>
> A It would help me proceed. It's hard to proceed any further. I mean that's why I was offering him therapy, because I don't think he could afford the EMG, so your hands are somewhat tied.
>
> If the EMG was available to us, then we could see whether something more invasive like surgery might help him or, if that was unrevealing, maybe an MRI of the neck. So, again, not knowing, it limits how far we can take his care.

The parties agreed to strike the following testimony:

> Q Okay. And is it possible, Doctor, that his symptoms may improve, depending on the treatment protocol?
>
> A Very possibly right. So if the compression of his nerve that resulted in the numbness was from his elbow, you could move the nerve to a more favorable ***1010** location and perhaps the numbness would resolve. Or perhaps from his neck, and then it might require more invasive, you know, some sort of decompressive surgery at his neck.
>
> So usually problems of numbness, you can tackle, unless it's a neuropathy ... or something like that, so I think at least you would do the work-up. So it's sort of frustrating, it's been frustrating for me not to be able to pursue this to the level of scrutiny that I'd like to.
>
> Q So it's possible at least that the numbness and some of the subjective pain symptoms may not be permanent in nature, depending on future treatment protocol?
>
> A It's possible, yes.

After trial, the jury returned a $292,330 verdict in O'Riley's favor. Rogers moved for a new trial, alleging that the trial judge prejudicially erred when he *sua sponte* struck portions of Harriott's testimony. On August 30, 2011, the Superior Court judge ordered a new trial on damages because he thought the excluded testimony impacted the jury's ability to measure the depth and credibility of Harriott's permanency opinion.[2]

We denied O'Riley's application for an Interlocutory Appeal.[3] The Superior Court judge presided over a second jury trial on the issue of damages, and that jury heard the previously excluded testimony. On August 7, 2012, the second jury returned a $7500 verdict in O'Riley's favor. O'Riley now appeals the Superior Court judge's decision to grant the motion for a new trial.

II. STANDARD OF REVIEW

When a party appeals a final judgment, we may review an interlocutory order granting a new trial.[4] We review a trial judge's decision to grant a new trial for an abuse of discretion.[5]

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Where the parties allege the decision to grant or deny a new trial turned on whether the trial judge erred as a matter of law or abused his discretion when he made an evidentiary ruling, we conduct a two-part analysis.[6] First, we must consider whether the specific evidentiary rulings at issue were correct, and second, if we find error or abuse of discretion in the rulings, we "must then determine whether the mistakes constituted significant prejudice so as to have denied the appellant a fair trial."[7]

III. ANALYSIS

The Superior Court judge properly excluded portions of Harriott's testimony in his initial evidentiary ruling. A trial judge has a duty to make sure "that the rules of practice and evidence are applied ... with or without objection by ***1011** counsel."[8] Our case law is clear that "when an expert offers a medical opinion it should be stated in terms of 'a reasonable medical probability' or 'a reasonable medical certainty.' "[9] We do not limit this requirement to only the medical opinions an expert offers during his direct examination.[10]

A doctor cannot base his expert medical opinion on speculation or conjecture.[11] As we clearly stated in *Oxendine v. State,* "a doctor's testimony that a certain thing is possible is no evidence at all."[12] A doctor's opinion about "what is possible is no more valid than the jury's own speculation as to what is or is not possible."[13]

For example, we held in *Riegel v. Aastad* that a medical expert witness's testimony concerning "possible medical consequences, rather than ... reasonable medical probability" was impermissible speculation.[14] In *Rizzi v. Mason,* the defendant alleged that the plaintiff did not comply with a discovery request when she did not produce a letter from one of the plaintiff's previous doctors in which the doctor opined that, because of an earlier accident, the plaintiff "may" require surgery in the future.[15] The Superior Court judge noted that the doctor's "opinion as to the need for future surgery was not stated in terms of 'reasonable medical probability' " and was therefore inadmissible on that basis.[16] Similarly, in *Kardos v. Harrison,* counsel crossexamined a medical expert witness about whether earlier intervention would have increased the patient's chance of a better outcome; the expert witness testified that he would have to speculate to answer the question.[17] We affirmed the Superior Court judge's dismissal of the case "because the plaintiff's only evidence ***1012** on causation was, by her own expert's admission, speculative."[18]

An attorney still has great latitude to crossexamine a medical expert witness about his opinion's basis. We have stated that an expert can offer opinions based on hypothetical factual situations.[19] The Appellate Division of the Superior Court of New Jersey noted that while New Jersey similarly limits medical expert testimony to a reasonable medical certainty or probability (not possibility), "testimony is not inadmissible merely because it fails to account for some particular condition or fact which the adversary considers relevant.

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The adversary may on cross-examination supply the omitted conditions or facts and then ask the expert if his opinion would be changed or modified by them."[20] For example, defense counsel had the right to inquire about whether the doctor recommended the plaintiff undergo an EMG test and whether the results of that test might change his expert opinion.

In contrast, the testimony excluded in this case did not test the bases of Harriott's permanency opinion. Rather, defense counsel asked the doctor to speculate about the possible medical consequences of possible treatment courses an EMG test might reveal.[21] When Rogers's counsel asked Harriott to opine on whether O'Riley's injuries were permanent based on treatment *possibilities* an EMG test *might* reveal, counsel impermissibly went beyond testing the credibility of Harriott's opinion to inviting Harriott to speculate. Therefore, the trial judge properly excluded that portion of Harriott's testimony during the first trial. Because the initial evidentiary ruling giving rise to the trial judge's decision to grant a new trial was not erroneous, we hold that trial judge abused his discretion when he granted the motion for a new trial.

IV. CONCLUSION

Therefore, we VACATE the Superior Court's judgment ordering a new trial, all subsequent rulings, and the second jury verdict and REMAND with instructions to reinstate the original jury verdict. Jurisdiction is not retained.

All Citations

69 A.3d 1007

Footnotes

1 The trial judge determined that it was "not crystal clear" whether O'Riley had exhausted his insurance benefits. *O'Riley v. Rogers,* 2011 WL 3908404, at *2 (Del.Super. Aug. 30, 2011). Because O'Riley relied on his counsel's advice that O'Riley had exhausted his benefits, the trial judge noted that the record could support a jury determination that O'Riley reasonably believed the insurance coverage was unavailable, which the jury would have considered when assessing whether to reduce damages for failure to mitigate. *Id.*

2 *Id.* at *3. The Superior Court judge reasoned that "[t]he permanent nature of the injuries was the critical element for this verdict," and therefore, the decision to exclude crossexamination questions testing the integrity of the principal medical expert's opinion prejudiced O'Riley. *Id.* at *1, *3.

3 *O'Riley v. Rogers,* 27 A.3d 552, 2011 WL 4383554, at *1 (Del. Sept. 21, 2011) (ORDER).

4 *Robinson v. Meding,* 163 A.2d 272, 275 (Del.1960) (citations omitted) ("Generally, under modern statutes and modern rules, an appeal from a final judgment brings up for review all interlocutory or intermediate orders involving the merits and necessarily affecting the final judgment which were made prior to its entry.").

5 *Barriocanal v. Gibbs,* 697 A.2d 1169, 1171 (Del.1997) (citing *Strauss v. Biggs,* 525 A.2d 992, 996–97 (Del.1987)).

6 *Id.* (citing *Strauss,* 525 A.2d at 997)

7 *Id.* (quoting *Strauss,* 525 A.2d at 997) (internal quotation marks omitted).

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8 *State Highway Dep't v. Buzzuto,* 264 A.2d 347, 351 (Del.1970) (citing *S. Atl. S.S. Co. of Del. v. Munkacsy,* 187 A. 600, 606 (Del.1936)).

9 *Floray v. State,* 720 A.2d 1132, 1136 (Del.1998) (footnote omitted) (citations omitted).

10 *See Armstrong v. Minor,* 323 N.W.2d 127, 128 (S.D.1982) (citations omitted) ("Appellant contends that the trial court erred in sustaining objections to questions posed on crossexamination by appellant's counsel that would have limited [the medical expert's] opinion to the reasonable medical certainty standard. In view of our holding that [m]edical experts are qualified to express their opinions based upon medical certainty or medical probability, but not upon possibility, the trial court did not err in sustaining the objections to the questions in issue." (alteration in original) (internal quotation marks omitted)). We note that while the Wisconsin Supreme Court permits a defendant (but not a plaintiff) to offer medical proof only based on possibilities, *see Hernke v. N. Ins. Co. of N.Y.,* 20 Wis.2d 352, 122 N.W.2d 395, 399–400 (1963), we disagree and find that double standard inconsistent with our case law limiting expert medical opinion testimony to a reasonable medical probability standard without consideration for a litigant's status as plaintiff or defendant. *See Floray,* 720 A.2d at 1136 (citations omitted).

11 *Oxendine v. State,* 528 A.2d 870, 873 (Del.1987) (citing *Riegel v. Aastad,* 272 A.2d 715, 718 (Del.1970)).

12 *Id.* (citing *Palace Bar, Inc. v. Fearnot,* 269 Ind. 405, 381 N.E.2d 858, 864 (1978)).

13 *Id.* (citing *Palace Bar,* 381 N.E.2d at 864).

14 *Riegel,* 272 A.2d at 718.

15 *Rizzi v. Mason,* 799 A.2d 1178, 1183 (Del.Super.2002).

16 *Id.* at 1184. She permitted testimony concerning the letter, however, while stressing it was otherwise inadmissible, in order to remedy the defendant's claim of prejudice stemming from the alleged discovery violation. *Id.*

17 *Kardos v. Harrison,* 980 A.2d 1014, 1018–19 (Del.2009).

18 *Id.* at 1019. The trial judge in the instant case relied on a Florida District Court of Appeal case to conclude that a crossexaminer can question a medical expert about possibilities rather than probabilities. *O'Riley v. Rogers,* 2011 WL 3908404, at *3 n. 12 (Del.Super. Aug. 30, 2011) (citing *AT & T Wireless Servs., Inc. v. Castro,* 896 So.2d 828 (Fla.Dist.Ct.App.2005)). We disagree with this conclusion to the extent it would permit a medical expert to offer his opinion, in this case about permanency, based on speculative possibilities. *See Floray v. State,* 720 A.2d 1132, 1136 (Del.1998) (citations omitted) (holding that "when an expert offers a medical opinion it should be stated in terms of 'a reasonable medical probability' or 'a reasonable medical certainty' " (footnote omitted)).

19 *Stafford v. Sears, Roebuck & Co.,* 413 A.2d 1238, 1245 n. 10 (Del.1980).

20 *State v. Freeman,* 223 N.J.Super. 92, 538 A.2d 371, 384 (Ct.App.Div.1988) (citations omitted).

21 Harriott testified concerning what O'Riley's EMG might show (nerve compression in the elbow, nerve compression in the neck, neuropathy, or something else) and how Harriott would treat what he speculated the EMG might show (moving the nerve, decompressive surgery, or something else).

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2009 WL 4654598
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
New Castle County.

Re: REID
v.
JOHNSTON.

C.A. No. 08C-01-025-JRS.
|
Dec. 3, 2009.

West KeySummary

1 **Automobiles** Costs

In an action for injuries allegedly sustained from an automobile collision, the complainant must reimburse the other driver's **expert** witness for his actual deposition preparation time. The complainant, as the party noticing the **expert** deposition, was required to reimburse the witness for the reasonable time he spent reviewing materials in preparation for the deposition. Further, in preparing for his discovery deposition, the witness was responding to discovery and should be reimbursed a **reasonable fee** for that time by the party seeking the discovery.

*Upon Plaintiff's Motion to Determine **Expert** Fees.*

Attorneys and Law Firms

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Thomas P. Leff, Esquire, Casarino Christman Shalk Ransom & Doss, P.A., Wilmington, DE.

Opinion

JOSEPH R. SLIGHTS, III, Judge.

***1** Dear Counsel:
As you know, this case arises out of a rear-end automobile collision which allegedly caused personal injury to the plaintiff, Shari Reid. The defendant, Michael Z. Johnston, has engaged Dr. Richard H. Bennett, a neurologist, to examine Ms. Reid and to offer opinions at trial regarding the extent to which the automobile accident proximately caused her injuries. Dr. Bennett examined Ms. Reid on February 6, 2009, and prepared an extensive report in which he detailed the information he reviewed prior to the examination, his clinical findings on examination, the medical literature upon which he relied, and his opinions regarding Ms. Reid's injuries and prognosis.

Plaintiff's counsel noticed Dr. Bennett's deposition for October 6, 2009. Upon receipt of the notice, Dr. Bennett issued a fee schedule in which he set forth his fee for the deposition and, particularly relevant here, his fee to prepare for the deposition. Plaintiff has filed a motion in which she seeks an order of this Court (1) setting the maximum fee Dr. Bennett may charge to sit for his deposition; and (2) relieving her of any obligation to compensate Dr. Bennett for the time he might spend preparing for his deposition. The Court already has given its ruling regarding Dr. Bennett's deposition fee. To follow is the Court's decision regarding the extent to which Dr. Bennett may pass his deposition preparation fee on to the Plaintiff. Remarkably, as best as the Court can discern, this is an issue of first impression, at least within the written jurisprudence of this Court. [1]

Before turning to the specifics of the Plaintiff's motion, it is useful first to identify certain overarching considerations that have guided the Court's analysis of the issue *sub judice.* First, under our rules of civil procedure, a party seeking discovery from an **expert** witness proffered by another party is responsible for the reasonable costs incurred by the **expert** in responding to that discovery. [2] In this regard, the Court draws a distinction between the cost of disclosing the **expert's** testimony under Rule 26(b)(4)(A)(i), [3] which cost must be borne by the party proffering the **expert** as a predicate to presenting that **expert** at trial, and the cost of responding to further discovery regarding the **expert's** opinion after the **expert** and his opinion have been disclosed, which cost, if reasonable, must be borne by the party seeking

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that discovery.[4] The distinction, of course, makes perfect sense. A party may not present **expert** testimony at trial unless and until that party discloses the substance of the **expert's** testimony to the other parties in the litigation.[5] It is reasonable to expect the proffering party to pay the **expert** for the time it takes to develop his opinions and then disclose them in a manner that will allow others (including the proffering party) to understand what the **expert** will say at trial. On the other hand, the proffering party gains little, if anything, from a pretrial discovery deposition of his **expert** when noticed by another party. It is not surprising, then, that our rules require that the party "seeking [such] discovery pay the **expert** a **reasonable fee** for time spent in responding to [such] discovery."[6]

***2** The second consideration that has guided the Court's analysis of this motion is the notion that the Court, whenever possible, should foster efficient discovery processes in order to "secure the just, speedy and inexpensive determination of every proceeding."[7] In this regard, the Court takes the liberty of stating the obvious-an **expert's** deposition will be more efficient and productive if the **expert** is prepared for the deposition. And, to be most efficient and productive, the preparation should occur before the deposition begins. Otherwise, the deposition would be interrupted frequently (and unnecessarily) whilst the **expert** "prepares" in the midst of the deposition itself.[8]

Next, the Court has considered the practical implications of deposition preparation-exactly what is the **expert** being asked to do? In order to prepare for a deposition, an **expert** must refresh his memory of the facts of the case, the documents or other matters he reviewed to reach his opinions, the process he employed to reach his opinions, and the opinions themselves. Assuming the proffering party properly complied with Rule 26(b)(4)(A)(i), the **expert** may well need only review the written disclosure and summary of his opinion (either by **expert** report or detailed interrogatory response) to restore his memory. If the case is more complex, the **expert** may need to review the actual records, research and other data that form the bases of his opinion(s) to prepare for the deposition. In either event, absent extraordinary circumstances, he will *not* be researching new matter or developing his opinions in the case anew. Preparation for deposition connotes reviewing what has already been reviewed, and becoming re-familiar with opinions already given in order to facilitate the deposition process-a process that has been initiated by the party who noticed the deposition.

Finally, the Court considered the fact that Delaware courts regularly have recognized that **experts** are entitled to be compensated (albeit reasonably) for their time. They are not "involuntary servants."[9] It is simply not reasonable to expect an **expert** to perform substantive work in a case without being compensated.[10] When the **expert** is responding to discovery, our rules direct that the **expert's** compensation should be paid by the party who propounds the discovery.

In light of the considerations just reviewed, and after considering the issue as it relates to this case, the Court is satisfied that the Plaintiff, as the party noticing the **expert** deposition, should be required to reimburse Dr. Bennett for the reasonable time he spends reviewing materials in preparation for the deposition. In preparing for his discovery deposition (noticed by another party), Dr. Bennett is "responding to discovery" and should be reimbursed "a **reasonable fee**" for that time by "the party seeking the discovery."[11] The time Dr. Bennett might spend conferring and preparing with retaining counsel regarding deposition testimony, however, is not reimbursable, as this time will be spent not to refresh Dr. Bennett's recollection of the facts and bases for his opinion (for which counsel's involvement is not required), but rather to address tactical and trial preparation issues, for which Dr. Bennett is not entitled to reimbursement from the Plaintiff.[12]

***3** The rule adopted here comports with the underlying purpose of Rule 26(b)(4)(C) and the Court's interest in managing litigation burden and costs by making the time spent in deposing **experts** more efficient. The Court declines to extend this rule only to "complex cases," as the determination of what is and what is not a complex case would itself provoke litigation and undermine the very purpose of the rule the Court adopts today-efficient, cost effective litigation practices. Moreover, efficiency in litigation is desirable in all civil cases, whether complex or not.

The Court next must decide how best to ascertain a "**reasonable fee**" for preparation time under Rule 26(b)(4)(C). Because each case is different, the Court's first inclination is to adopt a rule that would encourage the reviewing court to address the reasonableness question on a case-by-case basis. The difficulty with this approach, of course, is that it also would encourage the very sort of litigation that the Court is seeking to discourage by this decision. A "bright line" must be drawn, within reason of course. In this regard, the

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approach taken by the United States District Court for the District of Connecticut, in *Packer v. SN Servicing Corp.,* [13] is appealing. In *Packer,* the court adopted a rule that an **expert's** preparation time cannot exceed the length of the deposition itself, and his preparation fee cannot exceed his hourly deposition fee. [14] While any rule, by necessity, would involve some measure of arbitrariness, the rule adopted in *Packer* promotes certainty, predictability, and assurance of compensation for the **expert**, while at the same time placing reasonable limits on the **expert's** reimbursable preparation time and hourly fee. Absent extraordinary circumstances, therefore, the Court adopts a rule that the **expert** shall be reimbursed by the noticing party for time spent actually preparing for a deposition at the **expert's** hourly rate in an amount up to and including the amount of time spent in the deposition itself.

To summarize, the Court holds that the Plaintiff must reimburse Dr. Bennett for his actual deposition preparation time at his deposition rate up to the time taken to conduct the deposition itself. Accordingly, Plaintiff's Motion to Determine **Expert** Fees, as it pertains to this issue, is **DENIED.** If called upon to review Dr. Bennett's (or any other **expert's**) reimbursement request, the Court should (and will in this case) be mindful that preparation for deposition involves refreshing the **expert's** recollection of facts already reviewed and opinions already expressed. To reiterate, the deposition preparation session is not the time to conduct new research or to review new facts, at least not to the extent that the **expert** will seek reimbursement for that time from the opposing party. Nor may the **expert** seek reimbursement for the time spent meeting with the attorney(s) who retained him, even if such meetings ostensibly are meant to help prepare the **expert** for deposition. As stated, such meetings serve the tactical interests of the party who engaged the **expert** and are more accurately characterized as trial preparation expenses. Finally, the Court notes that any request for reimbursement for an **expert's** deposition preparation time should be in writing and should provide sufficient detail to allow opposing counsel to see what she is paying for. [15]

***4 IT IS SO ORDERED.**

Very truly yours,

Joseph R. Slights, III

All Citations

Not Reported in A.2d, 2009 WL 4654598

Footnotes

1 Among the Courts that have addressed this issue, there is a split of authority that mirrors the divergent positions taken by the parties in this case. *Compare* *Fisher-Price, Inc. v. Safety 1st, Inc.,* 217 F.R.D. 329, 331 (D.Del.2003) (preparation time is included in the **reasonable fee** to be charged the noticing party under Rule 26(b)(4)(C)), *Fleming v. United States,* 205 F.R.D. 188, 190 (W.D.Va.2000) (ordering party noticing **expert** deposition to pay for **expert's** deposition preparation), *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.,* 154 F.R.D. 212, 213 (E.D.Wis.1994) (same), *and* *EEOC v. Sears, Roebuck & Co.,* 138 F.R.D. 523, 526 (N.D.Ill.1991) (same), with *TV58 Ltd. P'ship v. Weigel Broad. Co.,* 1993 WL 125523, at *2 (Del.Ch.1993) (preparation time is not included in the **reasonable fee** absent compelling circumstances), *United States v. M & T Mortgage Corp.,* 238 F.R.D. 3, 14 (D.D.C.2006) (disallowing reimbursement for preparation time), *M.T.* *McBrian, Inc. v. Liebert Corp.,* 173 F.R.D. 491, 493 (N.D.Ill.1997) (same), *Benjamin v. Gloz,* 130 F.R.D. 455, 456 (D.Col.1990) (same), *and* *Rhee v. Witco Chem. Corp.,* 126 F.R.D. 45, 47 (N.D.Ill.1989) (same).

2 Del.Super. Ct. Civ. R. 26(b)(4)(C)(i) ("the Court *shall* require that the party seeking discovery pay the **expert** a **reasonable fee** for time spent in responding to discovery.")(emphasis added)).

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3 *Compare* Del.Super. Ct. Civ. R. 26(b)(4)(A)(i) ("A party may through interrogatories require any other party to identify each person whom the other party expects to call as an **expert** witness at trial, to state the subject matter on which the **expert** is expected to testify, and to state the substance of the facts and opinions to which the **expert** is expected to testify and a summary of the grounds for each opinion.") with Del.Super. Ct. Civ. R. 26(b)(4)(C)(i).

4 Del.Super. Ct. Civ. R. 26(b)(4)(C)(i).

5 *See Cloroben Chem. Corp. v. Comegys,* 464 A.2d 887 (Del.1983).

6 Del.Super. Ct. Civ. R. 26(b)(4)(C)(i).

7 Del.Super. Ct. Civ. R. 1 ("[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding.").

8 *See Magee v. The Paul Revere Life Ins. Co.,* 172 F.R.D. 627, 647 (E.D.N.Y.1997)(recognizing the benefits of the **expert's** pre-deposition preparation); *Hose v. Chicago and N.W. Transp. Co.,* 154 F.R.D. 222, 228 (S.D.Iowa 1994)(same).

9 *See generally Pinkett v. Brittingham,* 567 A.2d 858 (Del.1989).

10 *Fisher-Price, Inc.,* 217 F.R.D. at 331(citing *Fleming,* 205 F.R.D. at 190).

11 Del.Super. Ct. Civ. R. 26(b)(4)(C)(i).

12 *Rhee,* 126 F.R.D. at 47.

13 243 F.R.D. 39 (D.Conn.2007). The Court notes that some courts have declined to place any limits on the amount of reimbursable preparation time. *See, e.g., Underhill Inv. Corp. v. Fixed Income Disc. Advisory Co.,* 540 F.Supp.2d 528, 539 (D.Del.2008). Other courts have adopted adjusted ratios of preparation time to deposition time. *See, e.g., Fee v. Great Bear Lodge of Wis. Dells, LLC,* 2005 WL 1323162, at *3 (D.Minn.2005) (allowing a ratio of two hours of preparation time to one hour of deposition time); *Boos v. Prison Health Servs.,* 212 F.R.D. 578, 580 (D.Kan.2002) (granting reimbursement for three-and-one-half hours of preparation time for a one-and-one-half-hour deposition). For the reasons stated, the Court has declined to adopt either of these approaches in favor of the approach taken in *Packer.*

14 *Packer,* 243 F.R.D. at 43-44.

15 Counsel may, of course, stipulate to a different arrangement including, but not limited to, an agreement that each side will pay its own **expert** preparation costs.

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UNPUBLISHED OPINION. CHECK
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Superior Court of Delaware.

The STATE of Delaware, UPON the RELATION OF the SECRETARY OF the DEPARTMENT OF TRANSPORTATION, Plaintiff,
v.
MELPAR, LLC, 1,7761995 Square Feet (0.0408 acres) of Land, 711.9788 Square Fee (0.0163 acres) of Land, 3,598.7712 Square Feet (0.0826 acres) Part of Tax Map and Parcel Number 234-23.00-269.14 Situate in Indian River Hundred, and Dash-In Food Stores, Inc., Defendants.

C.A. No.: S21C-03-017 FJJ
|
Submitted: December 2, 2021
|
Decided: December 9, 2021

ON DEFENDANTS' MOTION FOR AN EVIDENTARILY HEARING - DENIED

ON PLAINTIFF'S MOTION FOR POSSESSION - GRANTED

ON DEFENDANTS' MOTION TO DISMISS – DENIED

ON PLAINTIFF'S MOTION TO VACATE DEPOSITION - DENIED

ON PLAINTIFF'S MOTION FOR PROTECTIVE ORDER - GRANTED

ON DEFENDANTS' MOTION TO AMEND ANSWER - GRANTED

Attorneys and Law Firms

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Richard A. Forsten, Esquire, Attorney for Defendant Dash In Food Services, Inc.

Richard L. Abbott, Esquire, Attorney for Defendant Melpar, LLC.

OPINION AND ORDER

Jones, J.

INTRODUCTION

***1** The Delaware Department of Transportation ("DelDOT") instituted condemnation proceedings against Melpar, LLC ("Melpar") and Dash In Food Stores, Inc. ("Dash In" or collectively "Defendants"). DelDOT now moves for an entry of an order granting it possession of the property ("Motion for Possession"). Defendants oppose the Motion for Possession and move to dismiss the condemnation action ("Motion to Dismiss") claiming that DelDOT failed to negotiate in good faith, as required under Delaware's Real Property Acquisition Act ("RPAA"). [1]

FACTUAL AND PROCEDURAL BACKGROUND

The property at issue is commercial land located at the southeast corner of the intersection of State Route 24, Johns Williams Highway and Long Neck Road, Sussex County. [2] On March 22, 2021, DelDOT filed its Condemnation Complaint ("Complaint" or "Motion for Possession") for a partial acquisition. The property to be taken is: (1) One Fee Simple Interest of 1,776 sq. ft. (0.0408 acres); (2) One Temporary Construction Easement of 711 sq. ft. (0.0163 acres); (3) One Temporary Construction Easement of 3,598 sq. ft. (0.0826 acres) of land; and (4) two light poles (the "Subject Property"). [3] The fee simple acquisition consists of an 8-foot-wide strip of land running mostly parallel to SR 23 along the Subject Property frontage.

Melpar owns the real property at issue. [4] Dash In is a tenant operating a gas station and convenience store at the Subject Property. [5]

In November 2010, DelDOT completed the SR 24, SR 30 to Love Creek Bridge Traffic Study ("Study"). [6] The Study discussed six intersections identified through DelDOT's Highway Safety Improvement Program ("HSIP") that required safety improvements. [7] The intersection of SR

24 at SR 5/ SR 23, where the Subject Property is located, received the lowest safety rating. Specifically, 13 crashes occurred at the entrance to the Subject Property at SR 23 between December 2006 to November 2009. [8]

"To improve the safety and operation of the [ ] intersection, as it relates to the Subject Property, DelDOT plans to: extend the left turn lane from westbound SR 23 heading towards the southbound SR 24 intersection; install bicycle lanes on westbound SR 23; channelize the entrance to the Subject Property from westbound SR 23; and install a two-way left-turn lane on southbound SR 24 at the Subject Property's SR 24 entrance." [9]

The existing entrance at SR 23 (Long Neck Road) ("SR 23 Entrance") will be channelized thereby preventing left in/ left out turns ("SR 23 Lefts"). [10] DelDOT contends that the removal of the SR 23 Lefts is a logical safety improvement to alleviate a documented crash problem at the current SR 23 Entrance. [11] The SR 23 Entrance is currently too close to the signal to allow vehicles turning left through queued traffic. Right in/right out turns will remain. Bike lanes will be added along northbound SR 23, and the left turn lane from northbound SR 23 onto westbound SR 24 will be restriped (collectively the "Improvements"). [12] The entrance to the Subject Property at SR 24 should remain unaffected by the Improvements.

***2** In January 2019, DelDOT reached out to an appraiser and instructed the appraiser in their scope of work agreement to: "[d]etermine market value of the proposed partial acquisition(s) and determine if there are any damages to the remainder, caused by the project if any. If damages to the remainder are seen by the appraiser, contact the Department to determine if a before and after method appraisal is appropriate." [13]

In June 2019, DelDOT obtained an appraisal prepared by W.R. McCain & Associates ("McCain Appraisal"). [14] The McCain Appraisal valued the Subject Property to be acquired by DelDOT for a sum of $76,900. [15] The McCain Appraisal determined there were no damages to the remainder parcel and performed a strip appraisal ("Strip Appraisal").

In September 2019, DelDOT sent a written offer to Melpar based off the McCain Appraisal. [16] The parties negotiated through writing and by phone. [17]

In August 2020, Melpar dissatisfied with the McCain Appraisal, had their own appraisal performed ("Tidewater Appraisal"). [18] The Tidewater Appraisal utilized the "before" and "after" appraisal method ("B&A Appraisal") and determined the value of the Subject Property was $848,100. [19]

In October 2020, DelDOT completed an internal review of the Tidewater Appraisal and rejected the appraisal. [20] The parties continued to negotiate until January 2021, when DelDOT informed Melpar that the parties were at an impasse and that DelDOT would proceed with acquiring the Subject Property through condemnation. [21]

In March 2021, after filing the Motion for Possession, DelDOT deposited $76,900 with the Court. [22] DelDOT maintains this deposit represents just compensation for the Acquired Property as based upon the highest fair market value. [23]

On April 14, 2021, Defendants' filed the Answer and Objections to Taking, Melpar filed the Motion to Dismiss, and Melpar filed a Motion to Schedule Evidentiary Hearing. On April 29, 2021, DelDOT filed Plaintiff's Response to the Motion to Dismiss (the "Response"). On April 30, DelDOT filed Plaintiff's Response to the Motion to Schedule Evidentiary Hearing. On May 3, 2021, Dash In filed a Response to the Motion to Dismiss, joining Melpar's Motion to Dismiss. Pursuant to the Court's request, the State filed a Response to Dash In's Motion on November 5, 2021. Melpar filed a motion for leave to file an Amended Answer and Objections to Taking on October 28, 2021 and the State's response was filed on November 15, 2021. On November 5, 2021 the State filed a motion to vacate the deposition of its **expert** that had been noticed by Melpar and a motion for a protective order. A response was filed by the State on November 17, 2021 The Court held oral argument on all pending motions on December 2, 2021.

PARTIES' CONTENTIONS ON MOTION TO DISMISS

A. Melpar

Melpar argues that DelDOT violated multiple requirements of the Delaware RPAA by not obtaining a legally required B&A Appraisal. Melpar argues that DelDOT's failure to

obtain a B&A Appraisal makes DelDOT's negotiations, just compensation calculation, and deposit invalid. Additionally, Melpar alleges DelDOT did not comply with requirements for establishing a recognized public use purpose six months prior to the initiation of condemnation proceedings. In its Amended Answer and Objections, Melpar alleges that the age of the State's appraisal makes the State's reliance upon it violative of the RPAA.

B. DelDOT's Response to Melpar.

***3** DelDOT maintains that the dispute with Melpar boils down to a disagreement over appraisal methodology. DelDOT asserts that a B&A Appraisal must only be performed if there are damages to the remainder parcel, and since there are none here, the Strip Appraisal was appropriate. As such, DelDOT contends that there have been no violations of the RPAA and that DelDOT is entitled to Possession and the Court should dismiss Melpar's Motion. DelDOT disputes that the age of its appraisal and its reliance on it violates RPAA.

C. Dash In.

Dash In has joined Melpar's Motion and repeats a number of the arguments raised by Melpar. In addition, Dash In argues that there were no **communications** between the State and Dash In. Dash In maintains that the new traffic patterns will impact its business, impact delivery trucks access to the property, and will result in a loss of 3 parking spaces which may cause zoning issues with Sussex County requiring a new site plan, and the potential installation of additional landscaping or stormwater management infrastructure.

D. State's Response to Dash In.

DelDOT argues that Dash In's objections and defenses to the Order of Possession are waived because Dash In has not opposed the Order of Possession by Affidavit, deposition or verified Answer nor has Dash In objected or raised any objections to taking in accordance with the requirements of 10 *Del.C.* § 6107(a). Second, the State maintains that it had no obligation to comply with the RPAA because there is no requirement under the RPAA for the State to negotiate with lessees. Finally, Dash In's claim for damages is non-compensable where ample and reasonable access continues to exist after the taking.

STANDARD OF REVIEW

In condemnation proceedings, there are two issues: 1) whether the taking is permissible, and 2) whether the taking is being justly compensated. [24] The Court must resolve first whether the taking is permissible before proceeding to a trial on just compensation. [25]

As part of the condemnation proceedings, the taking agency may move for entry of an order of possession of property. [26] Superior Court's Civil Rule 71.1 governs this procedure. [27] Such order "shall be entered forthwith, pursuant to 10 Del. C. § 6110(a)," unless the property owner can demonstrate "good cause" why the possession order should not be entered forthwith. [28] The property owner has the burden of overcoming the presumption of regularity and the prima facie case of necessity for a public use. [29]

Section § 6110(a) of Title 10 grants a public authority the right to take possession of the property "at any time after filing the condemnation proceeding," upon notice of the intent to take possession, and after depositing "in Court ... [in] the sum of money estimated by [the authority] to be just compensation for the property or the part thereof taken." [30]

A party whose property is subject to condemnation proceedings may object to the agency's taking of possession. [31] One such objection is an allegation that the condemner has violated the RPAA. [32] The RPAA's purpose is "to encourage and expedite real property acquisitions by agreements with owners, to assure consistent treatment of property owners, to promote public confidence in land acquisition practices, and to avoid litigation and thereby relieve congestion in the courts." [33] The RPAA provides a set of fifteen (15) guidelines for state and local land acquisition programs to follow in real property acquisitions. [34] These guidelines are directory rather than mandatory, and noncompliance with them is forgivable upon establishment of a valid excuse. [35]

***4** It is the objecting party's burden to first show a RPAA violation. [36] If that burden is met, the condemning party has the burden to provide a valid excuse for its noncompliance. [37] Valid excuses include good faith efforts to comply with the RPAA, or a showing that compliance would be futile. [38] And a contemnor's noncompliance may be excusable where it has no impact on the negotiations and does not otherwise frustrate

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the RPAA's purpose.[39] Should the condemning party fail to set forth a valid excuse for not complying with the RPAA, the Court must dismiss the condemnation action without prejudice.[40] If subsequent good faith efforts to comply do not result in agreement, a new condemnation action may be filed.[41]

DISCUSSION

Melpar's Claims

Melpar has asserted a number of violations of RPAA. While a number of violations are alleged, the central dispute, which forms the basis of the various violations of RPAA, is whether the State, as a matter of law, was required to use a B&A Appraisal as opposed to the strip method appraisal utilized by the State Appraiser. Defendants contend that a B&A Appraisal is required as a matter of law. The State disagrees.

Melpar relies on *Acierno* to support its argument that a B&A Appraisal is required. In *Acierno*, the Delaware Supreme Court was not addressing possession. Instead, the Supreme Court was reviewing an appeal of the final award of just compensation after trial.[42] While the Supreme Court began its analysis by recognizing the general rule that in a partial taking case just compensation is calculated using a B&A Appraisal, the central issue in the case was what benefits and advantages the owner realized due to the taking and construction of the road improvements and whether those advantages were to be set off against the value of the property taken and any severance damages at the final compensation hearing.[43] In short, *Acierno* was a just compensation case. Acierno does not stand for the proposition that a B&A Appraisal is required in all partial taking cases.

Melpar also cites the Court to two other cases: *State v. Teague* and *Lawson v. State*.[44]

In *State v. Teague*, the owner objected to possession because DelDOT's road design and median placement would eliminate a northbound driver's ability to make a left turn into the Defendants' store parking lot.[45] The defendant argued that DelDOT violated the RPAA because its appraisal was invalid for two reasons: (1) the appraiser did not account for the possibility that the parcel would be rezoned; and (2) the appraiser used the wrong valuation method.[46]

With respect to the valuation issue, the Court emphasized that during the first stage of a condemnation proceeding, determining an appraisal's validity requires good faith analysis, not a final valuation analysis.[47] Further, the Court noted that "DelDOT's testimony indicated that it chose to appraise the property using the 'strip' method because the method for which the plaintiffs argues–the "before and after" method–'would have yielded a negligible diminution in the [remainder parcel's] value.' "[48] "Given that DelDOT ... opted to use the valuation method more generous to the" plaintiffs, the Court found that DelDOT "satisfied its obligation to make a good faith offer," thereby excusing any possible error based on DelDOT's choice of valuation method.[49]

***5** In *Lawson v. State ex rel. Secretary of the Department of Transportation*, the State's appraisal underlying its initial offer did not account for the fact that the taking significantly reduced the property owner's reasonably demonstrated ability to develop the property consistent with its estimated highest and best use.[50] The Delaware Supreme Court found that the continued reliance on the flawed appraisal "frustrated the parties' negotiations."[51] Further, the Court reversed the trial judge's findings that the State had complied with § 9505(3), and held instead that the State violated the RPAA with no excuse for noncompliance.[52]

In *Lawson*, the Court recognizes the holding in *Teague* but distinguishes the facts because DelDOT's appraiser failed to consider the highest and best use of the remainder after the taking.[53]

This Court does not find that the cases relied upon by the Defendants stand for the proposition that in a partial taking the State is <u>required</u> to utilize a B&A Appraisal. The question of what appraisal approach to utilize under a given set of facts is a question that goes not to the initial question of whether it is RPAA compliant but to the ultimate just compensation question. If the two sides of a condemnation case present different methods of appraisals that are based on a good faith analysis of the situation by each side the resolution of which appraisal is appropriate should be determined during the just compensation phase for the Commissioners. It becomes part of the push and pull of the just compensation decision. This is not a situation where an appraisal lacked the parties input[54] or the State moved forward without giving the defendants an opportunity to obtain their own appraisal.[55] This is a case

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where the parties have an honest good faith dispute about what particular appraisal approach is most appropriate under the facts of this case.[56] In this situation, the appropriate manner to resolve the dispute is during the valuation phase by the triers of fact in that proceeding after the parties have had the benefit of full **discovery** and presentations at the just compensation hearing.[57] In short, under the facts of this case, Melpar has not sustained its burden of overcoming the presumption of Regularity.

To the extent Melpar argues that § 9505(1) has been violated because of lack of negotiations, I find that Melpar has not met its burden to show that DelDOT has violated § 9505(1). The records demonstrate that negotiations in the present case took over 15 months which included emails and phone calls. The fact that DelDOT said "no" to Melpar's counteroffer of $848,100.00 does not mean there were no negotiations. On this record, I find no violations of § 9505(1) as the negotiations were sufficient.

***6** Section 9505(3) requires a taking agency before the initiation of negotiations for real property [establish] an amount ... which it reasonably believed is just compensation. Section 9505(4) provides that the agency must deposit with the Court the sum of money estimated by the agency to be just compensation for the property. Section 9505(7) states that in no event shall the time for negotiations or condemnation be advanced, the deposit of funds in court, for the use of the owner deferred nor any coercive actions be taken to compel an agreement on the price to be paid on the property." Defendants allege a breach of these sections by the State. The basis for each of these breaches is the defendants' view that a B&A Appraisal was required. As I find that a B&A Appraisal is not required as a matter of law, I find that the State has not breached any of these sections.

Defendants allege a violation of Section 9505(15). Section 9505(15) requires that an agency establish a recognized public use at least six months in advance of the institution of condemnation proceedings in one of three permitted ways: (1) in a certified planning document; (2) at a public hearing held specifically to address the acquisition; or (3) in a published report of the acquiring agency.[58] To support compliance with this Section, DelDOT points to the FY2020/2021 Capital Transportation Plan.[59] DelDOT argues that it complied with § 9505(15) because "[t]he adopted FY 2020/2021 Capital Transportation Plan is a certified planning document which recognizes the Improvements as a public use."[60] On this record, I find that DelDOT's planning document is sufficient recognition of public use prior to six months and therefore DelDOT is in compliance with § 9505(15).[61]

DEFENDANTS' MOTION TO AMEND ANSWER AND OBJECTIONS

On October 28, 2021 Melpar filed a Motion for Leave to File Amended Answer and Objections to the Taking which Dash In has joined. The amendment seeks to add an allegation that the State has violated the requirements of RPAA by relying on an Appraisal that is 2 ½ years old and given the age of the appraisal, it does not constitute a reasonable estimate of the current fair market value of the property. The State opposes the Motion to Amend. The State maintains that there is no brightline rule to determine when an appraisal is outdated. The State also contends that the "shelf life" of the appraisal objection comes too late and as such this defense is waived.[62] The State alleges that the condemnation process protects Melpar from post filing fluctuations in valuation. Finally, the State alleges that the Amendment would be futile, the Motion is nothing other than a delay tactic; and a delay would cause prejudice to the State in increased construction costs.

Superior Court Civil Rule 15(a) provides that Leave to Amend a Complaint or Answer should be freely granted by the Court when justice is required and the opposing party is not seriously prejudiced by such an amendment.[63] The Court finds that the State will not suffer prejudice to such an extent as to require this Court not to grant the Amendment.[64] For this reason, Motion to Amend is Ganted.

***7** Having determined that the Amended Answer should be allowed, the question becomes whether the age of the appraisal is a violation of RPAA and if so, whether that should result in the granting of the Defendants' Motion to Dismiss.

The Court is not at all certain that the appraisal relied upon by the State is so outdated as to not reflect the existing real estate market conditions so as to make the State's reliance on it violative of RPAA. What the Court is certain of is that to dismiss this case on the grounds that a 2 ½ year old appraisal is being relied upon by the state under the facts of this case would be a futile exercise and have no impact on the negotiations.[65] The central dispute between the parties is the type of appraisal utilized by the State. To dismiss the case and require the State to produce an updated appraisal using

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the same strip method approach would not break the impasse between the parties and would have no meaningful impact on the negotiations. The wide disparity in value between the parties is based on which appraisal method is used. The gap in value would not be cured by getting a more up to date strip appraisal from the State when the defendants maintain that a B & A appraisal rather than a strip appraisal should be utilized. To dismiss the case because the state's appraisal is too old would be futile. As such the State's reliance on a 2 ½ year appraisal is not a violation of the RPAA.

Defendants are adequately protected in the condemnation process if the State's appraisal turns out to be outdated. First, interest is awarded on the difference between the deposit and the final award of just compensation. Second, the "effective" date for valuation of the property for the final award of just compensation is the date of possession. Changed circumstances and market fluctuations between the date of the deposit and the final award are realized. Lastly, Melpar is entitled to recover its reasonable litigation expenses, subject to exceptions, including reasonable attorney, appraisal, and **expert** witness fees where the final award is closer to Melpar's highest valuation evidence provide at trial then to DelDOT's mandatory pre-trial offer of judgment. [66]

DASH IN'S CLAIMS ON THE MOTION TO DISMISS

Dash In advances the same arguments as Melpar with regards to the adequacy of the State's appraisal method. Assuming that Dash In has standing under the RPAA to raise these arguments the question of the proper appraisal method to apply is one for the compensation phase after the development of a full record. Such an analysis will deal with claims relating to the diminished access, loss of parking spaces, and the impact to the delivery trucks. [67] , [68]

MELPAR'S MOTION TO SCHEDULE AN EVIDENTIARY HEARING

***8** Melpar has moved for this Court to hold an Evidentiary Hearing on its Motion to Dismiss. The State opposes the Motion arguing that a full evidentiary hearing is not necessary under the facts of this case and all that is necessary is a good cause hearing.

Superior Court Civil Rule 71.1 and 10 Del. C. § 6107 govern the procedure for a hearing in a condemnation case. Rule 71.1 provides for a good cause hearing. Rule 71.1 provides that an order of possession shall be entered forthwith pursuant to S 610(a), upon 10 days written notice of intent to present such order, supported by an affidavit of necessity, unless the property owner by affidavit, depositions, and/or verified answer shall show good cause why such order of possession should not be entered forthwith. The rule further state, "Any hearing on the issue of good cause shall be held without delay and on such affidavits, depositions, and/or verified answer. Disposition for the issue of good cause shall be made by the Court without delay." Finally both Rule 71.1 and Section 6110(a) permit the Court in its discretion to proceed ex parte.

This Court has refused to request for a "full blown evidentiary hearing" where the evidence presented by the parties prior to the good cause hearing was sufficient for the Court to rule. [69] Defendants would like a full blown evidentiary hearing to present the testimony of at least their **expert** to provide testimony to support his view on why the State should have utilized a B & A appraisal. [70] As explained above it is this Court's view that the appropriate appraisal method is a question to be decided during the just compensation phase.

On December 2, 2021, this Court held a hearing that satisfied the requirements of the good cause hearing. Prior to that hearing the parties developed an accurate record to adequately explain and support their positions. During the December 2, 2021 hearing the parties further explained their positions and left this Court with no doubt that the Court had an adequate record to address all of the issues surrounding the possession issue. Given the Court's conclusions a full blown evidentiary hearing is not needed by the Court. Therefore Defendants' request for an evidentiary hearing beyond the present record is Denied.

MOTION TO VACATE THE DEPOSITION OF THE STATE'S EXPERT

Melpar has noticed the deposition of Benjamin Bauer ("Bauer"). Bauer performed the State's Appraisal in this case. The State has moved to vacate the deposition of Bauer and for a Protective Order. [71] The primary argument set forth by the State in regard to the Motion to Vacate is that, absent a Court Order, Melpar is not permitted to depose Bauer.

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The State is correct that the **discovery** deposition of an **expert**, absent agreement by the parties, requires a court order. This particular judge has a very broad view of how **discovery** should be conducted, and absent a compelling reason, will allow a party to pick the method it would like to use to discover the information it is entitled to discover. The reasons advanced by the State as to why the deposition should not occur do not lead me to vacate the deposition of Bauer. To be clear, since I have ordered possession to the State, Bauer's deposition is permitted in the compensation phase. I will allow the deposition of Bauer as outlined below.

***9** Having ordered the deposition, Bauer's deposition and subpoena duces tecum may proceed only in a manner consistent with the terms of Superior Court Civil Rule 26. In other words, Bauer is entitled to reasonable compensation from the party requesting the deposition. The defendants are not entitled to view any draft reports of Bauer. Nor are Defendants entitled to view any **communications** between DelDOT's counsel and Bauer except to the extent the **communications** relate to Bauer's compensation, facts or data provided by the attorney that the **expert** considered informing the opinions expressed, and assumptions provided by the attorney that Bauer relied on informing the opinions expressed. **Communications** solely between the **expert** and DelDot employees before counsel's involvement are **discoverable**. Any draft reports authored before the involvement of counsel are also **discoverable**.

CONCLUSION

For the reasons stated above, it is hereby ordered this 9th day of December, 2021 that:

a. The Defendants' Motion to Amend its Answer is GRANTED;

b. The Defendants' Motion for an Evidentiary Hearing is DENIED;

c. The Plaintiff's Motion for possession is GRANTED;

d. The Defendants' Motions to Dismiss are DENIED; and

e. The Plaintiff's Motion to Vacate Deposition is DENIED and the Motion for Protective Order Is GRANTED to the extent outlined herein.

All Citations

Not Reported in Atl. Rptr., 2021 WL 5903311

Footnotes

1 29 *Del.C.* § 9501 et seq.

2 Melpar's Motion to Dismiss and Opposition to Motion for Possession ("Melpar's Mot."), ¶1. The street address for the Subject Property is 24851 John J. Williams Highway, Millsboro, DE 19966. Compl. ¶9.

3 DelDOT's Response to Melpar's Mot. ("Resp."), ¶1; *see also* Compl. Ex. A. for a more fully described in the metes and bounds legal description.

4 Compl. ¶9.

5 *Id.* ¶7.

6 *Id.* ¶10.

7 *Id.*

8 *See* Resp. ¶1; Resp., Ex. B at 5.

9 Compl. ¶10.

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10 Resp. ¶1.

11 *Id.*

12 *Id.*

13 Resp., Ex. D.

14 Resp., Ex. C.

15 *Id.*

16 Resp., Ex. E (Affidavit attesting to the summary of negotiations and negotiations record).

17 *Id.*

18 *Id.*; Melpar's Mot., Ex. A.

19 Melpar's Mot. ¶12.

20 Resp., Ex. E (Affidavit attesting to the summary of negotiations and negotiations record).

21 *Id.*

22 *See* Certificate of Deposit; Transaction ID 66487905 (efiled April 6, 2021).

23 Compl. ¶16.

24 *Lawson v. State ex rel. Sec'y of the Dep't of Transp.*, 72 A.3d 84, 90 n. 31 (Del. 2013).

25 *Id.*; *see also* DEL. CODE ANN. tit. 10, § 6107 (2014) ("After the disposition of all such objections and defenses [to the taking] the cause shall proceed to the trial of the issue of just compensation.").

26 Del. Super. Ct. Civ. R. 71.1.

27 *Id.*

28 *Id.*

29 *Id.*

30 DEL. CODE ANN. tit. 10, § 6110(a) (2014) (requirements for entry into possession).

31 *See id.* at § 6107 (objections or defenses to the taking of property shall be made by answer).

32 *See, e.g., City of Dover v. Cartanza*, 541 A.2d 580, 583 (Del. Super. 1988).

33 *Cartanza*, 541 A.2d at 583.

34 DEL. CODE. ANN. tit. 29, §§ 9501 – 9506.

35 *See State ex rel. Sec'y of the Dep't of Transp. v. Teague,* 2009 WL 929935, at *3 (Del. Super. Apr. 3, 2009); *Cartanza,* 541 A.2d at 583 (RPAA's guidelines are directory, not mandatory, and therefore failure to comply with them is a defense or an objection to the taking). *See also Lawson.,* 72 A.3d at 88–89 n. 14

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(recognizing Supreme Court's implicit adoption, in *Key Properties Grp., LLC v. City of Milford,* 995 A.2d 147, 153–54 (Del. 2010), of *Cartanza*'s holding).

36 *State ex rel. Sec'y of the Dep't of Admin. Servs. v. Dorzback,* 1991 WL 89887, at *2 (Del. Super. May 28, 1991).

37 *Cartanza,* 541 A.2d at 583.

38 *Id.*

39 *Lawson,* 72 A.3d at 89 (citing *Teague,* 2009 WL 929935, at *3).

40 *Cartanza,* 541 A.2d at 583.

41 *Id.*

42 *Acierno*, 643 A.2d at 1334.

43 *Id.*

44 *See* *Teague,* 2009 WL 929935, at *1; *Lawson,* 72 A.3d at 92.

45 *Teague,* 2009 WL 929935, at *1.

46 *Id.* at *2.

47 *Id.* at *7.

48 *Id.*

49 *Lawson,* 72 A.3d at 90 (quoting *Teague*, 2009 WL 929935, at *7).

50 *Id.* at 92.

51 *Id.*

52 *Id.* at 92-93.

53 *Id.* at 92.

54 *State ex rel., Sec'y of Dept Admin serv v. Dorzback,* 1991 WL 89887 (Del. Super., 1991).

55 *State v. Amin*, 2007 WL 1784187 (Del. Super., 2006).

56 Melpar contends that the appraisal is fundamentally flawed because the appraiser described the use of the property as apartments. DelDOT indicates that the reference was a scrivener's error. Any fair reading of DelDOT's appraisal can only lend to a conclusion that the appraiser was aware that the use of the property was a convenience store. The appraisal even indicates that the current use of the property is “gas station/ convenience store”. The Court accepts DelDOT's position that the “apartment” reference was a scrivener's error.

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57 *State v. Middletown Development, Inc.*, 2015 WL 1086885 (Del. Super. 2015); *State v. Key Properties Group*, 2016 WL 359104 (Del. Super., 2016).

58 29 Del. C. § 9505(15).

59 Melpar's Mot. ¶23.

60 Resp. ¶23.

61 DelDOT also argues that it complied with § 9505(15) because the plan was presented at a public hearing in October 2016. Section 9505(15) requires that the public hearing be one "held specifically to address the acquisition." Based on the record presented, the Court cannot determine that the October 2016 hearing was held specifically to address the instant acquisition.

62 The State maintains that the Answer is not supported by Affidavits as required by Rule 71. This argument is plainly without merit as the Affidavits of Stephen Parsons and Laurence Moynihan have been filed and those Affidavits support the new allegation in paragraph 27 of the Amended Answer.

63 *Chrysler Corp. v. New Castle County*, 464 A.2d 75 (Del. Super., 1983); *Dunfee v. Blue Rock Van & Storage, Inc.* 266 A.2d 187 (Del. Super., 1970); *Paul v. Chromalytics Corp.*, 343 A.2d 622 (Del. Super., 1975); *Gott v. Newark Motors, Inc.*, 267 A.2d 596 (Del. Super., 1970).

64 At the December 2, 2021 hearing, the State concluded that it would suffer no prejudice.

65 *City of Dover v. Cartanza*, 541 A 2d 580, 583 (Del Super. 1988).

66 The State has indicated that once the date of the taking is established it will have its appraisal updated. The Court will require that this be done.

67 *Speedway LLC v. State*, 2016 WL 6477029 (Del. Super., 2016).

68 At this point, it is not clear to the Court how the valuation phase will work in terms of any apportionment that is appropriate between the defendants. The State, in its response to DASH In's Motion, has suggested a course of action. This issue requires further development by the parties before the Court can rule on this issue.

69 *State v. Amin*, 2017 WL 1784187, at 1 fn3 (Del Super., 2007).

70 Defendants also wanted to depose the State's **expert** undoubtedly to test his view on the proper appraisal method to be used

71 Melpar originally wanted the deposition completed during the Taking phase of the case. Given the Court's decision on the Motion for an Evidentiary hearing this issue is moot as to the taking phase. However the issue remains as to the deposition for the compensation phase.

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UNPUBLISHED OPINION. CHECK
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Superior Court of Delaware.

Re STATE of Delaware Department of Transportation
v.
FIGG BRIDGE ENGINEERS, INC. and AMEC
Environmental & Infrastructure, Inc., f/k/
a MACTEC Engineering and Consulting, Inc.

C.A. No. S11C–01–031 (RFS)
|
Date Submitted: August 2, 2013
|
Date Decided: September 19, 2013

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Opinion

RICHARD F. STOKES, JUDGE

***1** Dear Counsel:
After consideration of the arguments and materials pertaining to Defendant AMEC Environmental and Infrastructure, Inc.'s ("AMEC") Motion to Compel Discovery, the Motion is **GRANTED.**

Facts

In this case, several opinions have been published, [1] and the information about this litigation will not be repeated. The present question concerns whether AMEC may depose Mark McNeilly, P.E., D.GE. ("McNeilly") of Golder Associates, Inc. ("Golder") in Newark, New Jersey, where McNeilly is principally employed.

Under the Pretrial Scheduling Order, dated June 15, 2012, [2] Plaintiff State of Delaware Department of Transportation ("DelDOT") identified four trial experts, including two Golder individuals, William F. Brumund, Ph.D., P.E., D.GE. ("Brumund") and Graham Elliott, Ph.D., C.Eng. ("Elliot"). Brumund and Elliott base their expert trial testimony on two Golder reports, prepared in 2011 and 2013. Brumund, Elliott, McNeilly, and Kerem H. Esin, P.E. ("Esin") signed these reports. The signature portions of these documents designated Elliott and Esin as senior consultants, McNeilly and Brumund as principals. McNeilly also affixed his seal as a Delaware registered professional engineer.

Brumund and Elliot have been deposed. In July 2013, AMEC notified DelDOT that it sought to depose McNeilly. DelDOT opposed this, claiming McNeilly to be immune from discovery because, as opposed to Brumund and Elliot, McNeilly served only as DelDOT's "consultant" (*i.e.,* non-testifying expert).

AMEC points out that the 2013 Report identifies Brumund, Elliott, Esin, and McNeilly as "the four key Golder Associates' individuals." [3] Also, AMEC has received "thousands" of McNeilly's documents. [4] Additionally, the reports were the work of a "team" that included McNeilly. [5] AMEC argues that even as a non-testifying expert, McNeilly's role in the formation of the testifying experts' opinions, plus the fact that DelDOT and Golder did not screen McNeilly from the testifying experts, renders McNeilly vulnerable to AMEC's discovery request. Regardless of the label DelDOT attached to McNeilly, AMEC contends that exceptional circumstances under Delaware Superior Court Civil Rule 26(b)(4)(B) exist.

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***2** DelDOT notes that "McNeilly is an out-of-state, non-testifying consultant, who is neither an employee nor an agent of DelDOT." [6] DelDOT first argues that AMEC's Motion is procedurally flawed because in order to depose McNeilly, AMEC should have subpoenaed him. [7] Next, DelDOT argues that no exceptional circumstances under Rule 26(b)(4)(B) exist because all information that McNeilly could provide AMEC can be acquired from Brumund and Elliott. DelDOT asserts that AMEC's reliance on case law recognizing the discoverability of a non-testifying expert is misplaced because those cases did not discuss the issue presented in this Motion: the taking of a non-testifying expert's deposition, rather than production of documents. Also, DelDOT argues that if AMEC's Motion is granted, the scope of McNeilly's deposition should be limited to his role in preparing the 2011 and 2013 Reports. Furthermore, DelDOT contends that the costs of this discovery should be AMEC's responsibility. AMEC conceded this latter point at oral argument.

Discussion

As Rule 26(b)(4)(B) states, discovery generally is not permitted from non-testifying experts:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) *or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.* [8]

Defining "exceptional circumstances" is a case-specific and sometimes challenging pursuit. [9] This Court has stated before that "[p]arties ought to be able to consult with experts and obtain their views. They should be shielded, within reason, from having to expose these consultation experts to the full panoply of pretrial discovery." [10]

On the other hand, a party cannot claim that a consultant is immune from discovery where the work of a consultative non-testifying expert and a testifying expert co-mingle. The closer a testifying expert relies upon a non-testifying expert, the more the non-testifying expert becomes subject to discovery. [11]

***3** The issue of the discoverability of non-testifying experts has been grappled with by courts in and out of Delaware. From the case law, two separate scenarios have emerged: the "two-hat" scenario and the "hand-in-glove" scenario. [12] The former, which is not implicated in this Motion, involves one person functioning as both a consultative non-testifying expert and a testifying expert. [13]

Under the latter, "a non-testifying expert's report is used by a testifying expert as the basis for an expert opinion, or ... there is evidence of substantial collaborative work between a testifying expert and a non-testifying expert." [14] Evidence of this scenario can be when the work performed by or fees paid to the non-testifying expert exceed that of the testifying expert. [15] When this occurs, "[a] deposition limited in scope to the extent of participation of [the non-testifying expert's] in the preparation and drafting of the expert reports and the extent of any meetings and contacts between the" non-testifying expert will be permitted, so long as "the depositions [do] not extend into the underlying substantive analysis completed by" the non-testifying expert. [16]

***4** Within the "hand-in glove" scenario, another dichotomy emerges: discovery of a non-testifying expert's documents versus attaining a non-testifying expert's deposition. This Court discussed the former in the *Sea Colony* case, to which both AMEC and DelDOT cite:

> Where a non-testifying consultant assists a testifying expert, such *reports* are discoverable as an aid for cross-examination of the testifying expert. [W]here a party employs testifying experts and consultants from the same firm, discovery will not be compelled unless the testifying expert has seen,

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> commissioned, or relied upon the desired materials in preparing opinions and conclusions. [17]

The latter scenario, which is relevant to this case, has not been clearly settled by Delaware courts. Federal jurisprudence, however, provides helpful instruction. In *Herman v. Marine Midland Bank,* the federal district court denied the plaintiff's motion for a protective order in response to the defendant's notice to take the deposition of the co-author of the plaintiff's expert's report, stating that "the evidence clearly demonstrates that the expert report submitted by [the plaintiff's expert] was the result of *substantial collaborative work* by he and [his co-author]." [18] Considering the amount of the co-author's work performed and fees rendered (each more than 50% higher than the expert's), the court found the work between the co-author and the expert "indivisible." [19] Although the court did not actually rule that the collaboration between the two constituted an exceptional circumstance, this Court finds that extensive collaboration can be an exceptional circumstance for purposes of Rule 26(b)(4)(B). [20]

***5** There is one last piece to this puzzle: limiting the scope of the non-testifying expert's deposition. In *Apple Inc. v. Amazon.com, Inc.,* another federal case, the magistrate judge granted Amazon's request for a deposition of Apple's expert's assistants, but tailored the scope of that deposition only to the assistants' involvement in the creation of the expert's report. Amazon could question the assistants as to *whether* they performed consulting work for Apple independent of the expert, but could not question the assistants as to *what* they discovered in their independent work because Amazon had shown neither that the expert relied on the assistants' independent work nor that the expert substantially collaborated with the assistants regarding that work. [21]

With the aforementioned principles discussed, this Court finds that exceptional circumstances under Rule 26(b)(4)(B) have been shown, warranting AMEC's taking McNeilly's deposition. By signing the Reports, it appears that McNeilly is one of the authors whose work contributed to the ultimate trial opinions. At argument, DelDOT indicated that McNeilly was cast only as a consultant, rather than a testifying expert, because Brumund and Elliott have superior communication skills. This is a legitimate position. [22]

On the other hand, McNeilly substantially collaborated with his colleagues in the formulation of several findings and opinions, as Brumund described in his May 2013 deposition:

> Different folks did different pieces. [S]ince a lot of the original documents were in our Newark office, I [Brumund] would go to Newark and meet with Mark McNeilly and some of the other people in that office, David Lee, Paskal Masal, they were doing settlement calculations and time rate calculations, and a lot of the early work on the mechanisms at play would have been done by me and by folks in our Newark office. The first portion of the work was done largely by McNeilly and myself, and putting the report together, I brought in two other really good young engineers that I work with quite a lot, and that's Kerem Esin and Graham Elliott. And – so the four of us – I would meet with them; okay, your task is do this ... let's get it together, give me a draft, let's see how it looks, let me see what you're doing, make sure the calculations are checked. And so I was the orchestra leader, and I had different people doing different parcels of work. [23]

While McNeilly was involved in drafting Chapter 8 of the 2011 Report, "conclusions and opinions largely [were Brumund's]." [24] Brumund was the "team leader;" and while he "had different guys preparing drafts," he had overall responsibility. [25]

But the email record McNeilly sent dated April 29, 2013 shows McNeilly making technical forecasts. On October 24, 2012, in a series of emails sent to Brumund and Elliott, McNeilly attempted to develop a timeline concerning the decision to use mechanically stabilized earth ("MSE") walls. McNeilly also sent the link of Figg's Expression of Interest, DelDOT's original Request for a Quote ("RFQ") and Figg's

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updated Scope of Services ("SOS"), dated May 1, 2003 and October 20, 2003.

Further, McNeilly states that the SOS dated May 1, 2003 was incorporated into Figg's original agreement with DelDOT dated June 17, 2003. After he reviewed the two SOS documents which Figg prepared and issued to DelDOT, McNeilly concluded that the configuration of roadway embankments with MSE walls was not a precondition in Figg's original agreement with DelDOT. According to McNeilly, Figg was responsible for the design of the approach embankments. Also, McNeilly concluded that the decision to design/construct the MSE approach embankments was made between May 1, 2003 and October 20, 2003, about four months after Figg's original agreement. McNeilly notes that Figg started working at risk on the project as early as February 2003 and AMEC's subsurface phase and investigation was conducted between February and July 2003. Three emails on April 18th, 19th, and 29th of 2013 show McNeilly participating in eleven revisions to Golder's 2013 Report. The record shows that McNeilly recommended the removal or revision of a table concerning first cost construction estimates and assumptions as to drain elevations.

***6** Considering the forgoing, notwithstanding DelDOT's designation of McNeilly as merely a consultant, McNeilly had a substantial role in the procurement of the experts' reports, upon which DelDOT's designated trial experts relied. As in *Herman,* "extensive collaborative work" existed between McNeilly and the trial experts, which this Court considers to be an exceptional circumstance under Rule 26(b)(4)(B). [26] Therefore, discovery relating to McNeilly will be permitted.

Additionally, this discovery will be broader than the mere production of documents. AMEC will be permitted to take McNeilly's deposition. As in *Apple,* however, this deposition will be limited, although it need not be as limited as the deposition in *Apple* because the trial experts in this case, unlike in that case, did rely on McNeilly. Thus, McNeilly's deposition will be limited to his interactions with the testifying experts, identifying what he said to them and what information and documents were provided. He may not be questioned about any matter upon which the testifying experts did not rely in forming their expert opinions.

For the reasons set forth above, AMEC's Motion is **GRANTED.** This ruling serves Rule 26(b)(4)(B)'s protective purposes relating to work product while allowing for the exploration of the bases of testifying experts' opinions. Costs shall be borne by AMEC.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

All Citations

Not Reported in Atl. Rptr., 2013 WL 5293549

Footnotes

1 *See generally AMEC E & I, Inc. v. State Dep't of Transp.,* 44 A.3d 921 (Table) (Del.2012) (denying interlocutory appeal regarding AMEC's Motion to Dismiss); *State Dep't of Transp. v. Figg Bridge Eng'rs, Inc.,* 2013 WL 4522955 (Del.Super.Aug. 13, 2013) (granting AMEC's Motion to Compel); *State Dep't of Transp. v. AMEC Envtl. & Infrastructure, Inc.,* 2013 WL 4521073 (Del.Super.Aug. 13, 2013) (granting in part AMEC's Motion to Compel); *Del. Dep't of Transp. v. MACTEC Eng'g & Consulting, Inc.,* 2011 WL 6400285 (Del.Super.Dec. 14, 2011) (granting MACTEC's Motion to Amend Caption); *State Dep't of Transp. v. Figg Bridge Eng'rs, Inc.,* 2011 WL 6208701 (Del.Super.Dec. 7, 2011) (denying MACTEC's Motion for Consideration and Reargument); *State Dep't of Transp. v. Figg Bridge Eng'rs, Inc.,* 2011 WL 5593163 (Del.Super.Nov. 9, 2011) (granting in part, denying in part MACTEC's Motion to Dismiss).

2 Amended November 14, 2012.

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3 2013 Report at 2.

4 Mot. to Compel at 2.

5 *Id.* (citing Brumund dep. at 71–76; email correspondence from McNeilly).

6 Opp'n to Mot. to Compel at 2.

7 If a subpoena was served through the commission process for an out-of-state deposition under Civil Rules 28 and 45, an objection could be made that it should be quashed. The argument would be that the Court should have first passed on the question whether McNeilly is subject to examination for the reasons asserted by AMEC. The issue will be addressed on the merits now in the interest of judicial economy.

8 Super. Ct. Civ. R. 26(b)(4)(B) (emphasis added). Rule 35(b) pertains to disclosure of written reports for mental or physical examinations that are not in play here.

9 *Winchester v. Hertrich,* 658 A.2d 1016, 1020 (Del.Super.1995) ("Discovery of a consultation expert is permitted only under 'exceptional circumstances'. The plaintiff has not shown or argued that exceptional circumstances exist. There is no indication he lacks an expert, that the defendants have cornered readily available experts, or any other recognized exceptional circumstances. As that issue is not before this Court at this time, what constitutes an exceptional circumstance is to be decided another day."); *but see* *Apple Inc. v. Amazon. com,* 2013 WL 1320760, at *3 n.2 (N.D.Cal. Apr. 1, 2013) ("Exceptional circumstances exist where the condition observed by the expert is no longer observable, where the costs of an independent examination would be judicially prohibitive, or where there are no other available experts in the same field or subject area.").

10 *Winchester v. Hertrich, supra.* The limitation on discovery also limits one party from riding the coattails of the other party's pre-trial work. *Id.*

11 *Id.* ("Rule 26(b)(4)(B) ... draws the distinction based not on degree of involvement between counsel and expert but between testifying and consultation experts.").

12 *See, e.g., Council of Unit Owners of Sea Colony East, Phase III Condo. v. Carl M. Freeman Assocs., Inc.,* 1989 WL 25839, at *2 (Del.Super.1989) ("The effect of ... Rule [26(b)(4)(B)] is less clear when an expert wears two hats, i.e. when the testifying expert also acts as non-testifying consultant to counsel on other subjects *or* where a non-testifying expert acts as a consultant to a testifying expert witness." (emphasis added) (citation omitted)).

13 *See Tampa Bay Water v. HDR Eng'g, Inc.,* 2010 WL 3394729, at *2 (M.D.Fla. Aug. 26, 2010) ("A majority of courts take the view that once a litigation consultant also becomes a testifying expert, all materials considered by the expert in the formation of his testimony are discoverable regardless of whether these same materials were also considered by the expert in his role as litigation consultant.") (citing, *inter alia,* *Yuba River Citizens League v. Nat'l Marine Fisheries Serv.,* 257 F.R.D. 607, 614 (E.D.Cal.2009)).

In *LC v. AC,* the Family Court laid out a useful framework of how to proceed if confronted with the following circumstances:

> [T]he question of whether Rule 26 ... is applicable to this case turns on whether the appraiser retained by Husband was hired as a consultation expert or as an expert witness for trial. If the Court finds that Husband's appraiser was retained as a consultative expert, Rule 26 ... applies to this case. Under the Rule, Wife must make a showing of exceptional circumstances in order to compel the appraiser's testimony. If,

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> however, the Court finds that Husband's appraiser was retained as an expert witness for trial the Rule does not apply. Instead, the Court may exercise its discretion and make the determination as to whether the expert can be compelled to testify based on the "interests of fairness."

LC v. AC, 2004 WL 3245793, at *5 (Dec. 14, 2004) (footnotes omitted) (quoting and citing this Court's decision in *Winchester*, 658 A.2d at 1021). Here, McNeilly was not designated as a trial expert and the "interests of fairness" criteria would not be applicable, that is, expert trial testimony could not be compelled.

14 *See* *Long Term Capital Holdings v. United States,* 2003 WL 21269586, at *2–3 (D.Conn. May 6, 2003) (citing, *inter alia, Derrickson v. Circuit City Stores, Inc.,* 1999 U.S. Dist. LEXIS 2100, at * 18 (D.Md. Mar. 19, 1999)). The term "hand-in glove" comes from the *Derrickson* case. *Derrickson,* U.S. Dist. LEXIS 2100, at *18.

This scenario differs from when a non-testifying party "ghost writes," or composes a report which the expert claims to be his own in its entirety. *See* *id.* at *4 (quoting and citing *Trigon Ins. Co. v. U.S.,* 204 F.R.D. 277, 291 (E.D.Va.2001)).

15 *See id.* at *3 (citing *Herman v. Marine Midland Bank,* 207 F.R.D. 26, 30–32 (W.D.N.Y Apr. 25, 2002)).

16 *See id.* at *4 (citing *Bank Brussels Lambert v. Chase Manhattan Bank,* 175 F.R.D. 34, 45 (S.D.N.Y.1997)).

17 *Sea Colony,* 1989 WL 25839, at *2–3 (citations omitted). *Sea Colony* has aspects of a "wearing-of-two-hats" case and a "hand-in glove" case. In *Sea Colony,* the Court granted the plaintiff's motion in part, ruling that the plaintiff could attain a witness's notes and certain reports because the question of whether that witness was a testifying versus non-testifying expert witness was "blurred." *Id.* at *4. Additionally, the Court ordered that communications and reports submitted between a consultant and a testifying witness (who was also considered only a "consultant" on some issues) be turned over to the plaintiff because the consultant "did provide [the testifying witness] with information which served as the basis for observations and conclusions about which [the testifying witness] will be testifying." *Id.* at *5. Interestingly, plaintiff asked for a particular set of notes from the testifying witness, which apparently did not exist. *Id.* The defendants, however, "agreed to make [the testifying witness] available during the continuation of his *deposition* to respond to questions concerning his comments on the ... report" and summarize such comments via affidavit. *Id.* (emphasis added). Thus, the *Sea Colony* case did not analyze the difference between the movant's attempt to reach the witness's report, rather than attain his deposition.

18 *Herman v. Marine Midland Bank,* 207 F.R.D. at 31 (emphasis added).

19 *Id.*

20 Another avenue has been recognized that is consistent with the Court's ultimate ruling. In *In re Chaparral,* a case from the Delaware Court of Chancery, to which both parties cite, the plaintiffs retained a firm that provided both expert witness and consulting services; and the strict lines that should have been drawn between the two functions became fuzzy. Rather than finding exceptional circumstances under Rule 26(b)(4)(B), which the defendants did not argue, the Vice Chancellor ruled that the consultants had, in effect, transformed themselves into testifying experts. *In re Chapparal, Inc. S'holders Litig.,* 2007 WL 2998967, at *1–3 (Del. Ch. Oct. 11, 2007) ("[I]t is reasonable to conclude that the opinion [the trial expert] eventually formed was based, at least indirectly, on the work product of the consultants. In light of this conclusion, it is appropriate for this court to consider the consulting team as testifying experts for purposes of discovery, making the production of the documents sought by the defendants appropriate." (footnote omitted)).

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21 *Apple Inc. v. Amazon.com, Inc.,* 2013 WL 1320760, at *2–4 (N.D.Cal. Apr. 1, 2013).

22 *See* *Winchester v. Hertrich,* 658 A.2d at 1019–20 (explaining how the hiring party has the prerogative as to whether the person retained will be labeled a "consultant" or a "testifying expert").

23 Brumund Dep. 71:15–16, 19–72:16, May 21, 2013.

24 *Id.* at 76: 14–15.

25 *Id.* at 76: 20–21.

26 *See* *Herman,* 207 F.R.D. at 31.

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

TWITTER, INC.
v.
Elon R. MUSK et al.

C.A. No. 2022-0613-KSJM
|
August 25, 2022

Attorneys and Law Firms

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Opinion

Kathaleen St. Jude McCormick, Chancellor

***1** Dear Counsel:
This letter resolves issues raised in the August 15, 2022 letter to the court from Twitter, Inc. ("Plaintiff"), which this decision refers to as Plaintiff's "Second **Discovery** Motion." The motion seeks relief in connection with **discovery** directed to Defendants Elon R. Musk, X Holdings I, Inc., and X Holdings II, Inc. ("Defendants") concerning Defendants' data science analysts (the "Data Scientists"). [1]

Through this action, Plaintiff seeks to specifically enforce an Agreement and Plan of Merger (the "Merger Agreement") dated April 25, 2022, under which Defendants agreed to acquire Plaintiff. [2] Section 6.4 of the Merger Agreement grants Defendants the right to information from Plaintiff (subject to certain conditions, restrictions, and exceptions) "for any reasonable business purpose related to the consummation of the transactions contemplated by this [Merger] Agreement." [3] In May 2022, Defendants demanded information pursuant to Section 6.4 concerning Plaintiff's methods of calculating monetizable daily active usage or users ("mDAU"). [4] In response, Plaintiff provided its "firehose" data—i.e., a live feed of data concerning public accounts on Plaintiff's platform. Defendants then provided Plaintiff's firehose data to the Data Scientists, who conducted a "preliminary analysis" of that data. [5] Based expressly in part on that preliminary analysis, Defendants terminated the Merger Agreement on July 8, 2022. Plaintiff filed suit, and Defendants responded with counterclaims that reference analyses performed by the Data Scientists (with the preliminary analysis, the "Analyses") at least eight times. [6]

***2** Defendants have advanced a variety of positions to shield from **discovery** the Data Scientists' information, including the Analyses. Although they abandoned most of those positions, they maintain that the Data Scientists' information is insulated from **discovery** by the non-testifying expert protection and the work product doctrine. Through its Second **Discovery** Motion, Plaintiff seeks a declaration that no blanket protection or privilege applies to this information.

Non-Testifying Expert Protection

Court of Chancery Rule **26**(**b**)(4)(B) restricts **discovery** from persons retained as non-testifying experts in anticipation of litigation. [7] Rule **26**(**b**)(4)(B) tracks the language of its federal counterpart, and this court has looked to federal authorities when applying it. [8] The restriction stems from the concern that "[a]llowing routine **discovery** as to [non-testifying experts] would ... deter thorough preparation of the case and reward those whose adversaries were most enterprising." [9] The restriction prevents the "additional drawback" that, after learning of experts that a party retained but elected not to have testify, "the opponent might later seek to call them as witnesses to attest to views that the opponent found congenial." [10] The theory is that "[i]f the price for seeking expert consultation is possibly to live or die by the unknown opinion of the expert first consulted, there will be even more reluctance to consult." [11]

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Rule 26(b)(4)(B) does not provide unqualified immunity. A party may obtain discovery from a non-testifying expert "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." [12] Rule 26(b)(3), which protects work product, contains a similar exception and permits discovery of work product "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." [13] The exception for non-testifying experts in Rule 26(b)(4)(B) has been described as "more exacting" than the exception for work product in Rule 26(b)(3). [14]

***3** Rule 26(b)(4)(B) does not "shield testimony by a natural fact witness" from discovery. [15] As the advisory note to the rule's federal counterpart explains, the rule does not protect "the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness." [16] When a party invokes Rule 26(b)(4)(B) to shield discovery of a fact witness, this court is rightly skeptical. [17]

In this case, Defendants insist that the Data Scientists were retained by counsel in anticipation of litigation and to assist counsel in rendering legal services as non-testifying experts. The language of the Data Scientists' engagement letters provides support for this assertion, as does the timing of their retention. [18]

Yet, the Data Scientists were also "actor[s] or viewer[s] with respect to transactions or occurrences that are part of the subject matter of [this] lawsuit." [19] Defendants expressly relied on the Data Scientists' preliminary analysis to justify making additional information requests and later terminating the Merger Agreement. [20] Defendants also rely on the Analyses throughout their counterclaims. [21] In these circumstances, it is clear that the Data Scientists did not act solely as non-testifying experts. Rather, at least with respect to the Analyses, they are fact witnesses.

The Data Scientists' dual-natured role forces the following question: To what degree do the protections of Rule 26(b)(4)(B) extend to persons who played a dual role as fact witnesses and non-testifying experts?

Plaintiff answers this question by citing *Hexion*, where this court declined to recognize a party's designation of a fact witness with knowledge about issues at the heart of a case as a non-testifying expert. [22] There, the plaintiff-buyer terminated a merger agreement with the defendant-seller, claiming that the seller had suffered a material adverse effect and that the merger could not close because the buyer's financing sources could not be provided with a "satisfactory solvency opinion[.]" [23] The seller purported to retain its financial advisor for the merger, Merrill Lynch, as a litigation consultant and attempted to shield all of Merrill Lynch's financial advice in connection with the merger from discovery under Rule 26(b)(4)(B).

The *Hexion* court rejected the seller's argument, holding that "Rule 26(b)(4)(B) does not apply to Merrill Lynch in its role as [the seller's] financial advisor because in that role Merrill Lynch has acquired and continues to acquire information as an 'actor' in or 'viewer' of the [merger] transaction, which lies at the heart of this lawsuit." [24] Furthermore, because Merrill Lynch did not clearly distinguish between work it performed as a financial advisor and as an ostensible litigation consultant, the court declined to recognize Merrill Lynch as a non-testifying expert for any purpose whatsoever.

***4** The logic of *Hexion* favors Plaintiff. Rule 26(b)(4)(B) does not protect the Analyses that lie at the heart of this lawsuit. Because Rule 26(b)(4)(B) does not protect the Analyses, it does not protect documents or communications relating to those Analyses. And if Defendants failed to distinguish between the Data Scientists' work performed for those ends and any work performed in an expert capacity, Rule 26(b)(4)(B) does not protect any of it.

Plaintiff argues for the same result under the "exceptional circumstances" standard. As to the Analyses, Plaintiff has demonstrated "exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." [25] Defendants relied on the Analyses as a basis for termination and in support of their counterclaims. To probe the veracity of Defendants' assertions, Plaintiff requires the Analyses. Plaintiff cannot obtain those facts through any other means.

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Invoking case law interpreting the work product doctrine, Defendants argue that "dual-purpose" documents generated by an alleged expert should be protected, even though the materials also had a nonlitigation purpose, if the documents were prepared for litigation.[26] Defendants urge the court to apply the "because of" test rather than following *Hexion*. Under the "because of" test, the court asks in light of "the totality of the circumstances" why the document was prepared.[27] "If a document was generated 'because of litigation,' then it is likely privileged," but "[i]f the document was created for some other reason, such as a business purpose, then it is likely not protected."[28]

Defendants cite to cases declining to compel the production of documents under the "because of" dual-purpose test.[29] Each of the dual-purpose cases on which Defendants rely analyzes the dual-purpose issue with some reference to the substantial-need standard of Rule **26**(**b**)(3).[30] As discussed above, the substantial-need standard is less exacting and easier to meet than the exceptional-circumstances standard. It follows that if a court denied protection under the lower standard, then the court also should deny protection under the higher standard.

***5** Defendants' reliance on *Rohm & Haas* illustrates why their reliance on the because-of case law is misplaced. The **discovery** dispute there concerned a dynamic financial model that the defendant used for corporation decision-making. The plaintiff argued that the model was critical to its ability to understand the defendant's representations to banks, rating agencies, and its board. The defendant produced multiple versions of the model but claimed that a recently updated version was protected work product because it was created at the request of the defendant's head of litigation for "litigation support and settlement analysis."[31] The court agreed with the defendant, observing that it was "hard pressed to think of any information that warrants greater protection under attorney work product doctrine than potential settlement strategies prepared at the direction of counsel."[32] Applying the because-of test, the court observed that "the litigation purpose of the [model] sufficiently permeates the business purpose of the model to warrant work product protection."[33] The court then factored that holding into the governing substantial-need standard and concluded that the plaintiff failed to meet its burden.

Defendants parrot the "permeates the business purpose" quote of *Rohm & Haas* in support of their position, claiming here that the litigation purpose of the Data Scientists' Analyses sufficiently permeates their business purpose as to render them immune from **discovery**. The court accepts Defendants' representation to this effect. Even so, that is not sufficient to shield the Analyses from **discovery**. Unlike in *Rohm*, Plaintiff would win under a work product analysis because it can demonstrate substantial need for the Analyses. The plaintiff in *Rohm & Haas* could not demonstrate substantial need because the plaintiff already had access to multiple versions of the model at issue, and the model did not form the basis for any allegations at the heart of the case. Here, Plaintiff does not have access to any versions of the Analyses, which are central to various aspects of this case.

Plaintiff's ability to demonstrate substantial need for the Analyses renders Defendants' because-of cases inapposite on the application of Rule **26**(**b**)(4)(B). Plaintiff has shown the exceptional circumstances necessary to warrant production of Analyses, even if they would otherwise be protected under Rule **26**(**b**)(4)(B).

Work Product Protection

In addition to using work product cases to bolster their invocation of the protection for non-testifying experts, Defendants invoke the work product doctrine independently. To that end, they contend that any otherwise-discoverable material in the Data Scientists' possession was generated at least in part "in anticipation of litigation" and is thus shielded by Rule **26**(**b**)(3).

Rule **26**(**b**)(3) generally protects "documents, electronically stored information, and tangible things" that have been "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."[34]

Rule **26**(**b**)(3) does not provide an unqualified protection. As discussed above, the rule permits **discovery** of work product "upon a showing that the party seeking **discovery** has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[35] This decision has already explained that Plaintiff meets the substantial-need test as to the Analyses.

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Equally important, Rule 26(b)(3) only protects the work product of the attorney. "At its core, the work-product doctrine shelters the mental processes of the attorney."[36] The doctrine does not shelter the mental processes of the expert, which are subject to a separate legal analysis and framework discussed above.[37] A non-testifying expert's information "is not itself work product."[38] Thus, to the extent Defendants object to production of *all* the Data Scientists' documents on the grounds that they categorically constitute protected work product, that objection is overruled.

***6** That said, "as a collaborator in the development of pretrial strategy, a non-testifying expert may become a unique repository of insights into counsel's opinion work product[.]"[39] And while Plaintiff has demonstrated exceptional circumstances and thus a substantial need for the Analyses, it is possible that communications with counsel concerning the Analyses reflect work product. It is difficult to assess that possibility at this stage because the documents at issue have not been logged. In any event, to the extent that Plaintiff seeks a declaration that Defendants may not assert work product protection over *any* of the Data Scientists' documents, that request is denied.

Conclusion

Summing it up, to the extent that Defendants have lodged a blanket objection to producing *all* of the Data Scientists' documents as non-testimony expert materials or work product, that objection is overruled. At a minimum, Defendants must produce the Analyses.

That leaves documents and communications and **drafts** concerning the Analyses. Rule 26(b)(4)(B) does not apply to those materials. To the extent Defendants claim that any document contains work product, Defendants must identify that document on a privilege log. At that point, Plaintiff can seek production of specific documents.[40] Plaintiff's Second **Discovery** Motion is therefore granted in part.

This decision also has not reached the thorny question of whether Defendants may assert privilege over the Data Scientists' documents and communications that post-date the Analyses. To be clear, this decision neither endorses nor rejects any arguments concerning that **discovery**. Given the dual role of the Data Scientists, however, Defendants should log any such communications withheld on privilege grounds.

IT IS SO ORDERED.

Sincerely,

/s/ Kathaleen St. Jude McCormick
Kathaleen St. Jude McCormick

Chancellor

All Citations

Not Reported in Atl. Rptr., 2022 WL 3656938

Footnotes

1 C.A. No. 2022-0613-KSJM, Docket ("Dkt.") 160 ("Pl.'s Second Disc. Mot."); *see also* Dkt. 168 ("Defs.' Response to Pl.'s Second Disc. Mot."); Dkt. 196 (Pl.'s Reply to Pl.'s Second Disc. Mot.).

2 *See generally* Dkt. 1 ("Compl.").

3 Compl. Ex. 1 (Merger Agreement) § 6.4.

4 Pl.'s Second Disc. Mot. at 4.

5 *Id.* Ex. A at 6.

6 Dkt. 42, Countercls. ¶¶ 13 ("[P]reliminary expert estimates of the false or spam accounts in Twitter's mDAU population, based on the data Twitter has provided and using a publicly available machine learning algorithm,

yield findings that are shocking," including that "one-third of visible accounts may have been false or spam accounts[.]"), 17 ("The Musk Parties' preliminary analysis shed light as to why Twitter has stonewalled—Twitter did not want the Musk Parties (or the market) to discover that Twitter has been misleading investors regarding its 'key metric.' "), 116 ("[C]ontrary to Twitter's representations that its business was minimally affected by false or spam accounts, the Musk Parties' preliminary estimates show otherwise."), 117 ("An analysis of Firehose data from the first week of July, including processing visible accounts using a publicly-available machine-learning spam detection model, shows that, during that timeframe, false or spam accounts accounted for 33% of visible accounts."), 118 ("[E]ven assuming that *every single one* of the invisible accounts is a legitimate user, and not a false or spam account (an assumption as conservative as mathematically possible), these preliminary findings indicate a floor for the prevalence of false or spam accounts among Twitter's mDAU of 10%, rendering Twitter's statements that less than 5% of mDAU is comprised of false or spam accounts materially misleading.") (emphasis in original), 119 ("[C]ontrary to the implication in the 2021 10-K that fewer than 10.85 million mDAU were false or spam accounts, preliminary findings suggest that more than 20 million mDAU were false or spam accounts."), 120 ("Not only does preliminary analysis reveal that Twitter's false or spam accounts exceed 10% of mDAU, the Musk Parties estimate that false and spam accounts make up an even more significant portion of the mDAU that actually see ads based on Twitter's own data regarding ad engagement among its userbase."), 150 ("In reality, as discussed above, preliminary estimates based on only the 30% of mDAU visible in the Twitter Firehose already indicate that one third of visible accounts and 10% of the mDAU count may be made up of false or spam accounts.").

7 Ct. Ch. R. **26**(**b**)(4)(B).

8 *See*, *e.g.*, *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 959 A.2d 47, 50–51 (Del. Ch. 2008); *In re Speedway Motorsports, Inc.*, 2001 WL 818169, at *1 (Del. Ch. July 10, 2001); *see also State v. Figg Bridge Eng'rs., Inc.*, 2013 WL 5293549, at *4–5 (Del. Super. Sept. 19, 2013); *Pfizer v. Advanced Monbloc Corp.*, 1999 WL 743868, at *5 (Del. Super. Sept. 20, 1999); *Winchester v. Hertrich*, 658 A.2d 1016, 1020–21 (Del. Super. 1995); *Harris v. Parmi Tool Co., Inc.*, 1990 WL 9495, at *4 (Del. Super. Jan. 3, 1990).

9 8A Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. § 2032 at 94 (3d ed.) [hereinafter "Wright & Miller"].

10 *Id.* at 97.

11 *Id.* at 100.

12 Ct. Ch. R. **26**(**b**)(4)(B).

13 Ct. Ch. R. **26**(**b**)(3).

14 *People ex rel. Wheeler v. S. P. Transp. Co.*, 1993 WL 816066, at *8 (E.D. Cal. Sept. 2, 1993) ("[S]ince the exceptional circumstances condition to preclude application of subdivision (b)(4)(B) of Rule 26 is more exacting than the substantial need requirement found in subdivision (b)(3), the court will analyze the exception under this more stringent standard."); *see also MeadWestvaco Corp. v. Rexam, PLC*, 2011 WL 2938456, at *6 (E.D. Va. July 18, 2011) ("Plaintiff cannot meet the standard of 'exceptional circumstances' because it cannot even meet the lower threshold of 'substantial need.' "); *U.S. v. 22.80 Acres of Land*, 107 F.R.D. 20, 23 (N.D. Cal. 1985) (describing the exceptional-circumstances standard as "more demanding" than the substantial-need standard).

15 *Hexion*, 959 A.2d at 51.

16 Fed. R. Civ. P. **26**(**b**)(4)(B) advisory committee's note (1970) (quoted in *Hexion*, 959 A.2d at 50).

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17 *See Hexion*, 959 A.2d at 51.

18 *See* Defs.' Response to Pl.'s Second Disc. Mot. Ex. A at 1 (retaining one of the Data Scientists' companies "to serve as an outside expert and to support Skadden's provision of legal advice to Client," to "work at Skadden's direction and report directly to Skadden," and to provide "services of a character and quality which would necessarily be adjunct to Skadden's services as attorneys"); *id.* Ex. B at 1 (same); *id.* Ex. C. at 1 (same).

19 Fed. R. Civ. P. **26**(**b**)(4)(B) advisory committee's note (1970) (quoted in *Hexion*, 959 A.2d at 50).

20 Pl.'s Second Disc. Mot. Ex. M at 2.

21 Dkt. 42, Countercls. ¶¶ 13, 17, 116–20, 150.

22 *Hexion*, 959 A.2d at 52.

23 *Id.* at 49.

24 *Id.* at 50.

25 Ct. Ch. R. **26**(**b**)(4)(B).

26 *See* Defs.' Response to Pl.'s Second Disc. Mot. at 24 (referring back to Defendants' work-product argument); *see also* 8 Wright & Miller § 2024 at 512–14 (discussing the dual-purposes scenario).

27 *Pfizer*, 1999 WL 743868, at *5.

28 *JPMorgan Chase & Co. v. Am. Century Cos., Inc.*, 2013 WL 1668393, at *3 (Del. Ch. Apr. 18, 2013).

29 Defs.' Response to Pl.'s Second Disc. Mot. at 19 (citing *Rohm & Haas Co. v. Dow Chem. Co.*, 2009 WL 537195 (Del. Ch. Feb. 26, 2009); *In re Grand Jury Subpoena (Mark Torf/Torf Env't Mgmt.)*, 357 F.3d 900 (9th Cir. 2004) ("Torf"); *U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1998); *U.S. Inspection Servs., Inc. v. NL Engineered Solutions, LLC*, 268 F.R.D. 614 (N.D. Cal. 2010); and *Hollinger Int'l Inc. v. Hollinger Inc.*, 230 F.R.D. 508 (N.D. Ill. 2005)).

30 *See* *Rohm & Haas*, 2009 WL 537195, at *2 (holding that "[g]iven the information to which it already has access, Rohm and Haas has not demonstrated a substantial need for the Litigation Support Model"); *Adlman*, 134 F.3d at 1204 (rejecting the argument that "[t]he IRS contends that even if the Memorandum qualifies as work product, it has made a sufficient showing of substantial need and unavailability so as to overcome the qualified protection accorded by Rule **26**(**b**)(3)"); *U.S. Inspection Servs.*, 268 F.R.D. at 626 (holding that "Fulks–Graham has not contended and cannot demonstrate that a substantial need exists for this document"); *see also* *Torf,* 357 F.3d at 904 (declining "to consider the government's contention made in its brief filed with this court, but not presented to the district court, that it has a substantial need for the withheld documents and that it would incur undue hardship in obtaining substantially equivalent information"); *Hollinger*, 230 F.R.D. at 511 n.5 (observing that "[d]efendants have not argued that they have a substantial need for the undisclosed material").

31 *Rohm & Haas*, 2009 WL 537195, at *1.

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32 *Id.*

33 *Id.* at *2.

34 Ct. Ct. R. **26**(**b**)(3).

35 *Id.*

36 *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 261 (Del. 1995).

37 *See* 8A Wright & Miller § 2029 at 17–18 (explaining that "[t]he knowledge of an expert is not privileged" and "is not part of the work product"); *see also* Fed. R. Civ. P. **26**(**b**)(4)(B) advisory committee's note (1970) (noting that the provisions of subdivision (b)(4) "repudiate the few decisions that have held an expert's information privileged simply because of his status as an expert" and "reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine").

38 8A Wright & Miller § 2032 at 96.

39 *Id.*

40 As a word of caution, Defendants are reminded that a large volume of logged entries can raise a red flag for the court. *See*, *e.g.*, *Mechel Bluestone, Inc. v. James C. Justice Cos., Inc.*, 2014 WL 7011195, at *6 (Del. Ch. Dec. 12, 2014).

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Order Amended by United States v. Veolia Environnement North America Operations, Inc., D.Del., November 17, 2014

2014 WL 5511398
United States District Court, D. Delaware.

UNITED STATES of America, Petitioner,
v.
VEOLIA ENVIRONNEMENT NORTH AMERICA OPERATIONS, INC., Respondent.

Civ. No. 13–mc–03–LPS
|
Signed October 31, 2014

Attorneys and Law Firms

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MEMORANDUM OPINION

STARK, U.S. District Judge:

***1** Pending before the Court is Petitioner United States of America's Motion to Enforce Internal Revenue Service ("IRS") Summonses against Veolia Environnement North America Operations, Inc. ("Taxpayer"). (D.I. 1) Taxpayer has refused to produce materials sought by the IRS based on Taxpayer's assertion of work-product protection, attorney-client privilege, and tax practitioner privilege.

BACKGROUND [1]

I. The IRS Audit

This dispute arises out of an IRS audit of Taxpayer's 2006 U.S. federal income tax return, in which Taxpayer claimed a $4.5 billion worthless stock deduction. (D.I. 5 at 2; D.I. 11 at 1) Taxpayer is a U.S. holding company owned by Veolia Environnement S.A. ("VE"), which is itself a subsidiary of Vivendi S.A., a multi-billion dollar French conglomerate. (D.I. 11 Ex. 1 ¶¶ 7–8)

In April 1999, Taxpayer purchased Water Application & Solutions Corporation [2] ("WASCO") for $8.2 billion. (D.I. 8 ¶ 6) By 2006, Taxpayer had come to the conclusion that WASCO's stock was worthless. It then retained legal advisors and tax **experts** to identify a means by which it could claim WASCO's stock as a deduction under Section 165(g) of the Internal Revenue Code, 26 U.S.C. § 165(g). (D.I. 7 ¶¶ 7–11) Specifically, Taxpayer intended to reduce ordinary income by taking a deduction for worthless securities in affiliated corporations. *See* 26 U.S.C. § 165(g)(3); *see also* D.I. 11 at 3–4.

In 2006, Taxpayer determined that converting WASCO to a Delaware Limited Liability Corporation ("LLC") could be a viable "trigger" for claiming the deduction on its tax return. (D.I. 8 ¶ 10) Before finalizing the decision to convert WASCO to an LLC and claim the deduction, Taxpayer and VE retained counsel at Cleary Gottlieb Steen & Hamilton LLP ("Cleary Gottlieb") for legal advice, and additionally hired two valuation firms, Aon Accuracy ("Aon") and XRoads Solutions Group LLP ("XRoads"), to evaluate and produce written reports on WASCO's insolvency. (D.I. 7 ¶¶ 7–8; D.I. 8 ¶¶ 18, 20–21) On December 18, 2006, the Boards of Directors of WASCO and Taxpayer met and authorized the companies to pursue the claim. (D.I. 7 ¶ 12) Several days later, on December 22, 2006, WASCO was converted to an LLC. (D.I. 7 ¶ 15)

In February 2007, Taxpayer—already under audit by the IRS for its 2004 and 2005 returns—applied for and subsequently enrolled in the IRS's newly established Pre–Filing Agreement ("PFA") program, which was created "to resolve, before returns are filed, issues that are likely to be disputed in post-filing audits." (D.I. 8 ¶ 28; D.I. 11 at 4–5; *see also* D.I. 5 at 4) [3] In April 2007, VE and Taxpayer hired a third valuation firm, Duff & Phelps LLC ("Duff & Phelps"), to produce an independent valuation of WASCO's stock. (D.I. 8 ¶ 30; D.I. 5 at 5) Taxpayer provided the IRS with XRoads' final versions of the reports on WASCO's stock, which both XRoads and Duff & Phelps prepared, as an effort to bolster Taxpayer's claim that WASCO's stock was worthless. (D.I. 8 ¶ 31; D.I. 5 at 5)

***2** On December 5, 2008, the IRS issued summonses for a variety of documents in Taxpayer's possession. (D.I. 1 at ¶ 8) While Taxpayer produced "hundreds of thousands of pages in response to hundreds of requests from the IRS" (D.I. 4 at ¶ 10), it initially withheld 361 documents and portions of 45 documents. (D.I. 5 at 1; *see also* D.I. 8 ¶ 43) (stating that Taxpayer produced 641,415 bates-stamped pages to IRS between January 2009 and April 2013) Taxpayer refused to produce these materials based on its assertion of several privileges: (1) work-product protection under Federal Rule of Civil Procedure **26**(**b**)(3); (2) attorney-client privilege; and (3) tax practitioner privilege under 26 U.S.C. § 7525(a)(1). (D.I. 5; D.I. 12)

II. Procedural History

On January 4, 2013, the government filed this action to enforce the summonses and compel the production of the documents withheld by Taxpayer. (D.I. 1)[4] On April 30, 2013, following briefing, the Court held a hearing regarding the government's motion. (*See* Transcript of Apr. 30, 2013 hrg. (D.I. 21)) ("Tr.")[5] Among the matters discussed were whether the Court should review a portion of the withheld documents *in camera* and, if so, which ones. (*See* Tr. at 14) After the parties further met and conferred, the government agreed to withdraw its request for 178 documents and requested that the Court conduct a review of a sample of 55 documents representative of the remaining 228 contested documents. (D.I. 16 at 2) The Court then ordered Taxpayer to submit the requested 55 documents for *in camera* review (D.I. 18), and on May 24, 2013 Taxpayer did so.

Following inspection of the 55 documents, this Court issued a Memorandum Order on October 25, 2013. (*See* D.I. 23) The Court made several findings, including a finding that Taxpayer had met its burden to show that it anticipated litigation as early as March 2006 *(id.* at 9), and that Taxpayer improperly withheld documents containing communications made to its testifying **experts**, XRoads and Duff & Phelps (*id.* at 13). The Court ordered the production of documents disclosed to testifying **experts** unless otherwise protected under Rule **26**(**b**), and further ordered the parties to meet and confer to identify which documents still remained in dispute. (*Id.* at 14, 16–17)

By November 14, 2013, both parties indicated to the Court that 92 documents remained in dispute. (D.I. 25, 26) These disputed documents generally fall into two categories: (1) materials claimed as work-product from 2006 onwards, and (2) materials protected under the attorney-client and tax practitioner privileges. On November 22, 2013, the Court ordered Taxpayer to submit the remaining documents in dispute for *in camera* inspection and—given the variety of documents claimed protected under the attorney client and tax practitioner privileges[6]—allowed Taxpayer to accompany each document with a brief description of the privilege purportedly protecting each document in question. (D.I. 27) On December 6, 2013, Taxpayer submitted the documents. On December 13, the parties notified the Court that no other documents remained in dispute. (D.I. 29, 30)

LEGAL STANDARDS

I. Work–Product Doctrine

***3** Federal Rule of Civil Procedure **26**(**b**)(1) broadly provides: "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." The work-product exception to this disclosure requirement is set forth in Rule **26**(**b**)(3)(A), which states: "Ordinarily, a party may not discover documents ... that are prepared in anticipation of litigation or for trial by or for another party or its representative." This work-product doctrine functions to "promote[ ] the adversary system" by guarding the confidentiality of documents prepared in anticipation of litigation, allowing a party to prepare for litigation without fear that its work-product will be used against it. *See* *Westinghouse Elec. Corp. v. Republic of Philippines,* 951 F.2d 1414, 1428 (3d Cir.1991); *see* *Hickman v. Taylor,* 329 U.S. 495, 510–11 (1947).

The "burden of demonstrating that a document is protected as work-product rests with the party asserting the doctrine." *Conoco Inc. v. U.S. Dept. of Justice,* 687 F.2d 724, 730 (3d Cir.1982). Hence, "[o]nly by looking to the state of the mind of the party preparing the document, or ... the party ordering the preparation of the document[,]" *Martin v. Bally's Park Place Casino & Hotel,* 983 F.2d 1252, 1260 (3d Cir.1993), can a court determine if a document comes within the scope of Rule **26**(**b**)(3) protection. "[D]isclosure to a third party does not necessarily waive the protection of the work-product doctrine;" thus, in order to determine whether there has been a waiver of the work-product doctrine, courts must "distinguish between disclosures to adversaries and disclosures to non-adversaries." *Westinghouse Elec. Corp.,* 951 F.2d at 1428. "Under this standard, the voluntary disclosure of attorney

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work-product to an adversary or a conduit to an adversary waives work-product protection for that material." *United States v. Deloitte LLP,* 610 F.3d 129, 140 (D.C.Cir.2010); *see also* *In re Chevron Corp.,* 633 F.3d 153, 165 (3d Cir.2011) ("[I]t is only in cases in which the material is disclosed in a manner inconsistent with keeping it from an adversary that the work-product doctrine is waived.").

II. Attorney–Expert Communications

Federal Rule of Civil Procedure 26(a)(2)(B)(ii) mandates the disclosure of all "facts or data considered by" an **expert** witness who is retained or employed to provide **expert** testimony, when the facts or data were considered by the **expert** "in forming" "opinions the witness will express." *See also* Fed.R.Civ.P. 26(a)(2)(B)(i). In 2010, Rule 26 was amended to "address concerns about **expert** discovery," including by adding Rule **26**(**b**)(4)(B) protecting **drafts** of export reports required under Rule 26(a)(2)(C). *See* adv. comm. notes (2010). Also added was Rule **26**(**b**)(4)(C), which "protect[s] communications between the party's attorney and any [**expert**] witness required to provide a report under Rule 26(a)(2)(B)," with three exceptions into which discovery is permitted: "communications [that] (i) relate to compensation for the **expert's** study or testimony; (ii) identify facts or data that the party's attorney provided and that the **expert** considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the **expert** relied on in forming the opinions to be expressed." The advisory committee notes accompanying the 2010 amendments state: "The addition of Rule **26**(**b**)(4)(C) is designed to protect counsel's work-product and ensure that lawyers may interact with retained **experts** without fear of exposing these communications."

III. Attorney–Client and Tax Practitioner Privileges

The attorney-client privilege protects client and attorney communications related to securing legal advice. *See* *Rhone–Poulenc Rorer Inc. v. Home Indem. Co.,* 32 F.3d 851, 856 (3d Cir.1994). The privilege applies to communications from an attorney to a client as well as from a client to its attorney. *See* *Upjohn v. United States,* 449 U.S. 383, 390 (1981). The attorney-client privilege must be "strictly confined within the narrowest possible limits consistent with the logic of its principle" because the "privilege obstructs the search for the truth and ... its benefits are, at best 'indirect and speculative.' " *In re Grand Jury Investigation,* 599 F.2d 1224, 1235 (3d Cir.1979) (internal citation omitted).

***4** The burden of demonstrating the applicability of the attorney-client privilege thus rests on the party asserting the privilege. *See* *Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp.,* 805 F.2d 120, 126 (3d Cir.1986) ("A party asserting a privilege bears the burden of proving the applicability of the privilege"). Specifically, the party asserting privilege must show each of the following:

(1) the asserted holder of the privilege is or sought to become a client;

(2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;

(3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and

(4) the privilege has been (a) claimed and (b) not waived by the client.

*In re Grand Jury Investigation,*599 F.2d at 1233 (internal quotation marks omitted).

The tax practitioner privilege, codified at 26 U.S.C. § 7525(a)(1), protects communications between a taxpayer and a "federally authorized tax practitioner" for the purpose of obtaining tax advice, "to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney." *See generally Chao v. Koresko,* 2005 WL 2521886, at *3 (3d Cir. Oct. 12, 2005) (recognizing tax practitioner privilege). Section 7525(a)(1) codifies the tax practitioner privilege as reflecting "the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney" and, thus, "the scope of the tax practitioner-client privilege depends on the scope of the common law protections of confidential attorney-client communications." *United States v. BDO Seidman,* 337 F.3d 802, 810 (7th Cir.2003).

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DISCUSSION

I. Documents Claimed to be Work–Product

Taxpayer asserts work product protection with respect to roughly half of the 92 documents Taxpayer is withholding. Taxpayer contends that these documents were created in anticipation of litigation and are, therefore, protected under Rule 26(b)(3). The Court has reviewed each of these documents *in camera.* Broadly speaking, these materials fall into two categories: (A) draft reports of testifying experts; and (B) communications with testifying experts.

A. Draft Valuation Reports from XRoads and Duff & Phelps

Taxpayer claims that Privilege Log Nos. 275, 277, 280, 283–92, 315–17, and 342 are expert reports prepared by XRoads and Duff & Phelps [7] and, therefore, are protected work product. (*See* D.I. 17 at 3 n.8) The parties dispute whether some of these documents—namely, those labeled as "draft valuation letters" and "draft valuation presentations"—qualify as draft "reports" within the meaning of Rule 26(b)(4). (*See* D.I. 25 at 3; D.I. 26 at 2) Additionally, the government seeks production of any portions of these documents to the extent that they "may contain non-privileged materials." (D.I. 25 at 3)

1. Draft reports: Privilege Log Nos. 275, 277, 315–17

***5** Rule 26(b)(4)(B) extends work-product protection to "drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded." Several of the Privilege Log documents are just that. Privilege Log Nos. 275 and 277, authored by XRoads, and Nos. 315–17, authored by Duff & Phelps, are draft reports on the fair market value of WASCO, and come within the ambit of Rule 26(b)(4)'s protection. These documents were shared among employees of the testifying expert firms, Taxpayer, VE, outside counsel, and (for the Duff & Phelps reports) with outside tax advisors PricewaterhouseCoopers LLP ("PWC") As noted in the previous Memorandum Order, the Court is persuaded that "Taxpayer ... had common interests with its parent and other affiliated entities" and there was no waiver of protection by virtue of these documents being shared among members of the VE corporate family. (D.I. 23 at 16) In particular with regard to Nos. 315–17, the Duff & Phelps reports, the Court finds no waiver of privilege because PWC is not an adversary nor a conduit to an adversary. On the contrary, PWC was regularly consulted as a non-testifying expert. (*See* D.I. 7 ¶ 10; D.I. 5 at 3)

Accordingly, the Court finds that the Taxpayer has met its burden with regard to Privilege Log Nos. 275, 277, and 315–17. The Taxpayer will not be ordered to produce these documents to the government.

2. Draft valuation letters and presentations: Privilege Log Nos. 280, 283–92, 342

The Court also agrees with Taxpayer that Privilege Log Nos. 280, 283–292, and 342 are draft reports protected from disclosure as work product. (D.I. 17 at 3 n.8) Privilege Log No. 280 is described in the log as a "Draft Xroads valuation letter for Veolia Environment...." Privilege Log Nos. 283–292 and 342 are characterized as "Draft Valuation Presentations...."

Rule 26(b)(4)(B) protects "drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded." Here, the documents' contents reveal them to be draft reports, demonstrating counsel's collaborative interactions with expert consultants—notwithstanding the form these documents take. *See* *Republic of Ecuador v. For Issuance of a Subpoena Under 28 U.S.C. Sec. 1782(a),* 735 F.3d 1179, 1187 (10th Cir.2013).

Privilege Log Nos. 283–292 and 342 are labeled "draft valuation presentations" and, like Log No. 280, contain preliminary conclusions. The XRoads presentation includes summaries regarding WASCO's solvency and an outline. Privilege Log No. 342, the Duff & Phelps draft presentation, also contains summaries and conclusions regarding solvency, which reflect counsel's collaborative interactions with expert consultants. [8]

Privilege Log No. 283 consists of a cover letter with a document attached to it; the remainder of the document, other than the cover letter, is identical to Privilege Log Nos. 284–92 (except that the attachment to No. 283 has handwritten notes on it). The cover letter is not referenced in the privilege log and Taxpayer will be required to produce it. Taxpayer properly withheld the remainder of No. 283.

B. Communications with the Testifying Experts

Taxpayer has withheld or redacted a number of materials containing communications with testifying experts XRoads and Duff & Phelps on the basis that these documents reflect or contain opinion work-product protected under Rule 26(b)(3) and do not otherwise fall under any of the exceptions listed in Rule 26(b)(4)(C)(i)-(iii). (*See* D.I. 12 at 3) These documents are: Privilege Log Nos. 82, 147, 351, 353, 355–56; materials produced in redacted form, i.e., Privilege Log Nos. R295–96, R311–12, R267, R297–303; and Redaction Log Nos. R18–19, R26.[9] These documents generally fall into two categories: (1) communications between counsel and the testifying experts; and (2) communications between non-attorney employees and the testifying experts.

1. Attorney—expert communications: Privilege Log Nos. 82, 351, R295–96

***6** These documents contain communications between Taxpayer's counsel and the two testifying experts. Privilege Log No. 351 contains an email chain between Taxpayer, Taxpayer's Counsel, PWC, and Duff & Phelps. Log Nos. R295 and R296 contain redacted comments from Taxpayer's employees and outside counsel attached to an email sent to Xroads.

These documents are protected, as each contains attorney mental impressions and theories regarding the creation of the valuation report, and each comes within the scope of Rule 26(b)(4)(C)'s protection for an attorney's mental impressions when contained in a communication with a testifying expert.

Taxpayer has not met its burden, however, to show that Privilege Log No. 82 is protected.[10] This document consists of an email from Taxpayer's counsel at Geary Gottlieb to XRoads which, by its own language, puts forth "facts" for XRoads' consideration in preparing its valuation letters. Accordingly, this document must be produced. *See* Fed.R.Civ.P. 26(b)(4)(C)(i)-(iii).

2. Non–attorney communications with testifying experts: Privilege Log Nos. 147, R267, R297–303, R311–12, 332, 353, 355–56; Redaction Log Nos. R18–19, R26

These documents contain communications made to testifying experts by either Taxpayer's non-attorney employees or its retained non-testifying experts. Taxpayer argues, and the Court has found, that many of the materials created by Taxpayer and its non-testifying experts were prepared in anticipation of litigation as early as March 2006. (D.I. 23 at 9) However, the government contends that even if many of these documents are privileged, Taxpayer has waived the privilege. (D.I. 11 at 12–13)

After inspection, the Court concludes that Taxpayer waived work-product protection with respect to these disputed documents. Taxpayer predicates its argument on the theory that Rule 26(b)(3)(B) broadly protects from disclosure communications with testifying experts unless they come within one of the exceptions delineated in Rule 26(b)(4)(C) relating to compensation, facts or data, or assumptions relied upon by the expert. (*See, e.g.,* D.I. 28 at 1–2 ("[P]ortions of these ... documents ... are protected as opinion work-product under the work-product doctrine because they ... did not convey facts to XRoads, but consisted only of further discussion of the relevance of certain facts."))

This misapprehends the scope of Rule 26(b)(4)(C)'s protection, which extends only to communications between a party's attorney and a testifying expert. Rule 26(b)(4)(C) does not erase the general rule that work-product protection is waived when material is disclosed to a testifying expert. *See* *In re Chevron,* 633 F.3d at 165. Several recent appellate court decisions have held that the post–2010 version of Rule 26(b)(4) is narrow in scope. *See* *Republic of Ecuador v. Mackay,* 742 F.3d at 871 (9th Cir.2014) (holding that Rule 26(b)(4) does not provide presumptive protection for all testifying expert materials as trial preparation materials); *Republic of Ecuador v. Hinchee,* 741 F.3d 1185, 1195 (11th Cir.2013) (work-product protection only extends to core work-product of attorney). Other courts addressing the issue of whether the work-product doctrine extends to communications between a non-attorney or agent and the testifying expert have concluded that it does not. *See* *Fialkowski v. Perry,* 2012 WL 2527020, at *4 (E.D. Pa. June 29, 2012) (emphasizing Rule 26(b)(4)(C) is designed to protect just counsel's communications with expert); *In re Application of Republic of Ecuador,* 280 F.R.D. 506, 514–16 (N.D.Cal.2012) (stating Rule 26(b)(4)(C) does not protect communications between non-attorney employees of corporation and its expert witness, nor those between testifying and non-testifying experts).

***7** The Courts finds these cases instructive. By enlisting XRoads and Duff & Phelps as expert witnesses in its

litigation with the IRS, Taxpayer has placed them "in a position to serve as a conduit to transmit" either these documents "or at least [their] conclusions" to the IRS; the reason Taxpayer is submitting documents to these **experts** is the hope that the **experts** will agree with their content, incorporate them into an **expert** report, and thereby provide Taxpayer an opportunity to persuade the IRS to agree with Taxpayer's position. *See In re Chevron,* 633 F.3d at 165. Consequently, the documents submitted to the testifying **experts** here lose their work-product protection, unless the protection is otherwise preserved by Rule **26**(**b**)(4)(C).

Accordingly, Taxpayer must disclose Privilege Log Nos. 147, R267, R297–303, R311–12, 353, 355–56, and Redaction Log Nos. R18–19, R26, which comprise either communications between non-attorney employees of Taxpayer and the testifying **experts** (*see, e.g.,* Priv. Log No. 147) or communications between testifying **experts** and the consulting **experts** (*see, e.g.,* Priv. Log. Nos. R297–303; Red. Log No. R26).

II. Attorney–Client and Tax Practitioner Privileges

The government argues that Taxpayer has not established that either the attorney-client privilege or tax practitioner privilege applies to many of the documents, or, alternatively, that such a privilege was waived. (D.I. 11 at 12–13) Taxpayer has the burden to show that the attorney-client or tax practitioner privilege applies, and the Court must apply these privileges narrowly. *See In re Grand Jury Investigation,* 599 F.2d at 1235.

Again, the Court divides these materials into two general categories: (A) communications with attorneys or tax practitioners; and (B) internal documents Taxpayer claims reflect legal or tax advice.

A. Communications with Attorneys or Tax Practitioners

Many of the documents before the Court directly involve attorneys or tax practitioners. For the attorney-client privilege to attach to a document, the Court must be satisfied that it is: "(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client." *In re Chevron,* 650 F.3d 276, 289 (3d Cir.2011) (internal quotation omitted). Similarly, "the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney ... apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney." 26 § U.S.C. 7525(a)(1); *see also Seidman,* 337 F.3d at 810; *see generally Chao,* 2005 WL 2521886 (3d Cir. Oct. 12, 2005) (recognizing tax practitioner privilege).

1. Legal Memoranda: Privilege Log Nos. 122, 148, 149, 158, 206, 208

These withheld materials consist of legal memoranda from outside counsel or in-house counsel addressing various issues from at least 1999 onwards. The Court concludes that these documents were properly withheld on the basis of the attorney-client privilege. Each is a communication transmitted among privileged persons, the client from outside counsel (Priv. Log Nos. 148–49, 158, 206, 208) or among in-house counsel (Priv. Log No. 122). Furthermore, as memoranda analyzing legal implications of certain corporate transactions, these documents were made for the purpose of dispensing legal advice and were kept in confidence. *See Sampson v. Sch. Dist. of Lancaster,* 262 F.R.D. 469, 477 (E.D.Pa.2008) (finding legal memorandum protected under attorney client privilege). Stripping these documents of their privileged status would run contrary to the principle of "foster[ing] disclosure and communication between the attorney and the client." *Upjohn Co.,* 449 U.S. at 389.

***8** The Court finds that the privilege attaching to these documents has not been waived. The presence of a third party does not waive the attorney-client privilege if that presence is "essential to and in furtherance of the communication." *In re Grand Jury Investigations,* 918 F.2d 374, 384 (3d Cir.1990). To the extent that these documents were shared within the corporate family, such as those sent to or from VE, such involvement was essential to and in furtherance of the communications with the attorneys involved.

Accordingly, these documents were properly withheld.

2. Draft materials of attorneys/tax practitioners: Privilege Log Nos. 220, 246, 250, 254, 256, R215–219

These documents all consist of **draft** materials prepared by or with Taxpayer's outside counsel. Privilege Log Nos. 220, 254, and 256 are **drafts** of agreements or contracts prepared by outside counsel and sent to Taxpayer, and are protected under the attorney-client privilege. *See* *Andritz Sprout–Bauer, Inc. v. Beazer E., Inc.,* 174 F.R.D. 609, 633 (M.D.Pa.1997) ("Preliminary **drafts** of contracts are generally protected by attorney-client privilege, since [they] may reflect not only client confidences, but also legal advice and opinions of attorneys, all of which is protected by the attorney/client privilege.") (internal quotation omitted; alteration in original). Privilege Log Nos. 246 and 250 similarly reflect attorney advice to Taxpayer in handling the WASCO transaction and, like the **draft** contracts, their production would necessarily disclose confidential advice dispensed by outside counsel. The Court concludes that these materials may be withheld under the attorney-client privilege.

Although Privilege Log Nos. R215–19 also contain **drafts** of agreements prepared by outside counsel, an inspection of these documents reveals that the attorney-client privilege has been waived. The privilege log notes that these **draft** agreements, originally created in August 2000, were attached to an email from Elissa Moskowitz seven years later. Taxpayer has not shown why the involvement of Ms. Moskowitz, an employee of PWC, was essential or in furtherance of the communication. The gap in time suggests otherwise. These documents must be disclosed in their entirety.

3. Communications with attorneys or tax practitioners: Privilege Log Nos. 150, 154, 177, 201, 205, 252, 253; Redaction Log Nos. R32–R37

Before the Court are also numerous communications with attorneys and/or tax practitioners covering a wide variety of topics and issues relating to proposed transactions, including the WASCO transaction. Specifically, Privilege Log Nos. 150, 154, 177, and 205 are communications made with tax practitioners, and Privilege Log Nos. 252, 253, and Redaction Log Nos. R32–37 [11] are communications with Taxpayer's outside counsel. After an inspection of these documents, the Court concludes that Taxpayer has met its burden and established the claimed privilege. The documents for which Taxpayer claims the tax practitioner privilege either dispense tax planning advice in relation to different transactions (Priv. Log Nos. 154 and 205) or are necessary in order to obtain such tax planning advice and directly seek such advice (Priv. Log Nos. 150, 177).

Similarly, Privilege Log No. 252 directly solicits advice from outside counsel, while Log Nos. 253 and Redaction Log Nos. R32–37 provide legal advice and discuss this information with the client. Finally, Privilege Log No. 201, an email from outside counsel concerning an upcoming meeting, contains information necessary for Taxpayer to obtain legal advice relating to tax and business transactions in the form of agenda topics for a future meeting. These documents were properly withheld as privileged.

B. Internal Documents

***9** Taxpayer withholds many documents not involving any attorney or tax practitioner, arguing that the privileges nonetheless cover "internal communications in which the client reports or discusses counsel's advice." (D.I. 5 at 8) Even where an attorney is not the author or a recipient, a document may nonetheless be protected if it "reflect[s] confidential communications between client and counsel ... for the purpose of either (1) providing legal services or (2) providing information to counsel to secure legal services." *SmithKline Beecham Corp. v. Apotex Corp.,* 232 F.R.D. 467, 477 (E.D.Pa.2005) (citing *Cuno, Inc. v. Pall Corp.,* 121 F.R.D. 198, 202 (E.D.N.Y.1988)); *see also Schwarz Pharma., Inc. v. Teva Pharm. USA, Inc.,* 2007 WL 2892744, at *3 (D.N.J. Sept. 27, 2007) (stating that intra-corporate documents may be privileged where there is "some nexus between the privileged communication and a specific attorney.").

1. Protected documents: Privilege Log Nos. 161, 195, 209, 245, 247

Taxpayer has met its burden with respect to Privilege Log Nos. 161, 195, 245, and 247. *In camera* inspection reveals that these documents are related to other privileged documents, such as Privilege Log Nos. 245 and 247, [12] or explicitly reference advice sought from outside counsel, as in Privilege Log Nos. 161 and 195. These documents were properly withheld on the basis of privilege. Although Privilege Log No. 209 is not protected by the attorney-client or tax practitioner privilege, the content of this document makes clear that it was properly withheld as work-product.

2. Unprotected documents: Privilege Log Nos. 151, 152, 164–65, 171, 173–76, 178, 181–82, 196 pg. 5, 197–98, 224–25, 244; Redaction Log No. R41

The party withholding a document on the basis of privilege is tasked with "describ[ing] the nature of the documents ... in a manner that ... will enable other parties to assess the applicability of the privilege or protection." Fed.R.Civ.P. **26**(**b**)(5). "Where descriptions in the privilege log fail to meet this standard, then disclosure is an appropriate sanction." *SmithKline,* 232 F.R.D. at 475 (internal quotation omitted). The Court concludes that the privilege log descriptions do not support the Taxpayer's assertions of privilege with respect to the documents listed discussed in this section.

Many of the descriptions, for example, do not indicate an author and/or recipient, and the privilege log further provides no clue as to why they were created. (*See, e.g.,* Priv. Log Nos. 164, 173, 196 pg. 5; *see also* *SmithKline,* 232 F.R.D. at 476 ("We ... scrutinize closely any privilege claim where [the party asserting the privilege] is unable to identify the author or has provided only a general group-wide description for the recipients.")) Some documents, which appear to be legal memoranda or tax memoranda (*see, e.g.,* Priv. Log Nos. 197–98; Red. Log No. R41), are addressed so broadly—generally to the entire corporation—as to render the Court unable to determine whether the asserted privilege was waived, and thus must be produced. *See SmithKline Beecham Corp. v. Apotex Corp.,* 2000 WL 1310669, at *7 (N.D.Ill. Sept. 13, 2000) ("It was not unreasonable for the magistrate judge to have difficulty determining, from a general description like 'management,' whether a document had been too broadly distributed to seriously allow a claim of confidentiality.").

CONCLUSION

In accordance with the reasoning set forth above, the Taxpayer must disclose the documents identified as improperly withheld. An appropriate order follows.

ORDER

***10** At Wilmington, this 31st day of October, 2014:

For the reasons set forth in the Memorandum Opinion issued this date, IT IS HEREBY ORDERED that:

1. Petitioner United States of America's Motion to Enforce Internal Revenue Servia Summonses against Respondent Veolia Environnement North America Operations, Inc. ("Motion to Enforce") (D.I. 1) is GRANTED IN PART and DENIED IN PART, as follows:

A. Taxpayer must produce the following documents: Privilege Log Nos. 82, 147, 151, 152, 164, 165, 171, 173 through 176, 178, 181, 182, 196 pgs. 1 through 4, 197, 198, 215 through 219, 224, 225, 244, 267, 283 (letter only), 297 through 303, 311, 312, 332, 353, 355, 356; and Redaction Log Nos. 18, 19, 26, 41.

B. Taxpayer need not produce the following documents: Privilege Log Nos. 122, 148 through 150, 154, 158, 161, 177, 195, 201, 205, 206, 208, 209, 220, 245 through 247, 250, 252 through 254, 256, 275, 277, 280, 283 through 292, 295, 296, 315 through 317, 342, 351; and Redaction Log Nos. 32 through 37.

All Citations

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Footnotes

1 Additional background material can be found in the Court's Memorandum and Order dated October 25, 2013. (D.I. 23)

2 WASCO was known as U.S. Filter Corporation until 2004. (D.I. 11–1 ¶ 4)

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3 Quoting Rev. Proc.2005–12, 2005–1 C.B. 311, 2004 WL 2956045, § 2 (Dec. 22, 2004).

4 The Court's jurisdiction over this matter is not contested. (*See* D.I. 4 ¶ 1)

5 The order proposed by the government and entered by the Court in scheduling the April 2013 hearing included a finding that "the file in this matter reflects a *prima facie* showing" of the factors the government must show in order to obtain enforcement of the summonses. (D.I. 2 ¶ 3) The Supreme Court set out the relevant four-part test in *United States v. Powell,* 379 U.S. 48, 57–58 (1964): the government must show that (1) the investigation will be conducted pursuant to a legitimate purpose; (2) the inquiry may be relevant to the purpose; (3) the information sought is not already within the government's possession; and (4) the administrative steps required by the Code have been followed. Taxpayer does not meaningfully dispute that the government has made out a *prima facie* case, so the burden to justify withholding the summonsed documents has shifted to Taxpayer. (*See* D.I. 11 at 6)

6 Unlike the materials claimed protected as work-product (which applies almost exclusively to materials related to the WASCO transaction created from 2006 onwards), the documents claimed as privileged under the attorney-client and tax practitioner privileges pertain to a wide variety of subjects dating from 2001 onwards. (*See, e.g.,* Priv. Log No. 215 (containing **draft** amendment created by outside counsel in January 2001))

7 It is undisputed that XRoads and Duff & Phelps are testifying **experts** who must provide a written report as required by Rule 26(a)(2)(B). (D.I. 11 at 7; D.I. 12 at 2)

8 All of these documents were prepared after the time in which the Court previously found that Taxpayer anticipated litigation in March of 2006.

9 The documents subsequently produced in redacted form are a combination of redacted documents produced to the IRS prior to commencement of this enforcement action (Redaction Log documents) and documents originally withheld which were produced in redacted form pursuant to the Court's prior Orders (D.I. 23; D.I. 27; *see also* D.I. 30). For the sake of clarity, documents produced in redacted form are signified by an "R" preceding the privilege or redaction log number.

10 In addition to work-product protection, Taxpayer asserts attorney-client and tax practitioner privilege for this document. This document—an email between XRoads and the Taxpayer's counsel—is not a communication to or from a client and falls outside the scope of these privileges. *See* *In re Grand Jury Investigation,* 599 F.2d at 1233.

11 Taxpayer also asserts protection as work-product for Redaction Log Nos. R32–37, an issue the Court need not decide.

12 Privilege Log No. 247 is a large file containing numerous materials. To the extent that these materials are not strictly intra-corporate communications, they are nonetheless protected as direct and confidential communications with attorneys.

End of Document

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In-Person Depositions and Dealing with the Difficult Witness

Patrick G. Rock, Esquire
Heckler & Frabizzio, P.A.

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Ashby & Geddes

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PROFESSIONAL ASSOCIATIONS

American Board of Trial Advocates (ABOTA)2017- present
an elite national association of experienced trial lawyers and judges dedicated to the preservation and promotion of the civil jury trial right provided by the Seventh Amendment to the U.S. Constitution.
Defense Counsel of Delaware (President 2018, past Vice President)
is dedicated to promoting justice, professionalism, and integrity in the civil justice system by bringing together attorneys dedicated to the defense of civil actions.
Delaware State Bar Association
is marked by evolving efforts to promote ethical conduct by lawyers, to require and offer high quality continuing legal education, to protect the public from the unauthorized practice of law, to review and make recommendations regarding Delaware's court system and to foster the mentoring of new lawyers.
Delaware Claims Association
is an organization dedicated to fostering networking and training opportunities to attorneys and insurance professionals.
Maine Trial Lawyer Association
provides training, education, and networking opportunities to attorneys throughout the state fighting for justice for individuals and consumers in an adversarial system.
Thomas More Society
is a not-for-profit, national public interest law firm dedicated to restoring respect in law for life, family, and religious liberty. Based in Chicago, the Thomas More Society defends and fosters support for these causes by providing high-quality *pro bono* legal services from local trial courts all the way to the United States Supreme Court.

LECTURES

2010 Bad Faith Insurance Claims
2012 PIP and Subrogation Rights
2013 Construction Defects (Delaware Claims Association)
2013 General Liability
2014 Liability
2014 Personal Injury Seminar
2015 Lien Review

2016 Delaware Investigation - 2 CE Credits
2016 Case Review Training
2017 Delaware Investigation - 2 CE Credits
2018 General Liability - 2 CE Credits

ACHIEVEMENTS AND AWARDS

Top Lawyer Delaware Today 2015 – 2022
Delaware Today emailed an invitation to all 4,900 members of the Delaware Bar Association to vote in a poll on the Delaware Today web site. Only licensed attorneys were permitted to respond. Attorneys with the most votes received the recognition of Top Lawyer.
Martindale Hubbell AV Rating 4.9/5.0
Martindale-Hubbell is the premier source for finding and researching attorneys. Using our robust search functionality, you can quickly zero in on the right attorney based on practice area, client and AV Peer Review Ratings, law firm, and state bar admissions. Daily updates from trusted sources ensure the most current data is always available.
Best Law Firm U.S. News 2015-2020
U.S. News and Best Lawyers have joined to rank more than 13,000 firms across the U.S.
Top Workplace 2017 -2022
Energage CultureTech solutions are informed by the Top Workplaces research, a deep body of research that has helped us identify the 15 culture drivers that are critical to success in any organization. Surveying and studying over 50,000 organizations since 2006 means we know what a great culture looks like — and we know how to get you there.

PROFESSIONAL LICENSES

Delaware Bar Admitted 2005
Maine Bar Admitted 2001
Court of Appeals 2007
United States Third Circuit
Massachusetts Bar Admitted 2001
United States District Court 2005
Maryland Bar Admitted 2019

CAREER SUMMARY

Heckler & Frabizzio, P.A. Wilmington, Delaware July 2007 – Present
Head of Liability Department / Managing Partner
Insurance Defense Litigation Firm. Represents large insurance companies and employers in general liability claims, civil litigation, personal injury claims involving car accidents, insurance coverage disputes and insurance coverage analysis, premises liability and product liability claims, civil rights and Section 1983 claims.

Managing Partner since 2013 responsible for the direction, administration, and development of the Firm. Achieved increased revenue through the implementation of new processes and strategic planning. Created alternative partner agreements for multiple tiered partner development. Facilitated new organizational culture through training opportunities, the introduction of core values and a focus on accountability.

Marks, O'Neill, O'Brien & Courtney, P.C. Wilmington, Delaware
Attorney
Regional civil litigation firm. Represented medical professionals and corporations in 42 U.S.C. §1983 claims, medical negligence claims and other violations of constitutional rights claims. Defended manufacture's in asbestos litigation. Prepared legal opinion letters regarding contract interpretation, first party, and third-party insurance coverage.

Michael A. Pedicone, P.A. Wilmington, Delaware
Attorney
Civil litigation practice. Represented individuals and corporations in all aspects of litigation, including binding and non-binding arbitration, mediation, motion practice, depositions, discovery, and trial. Drafted opinion letters on insurance coverage issues and prepared Delaware Legal Update presentation for clients.

Patrick G. Rock, Esquire Shirley, Massachusetts
Attorney
Part-time solo practice. Represented clients in civil litigation, residential real estate transactions, landlord-tenant cases, consumer debt litigation, family law, estate administration (including drafting wills and simple trust instruments); formed closely held corporations.

EDUCATION

Juris Doctor - July 2000, Widener University School of Law, Wilmington, Delaware
Dean's List, Top 25% of Class, attended ITAP (Intensive Trial Advocacy Program) to develop trial advocacy skills. Certificate of Achievement: Admiralty. Completed a four-year extended division program in three years.

Bachelor of Arts, Political Science – May 1996, Thomas More College, Merrimack, New Hampshire
President's Scholarship. Senior Comprehensives: A, Senior Thesis: "The Eminentization of Justice Through the Authority of the Supreme Court," grade – A. Studied in Rome, Italy, 1994 Spring Semester.

AREAS OF PRACTICE

Civil Trial Practice
Construction Defect
Construction Law
Employment Law
General Practice
Insurance Defense
Personal Injury
Premise Liability
Product Liability
Trucking Law
§1983 Claims

TRIAL EXPERIENCE

20+ Jury Trials
Superior Court of Delaware
U.S. District Court
Supreme Court of Delaware
Court of Common Pleas and JP Court

TECHNICAL TRAINING

Westlaw, Lexis, TABS III, World Dox, About Time, Blackbaud for Windows, QuickBooks, Pacer, Elite Enterprise, Microsoft Project Manager and Microsoft Office

References are available upon request.

Bob,
I am writing this letter as the first step in the meet and confer process regarding my concerns with the impermissible interjections during the deposition that took place last Friday. I am not suggesting that these interruptions were conducted in bad faith. Rather, I often find that many attorneys have not had the occasion to investigate the law of deposition conduct. Therefore, I am reaching out to determine if there are any areas where we need judicial direction as to what is considered appropriate deposition conduct under the case law.

It is universally accepted that lawyers are strictly prohibited from making any objections or comments, which might suggest or limit a witness's answer to a question. This includes any objection that may suggest an answer in any way. To that end, in *In re St. Jude Medical, Inc.,* 2002 WL 1050311 (D. Minn.), Judge Tunheim ordered that: "Objecting counsel shall say simply the word "objection", and no more, to preserve all objections as to form." Any comment beyond the word objection is considered witness coaching. Any substantive objections are unnecessary because they are preserved.

Throughout the depositions you made numerous unnecessary objections (which were otherwise preserved), interjections and then directions to proceed to answer. With all due respect, those objections were improper. I am providing the case law that supports our position. If you disagree with this authority and have cases which support contrary positions please forward them to me immediately. Specifically, there were a number of repeated issues which the following cases address:

- "[i]nstructions to a witness that they may answer a question 'if they know' or 'if they understand the question' are raw,

unmitigated coaching, and are never appropriate." *Cincinnati Ins. Co. v. Serrano,* 2012 WL 28071, *5 (D. Ks)

· An objection to "improper foundation" is a relevance objection and need not be made at the time of the deposition. *Cincinnati Ins. Co. v. Serrano*, 2012 WL 28071, at *4. It is therefore improper.

· The use of comments such as: "I think he has already answered the question;" "It's repetitious;" "The question has already been asked;" or "It's already been asked and answered" are not objections, and are inappropriate, prohibited interruptions in the flow of the deposition. *Armstrong v. Hussmann Corp.* 163 F.R.D. 299, 301-02 (E.D. Mo. 1995).

Further, the Federal Rules prohibit instruction not to answer for anything other than to preserve a privilege or to enforce a limitation on evidence directed by the court.

I have attached a stipulation of authority and protective order to ensure we all agree on what the federal rules and cases require. Inasmuch as I am preparing for the next series of depositions in this case, that will be occurring over the next 60 days, including a deposition this Wednesday, I would appreciate a response on Tuesday to evaluate whether we will need a court ruling on what is appropriate conduct. Hopefully that will be unnecessary. I look forward to your thoughts regarding these issues. Thank you for your attention.

Mark R. Kosieradzki
KOSIERADZKI SMITH LAW FIRM, LLC 3675 Plymouth Boulevard, Suite 105 Plymouth, MN 55446 T 763 746 7800 F 763 746 7801 W 877 552 2873 www.KosLawFirm.com
www.MN-NursingHomeAbuse.com

unmitigated coaching, and are never appropriate." *Cincinnati Ins. Co. v. Serrano,* 2012 WL 28071, *5 (D. Ks)

· An objection to "improper foundation" is a relevance objection and need not be made at the time of the deposition. *Cincinnati Ins. Co. v. Serrano,* 2012 WL 28071, at *4. It is therefore improper.

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Further, the Federal Rules prohibit instruction not to answer for anything other than to preserve a privilege or to enforce a limitation on evidence directed by the court.

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Mark R. Kosieradzki
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Marianne Liptak, Trustee for the Next of Kin of Theresa Rotter and Personal Representative of the Estate of Theresa Rotter, Plaintiffs, vs. Ramsey County d/b/a Ramsey County Care Center; Steven Fritzke, in his individual capacity as Administrator of the Ramsey County Care Center; Joleen Magee, in her individual capacity as the Director of Nursing of the Ramsey County Care Center; and John Doe, in his individual capacity as an employee of the Ramsey County Care Center, Defendants.	CIVIL NO. 16-cv-225-ADM-JSM **STIPULATION FOR PROTECTIVE ORDER**

WHEREAS the counsel for the respective parties wish to have clarity as to the rules governing appropriate deposition conduct;

THE PARTIES enter into this stipulated statement of authority governing deposition conduct:

1. All depositions will be conducted in compliance with the Federal Rules of Civil Procedure.

2. Lawyers are strictly prohibited from making any comments or objections that might suggest or limit a witness's answer to a question.[1]

3. During the depositions counsel shall strictly adhere to Rule 30 (c)(1) and Rule 30(c)(2) wherein no objections may be made, except those objections regarding the form of the question or the existence of a privilege.

---

[1] Cincinnati Ins. Co. v. Serrano, 2012 WL 28071 (D. Ks. Jan. 5, 2012); Hall v. Clifton Precision, 150 FRD 525 (E.D. Pa. 1993).

4. If an objection to "form" is necessary, objecting counsel shall say simply the word "objection", and no more, to preserve all objections as to form.[2]

5. An objection to "improper foundation" is a relevance objection and need not be made at the time of the deposition.[3]

6. An objection that a question calls for speculation is a foundation objection, not a form objection and therefore is unnecessary.[4]

7. Instructions to a witness that they may answer a question 'if they know' or 'if they understand the question' are inappropriate.[5]

8. The use of comments such as: "I think he has already answered the question;" "It's repetitious;" "The question has already been asked;" or "It's already been asked and answered" are not objections, and are inappropriate, prohibited interruptions in the flow of the deposition.[6]

9. Private conferences between deponents and their attorneys in the course of interrogation are improper except for the purpose of determining whether a privilege should be asserted. Such conferences may be held during recess that defending counsel did not request.[7]

10. When a privilege is claimed, the witness shall nevertheless answer questions relevant to the existence, extent or waiver of the privilege, such as the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement was made, any other person to whom the contents of the statement has been disclosed, and the general subject matter of the communication.[8]

11. A party may instruct a deponent not to answer only when necessary to preserve a privilege or to enforce a limitation on evidence directed by the court. Whenever counsel instructs a witness not to answer a question, he or she shall state on the record the specific reason for such an instruction, the specific question, part of the question, or manner of asking the question upon which counsel is basing the instruction to answer the question.

12. An entity responding to a Fed.R.Civ.P. 30(b)(6) notice of taking deposition shall fully comply with its duties under Rule 30(b)(6) to designate proper individuals

---

[2] In Re St. Jude Medical, Inc., 2002 WL 1050311 (D. Minn. May 24 2002).
[3] Cincinnati Ins. Co. v. Serrano, 2012 WL 28071, at *4.
[4] Cincinnati Ins. Co. v. Serrano, 2012 WL 28071, at *4.
[5] Cincinnati Ins. Co. v. Serrano, 2012 WL 28071, at *5.
[6] Armstrong v. Hussmann Corp. 163 F.R.D. 299, 301-02 (E.D. Mo. 1995).
[7] In Re St. Jude Medical, Inc., 2002 WL 1050311 (D. Minn. May 24 2002).
[8] In Re St. Jude Medical, Inc., 2002 WL 1050311 (D. Minn. May 24 2002).

for the deposition and to ensure that the designated individuals are properly prepared to provide binding testimony regarding the matters of examination designated in the deposition notice. Any question that could reasonably be expected to produce relevant facts is permissible; including those outside the scope of inquiry designated in the Rule 30(b)(6) deposition notice. Designation of a witness for a Rule 30(b)(6) does not prevent a non-Rule 30(b)(6) deposition of the same witness[9]

Stipulated to:

KOSIERADZKI SMITH LAW FIRM, LLC

Dated: April 6, 2016

_____

Mark R. Kosieradzki (ID #57745)
Joel E. Smith (ID #213184)
Andrew D. Gross (ID #0395389)
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Attorneys for Plaintiff

GERAGHTY, O'LOUGHLIN & KENNEY,
Professional Association

Dated: April 6, 2016

_____

Robert Mahoney (#66643)
Andrea P. Hoversten (#0389252)
Suite 1100 Alliance Bank Center
55 East Fifth Street
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[9] King v Pratt & Whitney, 161 F.R.D. 475 (S.D. Fla. 1995).

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Del. R. Evid. 403

Download

As amended through February 21, 2023

Rule 403 - Exclusion of Excluding Relevant Evidence for Prejudice, Confusion, or Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice,confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Del. R. Evid. 403

Amended November 28, 2017, effective 1/1/2018.

Comment

This rule tracks F.R.E. 403.

In Concord Towers, Inc. v. Long, Del. Supr., 348 A.2d 325 (1975), the Delaware Supreme Court ruled that whether the existence of surprise is reversible error depends on whether the surprise is prejudicial.

It is not intended that this rule will change that rule of law. See also Bennett v. State, Del. Supr., 164 A.2d 442 (Supr.1960) and Hoey v. Hawkins, Del. Supr., 332 A.2d 403 (1975).

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by Westar Energy, Inc. v. Wittig, Kan.App., July 9, 2010

884 A.2d 500
Supreme Court of Delaware.

Thomas T.S. **KAUNG**, Plaintiff–Below, Appellant,
v.
COLE NATIONAL CORPORATION, A Delaware Corporation Defendant–Below, Appellee.

No. 480, 2004.
|
Submitted March 30, 2005.
|
Decided July 5, 2005.

Synopsis
Background: Chief financial officer (CFO) brought advancement action against corporation seeking advancement of his attorney fees related to time spent with a non-lawyer consultant in regards to a Securities and Exchange Commission (SEC) investigation of corporation that implicated CFO. The Court of Chancery, New Castle County, ruled that CFO was not entitled to advancement of fees related to consultant, ordered reimbursement of such fees that were already advanced, and awarded corporation attorney fees. CFO appealed.

Holdings: The Supreme Court, Ridgely, J., held that:

[1] corporation was entitled to a fee shifting award based on CFO's representatives' bad faith in bringing action, and

[2] chancery court's determination regarding reimbursement of already advanced fees was premature.

Affirmed in part and reversed in part.

Procedural Posture(s): On Appeal.

West Headnotes (14)

[1] **Costs, Fees, and Sanctions** Particular Litigation Conduct

Chief financial officer's representatives acted in bad faith in advancement action against corporation pursuant to indemnity agreement for fees related to non-lawyer consultant in regards to Securities and Exchange Commission (SEC) investigation that implicated officer, and thus, corporation was entitled to a fee shifting award that awarded corporation its attorney fees and costs associated with the litigation; record suggested that advancement action was brought in the hope that corporation would advance sums that were not reasonably incurred in connection with officer's representation, and officer's representatives made excessive and duplicative deposition requests while ignoring their own discovery obligations.

12 Cases that cite this headnote

[2] **Costs, Fees, and Sanctions** Discretion of court

The Court of Chancery's discretion is broad in fixing the amount of attorneys' fees to be awarded.

13 Cases that cite this headnote

[3] **Appeal and Error** Attorney Fees

Absent a clear abuse of discretion, Court of Chancery's award of attorney fees will not be reversed.

8 Cases that cite this headnote

[4] **Costs, Fees, and Sanctions** Necessity of Authorization for Award; "American Rule"

Under "American Rule," courts do not award attorney fees to prevailing parties in litigation.

31 Cases that cite this headnote

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[5] **Costs, Fees, and Sanctions** Meritless or Bad-Faith Litigation

There is exception to the American Rule, permitting award of attorney fees to prevailing party where losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

32 Cases that cite this headnote

[6] **Costs, Fees, and Sanctions** Meritless or Bad-Faith Litigation

Purpose of the "bad faith" exception to the American Rule, permitting award of attorney fees to prevailing party where losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, is to deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process.

50 Cases that cite this headnote

[7] **Pretrial Procedure** Failure to Appear or Testify; Sanctions

Unprofessional behavior obstructing a deposition is just as outrageous and unacceptable when accomplished by a non-lawyer consultant or a witness at a deposition as it is when accomplished by an attorney.

1 Case that cites this headnote

[8] **Corporations and Business Organizations** Actions or proceedings to enforce or deny

The narrow scope of the advancement proceeding, in which chief financial officer sought reimbursement for additional costs incurred in underlying litigation, prohibited the ultimate determination of officer's entitlement to indemnity or corporation's entitlement to recoupment of litigation costs previously advanced. 8 Del.C. § 145.

8 Cases that cite this headnote

[9] **Appeal and Error** Proceedings in Equity

Court of Chancery's factual findings are reviewed for clear error.

[10] **Appeal and Error** De novo review

Once the Court of Chancery's factual findings are established, appellate court will review the ultimate determination of the legal issue presented under a de novo standard of review.

[11] **Corporations and Business Organizations** Advancement of expenses

Rights of corporate officials to indemnification and advancement for expenses incurred in connection with litigation and other legal proceedings are deeply rooted in the public policy of Delaware corporate law in that they are viewed less as an individual benefit arising from a person's employment and more as a desirable mechanism to manage risk in return for greater corporate benefits. 8 Del.C. § 145.

15 Cases that cite this headnote

[12] **Corporations and Business Organizations** Discretionary or mandatory

Whether a corporate officer has a right to indemnification for expenses incurred in litigation is a decision that must necessarily await the outcome of the investigation or litigation. 8 Del.C. § 145.

7 Cases that cite this headnote

[13] **Corporations and Business Organizations** Actions or proceedings to enforce or deny

Scope of an advancement proceeding by corporate official against corporation, to obtain advancement for expenses incurred in connection with litigation and other legal proceedings, is limited to determining issue of entitlement according to corporation's advancement provisions and not to issues regarding the official's alleged conduct in the underlying litigation. 8 Del.C. § 145(k).

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19 Cases that cite this headnote

[14] **Corporations and Business Organizations** Actions or proceedings to enforce or deny

Corporate official's right to advancement of litigation costs is a subsidiary element of the right to ultimate indemnification, but the narrow scope of advancement proceeding prohibits an ultimate determination of indemnification and liability owed by a corporate official for sums already advanced; while the rights to indemnification and advancement are correlative, they are still discrete and independent rights, with the latter having a much narrower scope. 8 Del.C. § 145.

19 Cases that cite this headnote

***502** Court Below: Court of Chancery of the State of Delaware, in and for New Castle County, No. 163–N.
Upon appeal from the Court of Chancery. **AFFIRMED IN PART; REVERSED IN PART**.

Attorneys and Law Firms

John L. Reed (argued), Thomas P. McGonigle Matt Neiderman, of Duane Morris, L.L.P., New Castle, DE, for appellant.

Donald J. Wolf, Jr., Arthur L. Dent, Joseph B. Cicero, of Potter, Anderson & Carroon, L.L.P. and Robert P. Duvin, Robert M. Wolff (argued), Barry Y. Freeman, of Duvin, Cahn & Hutton, Cleveland, OH, for appellee.

Before STEELE, Chief Justice, HOLLAND and RIDGELY, Justices.

Opinion

RIDGELY, Justice:

This appeal challenges rulings of the Court of Chancery made in the context of an advancement proceeding for litigation expenses. The case was brought by the plaintiff-appellant, Thomas T.S. **Kaung** ("**Kaung**"), as a corporate officer under 8 *Del. C.* § 145 ("Section 145"), against the defendant-appellee, **Cole** National Corporation ("**Cole**"). The Court of Chancery ruled that **Kaung** was not entitled to receive advancement of any part of his attorneys' fees and expenses related to time spent with a non-lawyer consultant. The Court of Chancery next ruled that **Cole** was entitled to recoup sums previously advanced with respect to the non-lawyer consultant's fees and attorneys' fees related to time spent with the non-lawyer consultant. The Court of Chancery finally awarded **Cole** its attorneys' fees and expenses, together with court costs, incurred in connection with this case. **Kaung** appeals the latter two rulings.

We find no abuse of discretion by the Court of Chancery in its award to **Cole** of fees and other legal expenses related to this action. We reverse, however, the recoupment award because it is beyond the scope of a summary proceeding for interim advancement of litigation expenses under Section 145.

I. FACTUAL BACKGROUND

Kaung was employed by **Cole** on two separate occasions. [1] **Kaung** began his career with **Cole** in 1979 as a Corporate Controller and he ultimately rose to the positions of Executive Vice President and Chief Administrative Officer. In 1990, **Kaung** and **Cole** parted ways. In the interim, **Kaung** pursued other opportunities, including starting his own financial consulting firm called River International, Inc. ("River"), which provided consulting services in the area of financial controls. In fact, **Cole** was one of River's clients.

***503** During this relationship, River assisted **Cole** in restoring its financial viability and searching for high level management to fill the positions of Chief Operating Officer ("COO") and Chief Financial Officer ("CFO"). While **Cole** was successful in filling the COO position, it struggled to find a new CFO. **Cole's** Chief Executive Officer ("CEO"), Jeffrey **Cole**, then approached **Kaung** about taking the CFO position. **Kaung** was reluctant at first, because he was preparing to retire, but Jeffrey **Cole** ultimately persuaded **Kaung** to sign a three-year contract with **Cole** as its CFO. The parties had an understanding that during that period, Jeffrey **Cole** and **Kaung** would work towards turning around the company financially, while at the same time actively recruiting **Kaung's** replacement.

At the time **Kaung** became CFO, **Cole** insured **Kaung** and others with a Directors and Officers ("D & O") insurance policy. **Kaung** also entered into an indemnification agreement with **Cole**. This agreement provided that if **Kaung** was the subject of litigation related to his employment, **Cole** would

advance **Kaung** reasonable litigation costs to the extent that the D & O policy was insufficient. Section 2(a) of the agreement provides that the company shall indemnify the Indemnitee "against any and all costs, charges and expenses (including, without limitation, attorneys' and others' fees and expenses), judgments, fines and amounts paid in settlement actually or reasonably incurred...."[2] Pursuant to Section 2(e) of the agreement, attorneys' and others' fees and expenses "shall be paid by the Company in advance of the final disposition of such action, suit or proceeding as authorized in accordance with Section 4(b) hereof."[3] Section 4(b), in relevant part, states:

> For purposes of determining whether to authorize advancement of expenses pursuant to Section 2(e) hereof, the Indemnitee shall submit to the Board a sworn statement of request for advancement of expenses ... averring that (i) the Indemnitee has reasonably incurred or will reasonably incur actual expenses in defending an actual, civil, criminal, administrative or investigative action, suit, proceeding or claim and (ii) the Indemnitee undertakes to repay such amount if it shall ultimately be determined that the Indemnitee is not entitled to be indemnified by the Company, under this Agreement or otherwise.[4]

Kaung returned to **Cole** as CFO in March 2000, and as agreed, Jeffrey **Cole** hired **Kaung's** replacement, Larry Hyatt, in 2002. Following a short transition period, **Kaung** retired in July 2002. In the fall of 2002, however, questions arose regarding **Cole's** accounting practices. Those questions specifically addressed the revenues **Cole** recorded in its financials received from warranties sold on its optical products. **Cole's** former auditor, Arthur Andersen LLP, had maintained that recognizing warranty revenues at the time of sale was appropriate. Following the Enron and WorldCom scandals that implicated Arthur Anderson, **Cole** hired Deloitte & Touche LLP, which advised that the warranty revenue methodology that Arthur Anderson advocated was inappropriate. As a result, **Cole** publicly announced that it would restate its financials for fiscal years 1998 through 2001 as well as the first two quarters of 2002.

***504** In response to **Cole's** announcement, certain shareholders of **Cole** filed a class action suit on December 6, 2002. That suit, which contained allegations of securities fraud against **Cole** and its various corporate officers, included **Kaung** as a defendant. In addition, on December 24, 2002, the Securities and Exchange Commission (the "SEC") launched an investigation into **Cole's** accounting and financial reporting for the period during which **Kaung** was the CFO.

Cole then retained the Jones Day law firm to represent the corporate and individual defendants. **Cole** also hired the law firm of Venable LLP to perform an internal investigation. A determination was later made, however, that certain indemnitees, including **Kaung**, should seek separate representation. The **Cole** board of directors passed a resolution approving the separate representation.

Kaung hired Malcolm Kelso ("Kelso"), the sole member of the Irontree Group, Inc., as a non-lawyer consultant.[5] Kelso then introduced **Kaung** to Steven D. Cundra, Esquire ("Cundra"), of the O'Rourke & Cundra law firm, with whom Kelso had a prior relationship.[6] **Kaung** later retained the O'Rourke & Cundra law firm as his separate counsel in connection with the SEC investigation and the class action suit. The Court of Chancery inferred that Kelso recommended these lawyers and urged **Kaung** to hire them, as evidenced by the fact that Kelso engaged in profitable joint representation with this firm in the past.[7] This inference is supported by the record.

Initially, **Cole** advanced all of Kelso's and Cundra's bills.[8] However, **Cole** then began to question the advancement of **Kaung's** legal expenses, specifically inquiring into Kelso's qualifications and his role in the litigation. On May 2, 2003, counsel for **Cole** sent a letter to O'Rourke & Cundra concerning the advancement of their bills and inquiring about Kelso's qualifications. In addition, on May 9, 2003, **Cole's** general counsel, Leslie D. Dunn, Esquire ("Dunn"), wrote to **Kaung** directly, expressing concern about the reasonableness of Kelso's fees.

Dunn testified that despite these repeated requests she never received information regarding Kelso's education or professional background, the scope of his work at **Cole**, the number of hours he worked on this matter or even his billing rate. **Kaung** claimed that he responded to Dunn's reservations about Kelso by pointing out that Kelso provided litigation consulting services to both **Cole** and Jones Day in the past. **Kaung** also emphasized that AIG, the D & O insurance carrier, had ***505** reviewed and approved payment for Kelso's work.

Cole advanced approximately $150,000 with respect to Kelso's bills for time spent through May 15, 2003. **Cole**

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also advanced all of O'Rourke & Cundra's fees through January 2004. In December 2003, out of the concern that the fees requested by **Kaung** were becoming excessive, **Cole** hired the law firm of Duvin, Cahn & Hutton to evaluate all advancement requests from **Kaung** related to the SEC investigation.

On January 7, 2004, **Kaung** sent **Cole** a notice of default for its failure to pay the balance of Kelso's bills for the period of mid-May until August 2003 and the November and December 2003 bills of O'Rourke & Cundra. **Cole** responded to **Kaung** on January 12, 2004, advising him that it was investigating the reasonableness of his litigation expenses, emphasizing that the shareholders' class action suit had concluded. [9] The same day, **Kaung** filed suit in the Court of Chancery to compel **Cole** to advance Kelso's and Cundra's fees for the SEC investigation and related class action litigation. The next day **Cole** authorized full payment of O'Rourke & Cundra's outstanding bills, but again notified **Kaung** that it had retained special outside counsel to review the reasonableness of all the bills. Despite the fact that **Cole** paid O'Rourke & Cundra's outstanding bills and continued to advance its fees, **Kaung** persisted in prosecuting this case in the Court of Chancery.

The course of discovery in this case was marked by conflict. The most egregious conduct came from Kelso. The Court of Chancery found that there were "emails from Kelso to Dunn and outside counsel to **Cole** that are at best bizarre and at worst threatening ... [and] Kelso's behavior in connection with his own deposition was highly inappropriate in that he repeatedly postponed his appearance and then refused to answer questions when he finally appeared." [10] In addition, Cundra's conduct during discovery was suspicious in that he did not respond to any of **Cole's** interrogatories or requests for production of documents regarding Kelso. [11]

The Court of Chancery held a one day trial on June 18, 2004. At a pretrial conference, **Kaung's** new Delaware counsel withdrew **Kaung's** request for payment of Kelso's fees. The Court of Chancery, therefore, only considered Kelso's role as a litigation advisor for the purpose of evaluating O'Rourke & Cundra's fees related to consultations with Kelso. It determined that the time billed by O'Rourke & Cundra relating to its dealing with Kelso was not reasonably incurred in connection with its representation of **Kaung** pursuant to the indemnification agreement. [12] As a result, the Court of Chancery concluded that O'Rourke & Cundra was not entitled to advancement of its unpaid legal fees. [13] The Court of Chancery also held that **Cole** would be entitled to offset any additional amount of those disallowed time charges against any future request by **Kaung** for advancement, and that at the conclusion of the SEC matter **Cole** would be entitled to sue **Kaung** for recovery of amounts it has already advanced that it believes were not properly subject to a claim for indemnification. ***506** [14]

In its final order and judgment following its written opinion, the Court of Chancery ordered **Kaung** to pay **Cole** $150,606.85 for the amount already advanced for Kelso's fees. It also determined that $81,760 of O'Rourke & Cundra's bill related to its interactions with Kelso and that **Cole** had no obligation to pay **Kaung** the $65,226.86 billed for the time that O'Rourke & Cundra spent consulting with Kelso. **Kaung** was ordered to pay **Cole** $16,533.14 as the portion of O'Rourke & Cundra's fees that had already been advanced pertaining to its dealings with Kelso. **Kaung** was also ordered to pay **Cole** $300,000 for attorneys' fees and expenses due to the bad faith conduct of his representatives in this action.

II. THE COURT OF CHANCERY'S FEE SHIFTING AWARD

[1] [2] [3] We first address whether the Court of Chancery improperly shifted the costs of this advancement action to **Kaung** by awarding **Cole** its attorneys' fees and expenses, together with court costs, incurred in connection with this advancement action. At issue is whether the misconduct in this case satisfies the bad faith standard required for fee shifting. The Court of Chancery's discretion is broad in fixing the amount of attorneys' fees to be awarded. [15] Absent a clear abuse of discretion, we will not reverse the Court of Chancery's award. [16] After carefully reviewing the record, we find no abuse of discretion with respect to the Court of Chancery's fee shifting award.

[4] [5] [6] It is a general rule that courts in the United States do not award attorney's fees to prevailing parties in litigation. [17] This practice, commonly referred to as the "American Rule," [18] is followed by the Delaware courts. [19] However, there are recognized exceptions to the American Rule, which invoke equitable principles that have been recognized as a matter of common law. [20] One well-recognized exception to the American Rule is where the "losing party has 'acted in bad faith, vexatiously, wantonly,

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or for oppressive reasons.' "[21] The purpose of this so-called "bad faith" exception is to " 'deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process.' "[22] Delaware courts have awarded attorney's fees for bad faith when "parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims."[23] In the present case, the record fully supports the Court of Chancery's conclusion that **Kaung's** "actions in the course of this litigation constitute bad faith conduct sufficient to justify an award of attorneys' fees."[24]

***507** At the time the suit was filed, **Cole** had already advanced more than $150,000 with respect to Kelso's fees and was withholding further payment after **Kaung** failed to provide further information regarding the reasonableness of Kelso's bills. **Cole** was not delinquent in paying O'Rourke & Cundra's bills and actually authorized the payment of them the day after **Kaung** filed suit. The record suggests that the decision to file suit was made in the hope of **Cole** advancing sums that were not reasonably incurred in connection with the representation of **Kaung**.[25]

In addition, the record shows that throughout the litigation **Kaung's** representatives made excessive and duplicative deposition requests while ignoring their own discovery obligations. They refused to facilitate the schedule of Kelso's deposition, and when he finally appeared for deposition, he refused to answer questions and instead peppered **Cole's** attorneys with questions and accusations. Cundra, who accompanied Kelso to the deposition, aggravated the situation by supporting Kelso's behavior and failing to provide any substantive answers to **Cole's** discovery requests regarding Kelso.

We therefore have no difficulty in upholding the Court of Chancery's conclusion that the conduct of **Kaung's** representatives in this case rose to the level of bad faith. Thus, the Court of Chancery did not abuse its discretion in awarding **Cole** its attorneys' fees and expenses incurred in connection with this advancement action.

We take this opportunity to comment further on the unseemly conduct of Kelso and Cundra. We do so under our "exclusive supervisory responsibility to regulate and enforce appropriate conduct of ... all lawyers, litigants, witnesses, and others" participating in a Delaware proceeding.[26]

For the past several years, professionalism and legal ethics has been the subject of much discussion among judges, practitioners, scholars and the general public.[27] One component of this dialogue concerns professional responsibility in the discovery practice, which implicates the "basic and fundamental" concept of civility,[28] the flip side of the coin being incivility.[29] Civility plays an important role in the administration of civil and criminal justice. Without it, litigation becomes even more expensive and public trust and confidence in the administration of justice is undermined. Alexander Hamilton put it best that "the ordinary administration of criminal and civil justice ... contributes ... more than any other circumstance, to impressing upon the minds of the people affection, esteem, and reverence toward the government."[30] Litigation tainted with incivility ***508** and its resulting expense has the opposite effect. Justice Sandra Day O'Connor has commented:

> I believe that the justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another. Stress and frustration drive down productivity and make the process more time-consuming and expensive. Many of the best people get driven away from the field. The profession and the system itself lose esteem in the public's eyes.
>
> * * * * * *
>
> In my view, incivility disserves the client because it wastes time and energy—time that is billed to the client at hundreds of dollars an hour, and energy that is better spent working on the case than working over the opponent.[31]

We could not agree more with Justice O'Connor's insightful comments.

In *Paramount,* this Court addressed in an addendum to its opinion the "issue of professionalism involving deposition practice in proceedings in Delaware trial courts."[32] The focus of the addendum in *Paramount* was a lawyer, who represented a Paramount director in his deposition in an unprofessional way.[33] The lawyer did not otherwise appear for a party in this case and was not admitted *pro hac vice.*[34] During the deposition, he instructed the Paramount director not to answer questions, "was extraordinarily rude, uncivil and vulgar," obstructed the deposing lawyer from eliciting testimony from the Paramount director, and disparaged the deposing lawyer with personal insults.

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[7] This Court found that lawyer's "unprofessional behavior to be outrageous and unacceptable."[35] It is just as outrageous and unacceptable when accomplished by a non-lawyer consultant or a witness at a deposition. We join the Court of Chancery in its strong disapproval of it. For future guidance and deterrence, we emphasize that sanctions may be imposed upon anyone participating in a Delaware proceeding who engages in abusive litigation tactics.[36]

III. THE COURT OF CHANCERY'S RECOUPMENT AWARD

[8] **[9]** **[10]** We now turn to whether the Court of Chancery erred, as a matter of law, by determining **Kaung's** liability to **Cole** for fees previously advanced in this summary proceeding. We review the Court of Chancery's factual findings for clear error.[37] Once the Court of Chancery's factual findings are established, we will review the ultimate determination of the legal issue presented under a *de novo* standard of review.[38]

***509** **[11]** Section 145 of the DGCL vests Delaware corporations with the capacity to protect their present and former corporate officials from expenses incurred in connection with litigation and other legal proceedings.[39] Rights to indemnification and advancement are deeply rooted in the public policy of Delaware corporate law in that they are viewed less as an individual benefit arising from a person's employment and more as a desirable mechanism to manage risk in return for greater corporate benefits.[40] Section 145 of the DGCL expressly contemplates protection for corporate officials from the risks of legal proceedings not only by way of reimbursement (i.e., indemnification) but also by the pre-indemnification advancement of certain litigation-related expenses.[41]

[12] **[13]** An advancement action is a summary proceeding.[42] The statutory authorization for interim advancement of litigation expenses is distinct from the right to receive final indemnification under Section 145(a) and (b) of the DGCL.[43] Whether a corporate officer has a right to indemnification is a decision that must necessarily await the outcome of the investigation or litigation.[44] Section 145(e) of the DGCL fills the gap by permitting advancement, so the corporation may shoulder these interim costs.[45] However, the scope of an advancement proceeding under Section 145(k) of the DGCL is limited to determining "the issue of entitlement according to the corporation's advancement provisions and not to issues regarding the movant's alleged conduct in the underlying litigation."[46]

[14] We recognize, as the Court of Chancery has, that the right to advancement "is a subsidiary element of the right to ultimate indemnification"[47] and these legally distinct rights "are commonly addressed in neighboring statutory provisions."[48] However, the narrow scope of an advancement proceeding prohibits an ultimate determination of indemnification and liability owed by a corporate official for sums already advanced.[49] While the ***510** rights to indemnification and advancement are correlative, they are still discrete and independent rights, with the latter having a much narrower scope.[50]

In the present case, it was appropriate for the Court of Chancery to determine that the time billed by O'Rourke & Cundra relating to its dealings with Kelso was not reasonably incurred in connection with its representation of **Kaung** pursuant to the indemnification agreement, and that O'Rourke & Cundra was not entitled to advancement of its unpaid legal fees. However, we conclude that the Court of Chancery prematurely decided **Kaung's** liability for sums previously advanced voluntarily by **Cole**. The Court of Chancery's determination was premature, just as a direct recoupment claim would have been by **Cole** for fees it advanced. We hold that an advancement proceeding is summary in nature and not appropriate for litigating indemnification or recoupment. The detailed analysis required of such claims is both premature and inconsistent with the purpose of a summary proceeding.[51]

IV. CONCLUSION

We affirm the Court of Chancery's award of attorneys' fees and expenses in favor of **Cole**. We reverse as premature the judgment of the Court of Chancery to the extent it ordered **Kaung** to repay sums already advanced.

All Citations

884 A.2d 500

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Footnotes

1 **Cole** is a publicly traded company incorporated in Delaware with its principal place of business in Ohio. **Cole** is primarily engaged in the optical industry. Its business includes retail stores operating under the names "Things Remembered," Sears Optical, Target Optical, Pearle Vision and BJ's Optical. **Cole** also operates a managed vision care provider called **Cole** Managed Vision.

2 ***Kaung*** *v.* ***Cole*** *Nat'l. Corp.,* 2004 WL 1921249, at *4, 2004 Del. Ch. Lexis 126, at *17–*18.

3 *Id.* at *4, 2004 Del. Ch. Lexis 126, at *18.

4 *Id.*

5 **Kaung** testified that he and Kelso have known each other for over twenty years, and that they have worked on unrelated matters involving **Cole** in the past. In fact, Kelso is the ex-brother-in-law of Jeffrey **Cole**, the company's former CEO. Kelso has a very colorful background, including being serially sanctioned, found liable for civil theft in securities fraud and incarcerated for contempt of court. One judge has described Kelso as using "litigation to harass opponents and disrupt the judicial process." *Legal Econometrics, Inc. v. Abramson,* 1997 WL 786249, at *2 n. 2, 1997 U.S. Dist. Lexis 20354, at *5 (N.D.Tex.) (citation omitted).

6 The parties disputed the extent of Kelso's prior relationship with the O'Rourke & Cundra law firm, but the record is clear that the two have worked together on prior occasions. ***Kaung****,* 2004 WL 1921249, at *2 n. 5, 2004 Del. Ch. Lexis 126, at *6 n. 5.

7 *Id.* at *2, 2004 Del. Ch. Lexis 126, at *5.

8 The **Cole** board of directors authorized advancement of **Kaung's** legal expenses on January 23 and 24, 2003, and again, on March 27, 2003.

9 The shareholders class action suit was settled in May 2003. However, the SEC investigation was ongoing.

10 *Id.* at *2 n. 10, 2004 Del. Lexis 126 at *8 n. 10.

11 *Id.*

12 ***Kaung****,* 2004 WL 1921249, at *5–*6, 2004 Del. Ch. Lexis 126, at *26–*27.

13 *Id.* at *6, 2004 Del. Ch. Lexis 126, at *27.

14 *Id.*

15 *Johnston v. Arbitrium (Cayman Islands) Handels AG,* 720 A.2d 542, 547 (Del.1998).

16 *Id.* (citing *Chavin v. Cope,* 243 A.2d 694 (Del.1968)).

17 *Id.* at 545.

18 *Id.*

19 *Brice v. State,* 704 A.2d 1176, 1178 (Del.1998).

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20 *Id.* (citing *Goodrich v. E.F. Hutton Group, Inc.,* 681 A.2d 1039, 1043–44 (Del.1996)).

21 *Id.* at 1179 (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 258–59, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975)).

22 *Id.* (quoting *Schlank v. Williams,* 572 A.2d 101, 108 (D.C.1990)).

23 *Johnston,* 720 A.2d at 546 (footnotes and citations omitted).

24 ***Kaung***, 2004 WL 1921249, at *6, 2004 Del. Ch. Lexis 126, at *28.

25 An email from Kelso to Cundra strongly suggests an improper motive. The email reads as follows: "This looks good to me—file suit as soon as possible—they will pay—DUNN is a fool." *See* Transcript of Trial Proceeding on June 18, 2004 at Defense Exhibit 77.

26 *Paramount Communications, Inc. v. QVC Network, Inc.,* 637 A.2d 34, 52 n. 23 (Del.1994) (citations omitted).

27 *See generally* Paula L. Hannaford, *The National Action Plan on Lawyer Conduct: A Role for the Judge in Improving Professionalism in the Legal System,* 36 CT. REV. 36 (1999) (addressing he increasing role of the judicial system in improving attorney professionalism).

28 *Kohlmayer v. Nat'l R.R. Passenger Corp.,* 124 F.Supp.2d 877, 879 (D.N.J.2000).

29 *See* Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility Candor and Parlor Tricks,* 34 TEX. TECH. L. REV. 3, 7 (2002).

30 The Federalist No. 78, at 103 (Alexander Hamilton) (1st Modern Library ed., 1941).

31 *Paramount,* 637 A.2d at 52 n. 24 (quoting Justice Sandra Day O'Connor, Remarks to an American Bar Association Group on "Civil Justice Improvements" (Dec. 14, 1993)).

32 *Id.* at 52.

33 *Id.*

34 *Id.*

35 *Paramount,* 637 A.2d at 54–55.

36 *See* *Link v. Wabash R.R.,* 370 U.S. 626, 631–32, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (providing that courts have inherent power to levy sanctions in response to abusive litigation tactics); *Roadway Express v. Piper,* 447 U.S. 752, 764–67, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (recognizing that courts have inherent power to assess attorney's fees against counsel for abusive litigation practices); *In re Miller,* 81 B.R. 669, 676 (Bankr.M.D.Fla.1988) (noting that all courts have inherent civil contempt power).

37 *Scharf v. Edgcomb Corp.,* 864 A.2d 909, 916 (Del.2004) (citing *Anderson v. Bessemer City,* 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)).

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38 *Id.* (citing *Pullman–Standard, Div. of Pullman, Inc. v. Swint,* 456 U.S. 273, 289 n. 19, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); *Ornelas v. United States,* 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Lopez v. State,* 861 A.2d 1245 (Del.2004)).

39 *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery,* § 8–2.

40 *Id.*

41 *Id.*

42 *Homestore, Inc. v. Tafeen,* 2005 WL 1383348, at *1, 2005 Del. Lexis 217, at *2; *Fasciana v. Elec. Data Sys. Corp.,* 829 A.2d 160, 167 (Del.Ch.2003).

43 *See* *Advanced Mining Sys., Inc. v. Fricke,* 623 A.2d 82, 84 (Del.Ch.1992) (finding that "indemnification rights and rights to advancement of possibly indemnifiable expenses ... [are] distinct types of legal rights."); *Citadel Holding Corp. v. Roven,* 603 A.2d 818 (Del.1992) (holding that the right to advancement of expenses was not dependent on the right to indemnification).

44 *See* Wolfe & Pittenger, *supra* note 39, at § 8–2.

45 *Id.*

46 *Homestore,* 2005 WL 1383348, at *1, 2005 Del. Lexis 217, at *2.

47 *Weinstock v. Lazard Debt Recovery GP, LLC,* 2003 WL 21843254, at *4, 2003 Del. Ch. Lexis 83, at *12–*13.

48 *Nakahara v. NS 1991 Am. Trust,* 739 A.2d 770, 779 n. 52 (Del.Ch.1998).

49 *See, e.g., Reddy v. Elec. Data Sys. Corp.,* 2002 Del. Ch. Lexis 69, at *29 ("Section 145 of the DGCL is an explicit rejection of this approach, because the clear authorization of advancement rights presupposes that the corporation will front expenses before any determination is made of the corporate official's ultimate right to indemnification,") (citing *Greco v. Columbia/HCA Healthcare Corp.,* 1999 WL 1261446, at *4, 1999 Del. Ch. Lexis 24, at *12; *Ridder v. CityFed Fin. Corp.,* 47 F.3d 85, 87 (3d Cir.1995)).

50 *See* Wolfe & Pittenger, *supra* note 39, at § 8–2.

51 *See* *Bergonzi v. Rite Aid Corp.,* 2003 WL 22407303, at *3–*4, 2003 Del. Ch. Lexis 117, at *11–*12 (holding that the corporation could not assert as a defense to a claim for advancement or as a ground for recouping amounts previously advanced that the former CFO had not satisfied statutory standards of conduct for indemnification, notwithstanding a guilty plea by the former CFO in a criminal proceeding for which advances were sought, and that it would be premature to decide whether the former CFO was entitled to indemnification because he had not been sentenced and therefore the criminal proceeding had not reached final judgment). *Cf.* *Rales v. Blasband,* 634 A.2d 927, 931 n. 4 (Del.1993) (indicating that a statutory books and records action is a summary proceeding); *Khanna v. Covad Comm'n Group, Inc.,* 2004 WL 187274, at *6, 2004 Del. Ch. Lexis 11, at *22 (providing that a statutory books and records action is not the proper forum for

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litigating a breach of fiduciary duty case because the detailed analysis required for a fiduciary duty action would defeat the purpose of that summary proceeding).

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UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Court of Chancery of Delaware,
New Castle County.

RE: PHILLIPS
v.
FIREHOUSE GALLERY, LLC, et al.

C.A. No. 3644–VCL.
|
Aug. 9, 2010.

Attorneys and Law Firms

Joseph N. Gielata, Esquire, Joseph N. Gielata, Attorney at Law, Wilmington, DE.

Bernard George Conaway, Esquire, Campbell & Levine, LLC, Wilmington, DE.

Opinion

J. TRAVIS LASTER, Vice Chancellor.

***1** Dear Counsel:
This is a non-expedited matter set for trial on September 27 and 28, 2010. The parties twice have sought my immediate assistance with scheduling the deposition of Scott Welker, a non-party who previously served as the president of the nominal defendant. For the reasons discussed below, Mr. Welker's deposition will go forward, if at all, on August 28 or 29, 2010. Plaintiff's counsel will bear expenses of $5,000, an amount which I determine to be a reasonable and conservative estimate of the costs his scheduling antics inflicted on defense counsel.

FACTUAL BACKGROUND

On July 29, 2010, plaintiff's counsel emailed defense counsel to say Mr. Welker's deposition would take place on Monday, August 2 or Wednesday, August 4. On August 2, plaintiff's counsel noticed the deposition for August 4 at 3:00 p.m. These communications announced an abrupt change in Mr. Welker's role in the litigation. In May, plaintiff's counsel indicated that he would not depose Mr. Welker.

Defense counsel reacted to the last-minute deposition notice with some consternation, because he was then in the middle of a two-week vacation with his family. Defense counsel had not previously discussed his vacation plans with plaintiff's counsel, nor did he have a colleague on call to handle any discovery emergencies. While in another case this might amount to an oversight, in this matter it was reasonable. There was nothing on the calendar when defense counsel left, and although the dispute is obviously important to the parties, the case is not a high-dollar matter that can rationally support a large team of attorneys or (albeit a closer question) an attorney getting up to speed to stand by as backup.

In the face of defense counsel's objection to the sudden deposition, plaintiff's counsel insisted on pressing forward. He did not seek or provide alternative dates. Part of his justification appears to be that Mr. Welker was busy and that the questioning would be short, lasting perhaps an hour. Leaving aside that an hour of testimony for one side may elicit multiple hours of questioning by the other, brevity provided as much justification for rescheduling as for combatively digging in. Confronted by the plaintiff's intransigence, defense counsel contacted me. Through my assistant, I advised the attorneys that this was a matter they should work out and that if they did not, one of them would be unhappy.

Plaintiff's counsel then presented his colleague with the following options:

1) You can call in tomorrow[;]

2) An associate of yours can call in tomorrow[;]

3) I'll postpone the dep until next week if you agree to make yourself available EVERY day of the week at ANY time that Mr. Welker can make himself available.

If you go with # 3, I want an absolute written commitment from you, and an understanding that you will not bother the Court about this in the event that you are unavailable when Mr. Welker is available (assuming he is available next week).

***2** This was not constructive, and defense counsel understandably declined this scheduling ukase. Among other things, there were additional non-party depositions scheduled for the following week, and defense counsel had oral

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argument in another matter before the United States District Court for the Southern District of New York. The impasse persisted until defense counsel contacted Mr. Welker directly and obtained August 9, 10, 28 and 29 as alternative dates.

The August 9 and 10 dates conflict with other non-party depositions in this case, but everyone can attend on August 28 or 29. Plaintiff's counsel objects that the current *draft* scheduling order has his pre-trial brief due on August 27, but defense counsel offered to revise the schedule to accommodate him. Unmollified, plaintiff's counsel asked me on Friday, August 6 to let him proceed with the deposition on August 9 or 10.

LEGAL ANALYSIS

Court of Chancery Rule 30(b)(1) provides that "[a] party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action." Delaware lawyers are expected to (and customarily do) approach deposition scheduling with due regard for the ethic of civility that animates practice in this jurisdiction. Deposition scheduling is a cooperative endeavor. Counsel openly discuss witness availability and their own calendars so that depositions can take place at times convenient for all parties. When initially issued, deposition notices typically contain nominal dates and are designed to provide notice of the identity of the witness to be deposed, rather than unilaterally setting the date, time, and place when the deposition will go forward. *See La. Mun. Police Empl. Ret. Sys. v. Fertitta,* 2009 WL 3806216, at *1 (Del. Ch. Oct. 27, 2009) (noting similar practice with motions for commission). The parsimonious and begrudging proffer of one or perhaps two dates is not an acceptable approach to deposition scheduling. The surprise deposition notice certainly is not.

Of course there are many times when the facts require (or can accommodate) scheduling a deposition on short notice. It may be necessary for counsel to subject themselves to personal inconvenience when cooperatively preparing a matter for responsible consideration by the Court. This is not one of those times.

Under the circumstances of this case, the plaintiff did not give reasonable notice as required by Rule 30(b)(1). Plaintiffs counsel did not act in good faith by attempting to extract a deposition on the plaintiffs preferred schedule by not asking the witness for alternative dates. Defense counsel in a non-expedited case should not have to contact a witness directly while on a family vacation to verify what plaintiff's counsel was telling him about when the witness could be deposed. Plaintiff's counsel may take Mr. Welker's deposition on August 28 or 29, when all counsel are available. If plaintiff's counsel opts not to proceed on those dates, then he will forego Mr. Welker's deposition.

***3** Although this remedy addresses the current scheduling dispute, it is not a sufficient consequence for the burdens plaintiff's counsel imposed on his colleague. Plaintiff's counsel therefore shall pay $5,000, representing what I determine to be a reasonable and conservative measure of the expense plaintiff's counsel inflicted as a result of his improvident approach to deposition scheduling. I could well set the amount higher. Sadly, this amount does not address the unnecessary burden placed on the Court. Payment is due within five business days. I impose these costs on plaintiff's counsel personally rather than on the plaintiff, because it is incumbent upon Delaware attorneys to uphold the expectations for practitioners before this Court. This includes resisting importunate demands for aggressive litigation tactics, whether those demands originate externally with a client or internally from the belligerent emotions that inevitably cloud at times the judgment of those engaged in the adversary process.

IT IS SO ORDERED.

Very truly yours,

/s/ J. Travis Laster

J. Travis Laster
Vice Chancellor

All Citations

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EDUCATION

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J.D.

Undergraduate

1978 University of Richmond
B.A.
Magna Cum Laude

Professional Experience

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Delaware State Bar

1984 – present Director, Ashby & Geddes
Wilmington, DE

1981- 1984: Deputy Attorney General – State of Delaware

Awards and Honors

One of Delaware's Top Attorneys – Delaware Today for years
Delaware Super Attorney

Administrative

Delaware Trial Lawyers Association:
2003-2004: President
2002-2003: President-Elect
Past Member – Board of Governors

Member, House Task Force on Medical Malpractice Liability Insurance, 2006;

Past member, Superior Court Med. Negl. Case Scheduling Order Committee

Lecturer: Delaware Trial Lawyers; Malpractice Insurance Adjusters Conference, and University of Delaware.

Practice Concentration

Leads the firm's Medical Negligence, Automobile Accident, and Product Liablity groups.

213 A.3d 39
Supreme Court of Delaware.

IN RE: SHORENSTEIN HAYS-NEDERLANDER THEATRES LLC APPEALS

Nos. 596, 2018 and 620, 2018
|
Submitted: May 8, 2019
|
Decided: June 20, 2019
|
Reargument Denied July 8, 2019

Synopsis

Background: Member of Delaware limited-liability company (LLC), which, like the other member, was involved in theatrical productions, brought action against other member for a declaratory judgment that LLC affiliated with plaintiff member, which was an LLC that owned a theater in California, had no obligation to renew Delaware LLC's lease for the theater. Defendant member asserted counterclaims against plaintiff member, as well as third-party claims against the family that controlled plaintiff member, based on claims of breaches of fiduciary duty, breaches of contractual obligations, and other claims. After the Court of Chancery, C.A. No. 9380-VCP, Parsons, Vice Chancellor, 2015 WL 1839684, dismissed counterclaims in part, the Court of Chancery, C.A. No. 9380-VCMR, Montgomery-Reeves, Vice Chancellor, 2018 WL 3646817, determined that there was no enforceable promise to renew the lease of the California theater to the Delaware LLC, that plaintiff member did not breach Delaware LLC's agreement, that family that controlled the plaintiff member breached their common-law fiduciary duties of loyalty, awarded defendant member nominal damages, dismissed remaining counterclaims, and awarded defendant member attorney fees and costs for bad-faith **deposition** conduct by witness for plaintiff member. Defendant member then moved for a preliminary injunction to prevent plaintiff member and family that controlled plaintiff member from staging certain productions at the California theater, which was a motion based on claim of breach of contract and other claims. The Court of Chancery, C.A. No. 2018-0701-TMR, Montgomery-Reeves, Vice Chancellor, 2018 WL 6271655, denied motion. Defendant member appealed, plaintiff member cross-appealed, and the appeals were consolidated.

Holdings: The Supreme Court, Valihura, J., held that:

[1] LLC agreement's clause that restricted a member entity from competing with LLC referred to affiliates of a member and not just the member itself;

[2] LLC's agreement's clause requiring members to devote their efforts to maximize LLC's economic success established a contractual duty of members not to engage in competitive activities that would undermine LLC's economic success or that would create conflicts of interest between the members;

[3] defendant member failed to show a likelihood of success on the merits on its counterclaim that plaintiff member's staging of the productions in question breached the LLC agreement; and

[4] awarding defendant member attorney fees and costs for bad-faith **deposition** conduct by witness for plaintiff member was warranted.

Opinion in the declaratory judgment action affirmed in part and reversed in part.

Opinion on the motion for a preliminary injunction affirmed in part and reversed in part, and the matter remanded.

Procedural Posture(s): On Appeal; Motion for Declaratory Judgment; Motion for Preliminary Injunction; Motion for Attorney's Fees; Motion for Costs.

West Headnotes (14)

[1] **Appeal and Error** Clear Error; "Clearly Erroneous" Standard

An appellate court will uphold the trial court's factual findings unless they are clearly erroneous.

[2] **Appeal and Error** De novo review

Appeal and Error Construction, interpretation, and application in general

An appellate court reviews questions of law and contractual interpretation de novo.

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[3] **Corporations and Business Organizations** Engaging in competing business; usurping opportunities

Limited-liability company's (LLC) agreement's provision that restricted a member entity from competing with LLC referred to affiliates of a member and not just the member itself; limiting competition was the most important thing that the LLC agreement was meant to do, and limiting the agreement to only the members would have done nothing to limit competition.

2 Cases that cite this headnote

[4] **Contracts** Construction as a whole

Contracts Construction to give validity and effect to contract

Courts interpret contracts as a whole and give each provision and term effect, so as not to render any part of the contract mere surplusage, and courts will not read a contract to render a provision or term meaningless or illusory.

7 Cases that cite this headnote

[5] **Contracts** Language of Instrument

When the contract is clear and unambiguous, courts will give effect to the plain-meaning of the contract's terms and provisions.

6 Cases that cite this headnote

[6] **Evidence** Nature and Existence of Ambiguity in General

When a contract's plain meaning, in the context of the overall structure of the contract, is susceptible to more than one reasonable interpretation, courts may consider extrinsic evidence to resolve the ambiguity.

5 Cases that cite this headnote

[7] **Declaratory Judgment** Corporations

First member of limited-liability company (LLC) did not abandon its claim in declaratory judgment action that LCC's agreement's clause requiring the members to devote their efforts to maximize LLC's economic success barred second member from declining to renew LLC's lease of a theater owned by LLC associated with second member; first member consistently advanced such an argument in pretrial briefing, either expressly or by referencing language found only in the clause at issue, and first member referenced the same clause in post-trial briefing.

[8] **Corporations and Business Organizations** Engaging in competing business; usurping opportunities

LCC's agreement's clause requiring the members, both of which were involved in theatrical productions, to devote their efforts to maximize LLC's economic success established a contractual duty of members not to engage in competitive activities that would undermine LLC's economic success or that would create conflicts of interest between the members, and thus member associated with owner of a theater could not itself or through its affiliates use the theater to compete with LLC's core business if such competition would not maximize LLC's economic success, unless the competition involved theatrical productions that were controlled by a member and that fell within agreement's clause regulating when such controlled productions could take place within 100 miles of city in which theater in question was located.

[9] **Contracts** General and specific words and clauses

Usually, specific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one.

2 Cases that cite this headnote

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[10] **Appeal and Error** Course and Conduct of Further Proceedings in Lower Court

First member of limited-liability company (LLC), which was a member seeking a preliminary injunction prohibiting second member from staging certain theatrical productions at theater owned by entity associated with second member, did not waive its argument that the staging of the productions violated LCC's agreement's clause requiring the members to devote their efforts to maximize LLC's economic success, and thus first member would be allowed to make such an argument on remand; trial court in related action involving second member's request for a declaratory judgment had already ruled against first member's argument as to meaning of the clause at issue, which was a ruling reversed on an appeal that had consolidated both matters.

[11] **Injunction** Public amusement and entertainment

Injunction Limited liability companies

First member of Delaware limited-liability company (LLC), which, like the second member, was involved in theatrical productions, failed to show a likelihood of success on claim that second member's staging of certain theatrical productions at theater owned by entity associated with second member violated LLC agreement, and thus first member was not entitled to preliminary injunction prohibiting the staging of the productions, despite argument that the staging of the productions violated LLC's agreement's clause governing members' staging, within a certain distance of city where theater in question was located, of productions that the member controlled; terms that second member and productions' producers agreed upon were the product of negotiations that occurred simply because of theater's ownership.

1 Case that cites this headnote

[12] **Pretrial Procedure** Failure to Disclose; Sanctions

Awarding plaintiff attorney fees and costs for bad-faith **deposition** conduct by witness for defendant was warranted; witness's flippant, evasive, ridiculous answers and speech-making continued throughout the entirety of the **deposition**, which ran for nine hours and 35 minutes.

2 Cases that cite this headnote

[13] **Pretrial Procedure** Proceedings and order

Pretrial Procedure Proceedings

Depositions are court proceedings, and counsel defending the **deposition** have an obligation to prevent their deponent from impeding or frustrating a fair examination.

2 Cases that cite this headnote

[14] **Attorneys and Legal Services** Pro hac vice admission

Delaware counsel moving the admission of out-of-state counsel pro hac vice must ensure that the attorney being admitted reviews the Principles of Professionalism for Delaware Lawyers, and they must also ensure that the out-of-state counsel understands what is expected of them in managing **deposition** proceedings outside the courthouse so that the litigation process is not abused. Del. Ch. Ct. R. 170(b), 170(c)(ii).

***41** Court Below: Court of Chancery of the State of Delaware, C.A. Nos. 9380-VCMR and 2018-0701-TMR

Upon appeal from the Court of Chancery. **AFFIRMED** in part, **REVERSED** in part, and **REMANDED**.

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Before VALIHURA, SEITZ, and TRAYNOR, Justices.

Opinion

VALIHURA, Justice:

***42** This is a consolidated appeal of two separate actions, both of which arise from a dispute involving a theater partnership.[1] Robert E. Nederlander, Sr. ("Robert")[2] controls Nederlander of San Francisco Associates ("Nederlander"), a California general partnership. Carole Shorenstein Hays ("Carole") and her family control CSH Theatres L.L.C. ("CSH"), a Delaware LLC.[3] Nederlander and CSH each own a fifty-percent membership interest in Shorenstein Hays-Nederlander Theatres LLC ("SHN"), a Delaware LLC that operates theaters in San Francisco under SHN's Plan of Conversion and Operating Agreement of the Company (the "LLC Agreement").

In 2010, CSH Curran LLC ("CSH Curran"), an entity that Carole co-manages,[4] purchased the Curran Theatre in San Francisco (the "Curran"). SHN had been operating under a lease from the Curran's then-owners, the Lurie Company ("Lurie"), since the beginning of the partnership. Carole and her husband, Dr. Jeffrey Hays ("Jeff") (collectively, the "Hayses"), did not extend that lease with SHN when it expired in 2014. Thereafter, the Hayses began staging productions at the Curran. In February 2014, CSH sued Nederlander in the Court of Chancery for a declaratory judgment that it had no legal obligation to renew the Curran lease (the "Declaratory Judgment Action").[5] Nederlander asserted counterclaims against CSH and third-party claims against the Hayses for breaches of their fiduciary and contractual obligations, among other claims.[6] The court held in a thorough July 31, 2018 opinion that there was no enforceable promise to renew the lease of the Curran to SHN, that CSH did not breach the LLC Agreement, and that the Hayses breached their common law fiduciary duties of loyalty (the "Declaratory Judgment Opinion").[7]

In September 2018, Nederlander sought a preliminary injunction in the Court of Chancery against CSH and the Hayes to ***43** prevent them from staging *Dear Evan Hansen* and *Harry Potter and the Cursed Child* ("*Harry Potter*") at the Curran (the "PI Action"). In the PI Action, Nederlander asserted four counts, but focused its injunction efforts on Count I, which asserted breach of contract claims (based upon the "provisions of Section 7.02 of the LLC Agreement or the contractual fiduciary duties owed to SHN and its members under the LLC Agreement")[8] against all defendants in that action.[9] The trial court denied that motion in a November 30, 2018 opinion (the "PI Decision").[10] On December 21, 2018, the trial court entered a partial final judgment as to Count I of Nederlander's Complaint, pursuant to Court of Chancery Rule 54(b), to allow for an immediate appeal of the PI Decision.

Nederlander argues on appeal that the trial court erred in the Declaratory Judgment Action by refusing to enforce Section 7.02(a) of the LLC Agreement against the Hayses. Specifically, Nederlander contends that the Hayses engaged in competitive conduct at the Curran that violated their contractual duty under Section 7.02(a) to maximize SHN's economic success. Alternatively, Nederlander argues that the trial court erred in the PI Decision by holding that the Hayses did not "control" *Dear Evan Hansen* and *Harry Potter*, and that the Hayses violated Section 7.02(b) of the LLC Agreement as a result. On cross-appeal, CSH contends that Nederlander's arguments are irrelevant because the trial court incorrectly held in the Declaratory Judgment Action that CSH's Affiliates, including the Hayses, are bound by Section 7.02.

For the reasons explained below, we agree with Nederlander that the Court of Chancery misinterpreted Section 7.02(a) and that the Hayses cannot stage competitive productions (not falling within Section 7.02(b)'s exceptions) at the Curran that violate its contractual duty to maximize SHN's economic success. Accordingly, we reverse that aspect of the trial court's decision. Because Nederlander has not challenged the court's rulings in the Declaratory Judgment Action as to damages and other forms of relief, we decline to remand that action.[11] Further, in view of our reversal of the trial court's interpretation of Section 7.02(a) in the Declaratory Judgment Action, we order remand of the PI Action for

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further proceedings consistent with this Opinion. We find no error with any other aspect of the trial court's decisions.

I. Background [12]

SHN began in 1977 as Shorenstein-Nederlander Productions of San Francisco, a partnership formed between Walter Shorenstein, Carole's father, and James M. Nederlander, Robert's brother. Since then, SHN has staged productions at several ***44** San Francisco theaters. On January 1, 1980, the partnership entered into a ten-year, written lease of the Curran with Lurie. [13] The partners extended the lease in 1989, 1990, and 1997.

In 1990, Walter Shorenstein sued Nederlander, claiming that it was "[b]ooking productions to play in competing geographic locations" and "[s]cheduling productions to play in nonpartnership theaters on the most advantageous and profitable dates." [14] The partners settled that litigation and supplemented the partnership agreement in 1992. Out of concern for Nederlander competition with the partnership, that supplement included a new provision in the partnership agreement, Section 4, which provided that:

> Both partners will devote their efforts to maximize the economic success of the Partnership and avoid conflicts of interest. Neither party will stage any production within 100 miles of San Francisco unless (i) it has first played in a Partnership theatre, or (ii) it has been rejected for booking by the other party, or (iii) the Partnership shares in the profits and/or losses of such booking pursuant to an agreement. [15]

This trial court found that this provision was "substantially similar" to Section 7.02 of the LLC Agreement, a key provision on appeal. [16] The trial court stated that limiting competition by the Nederlanders was " 'the most important thing' the agreement was meant to do." [17]

On November 6, 2000, the partnership was converted into a Delaware LLC, and Nederlander and CSH entered into the LLC Agreement as members with a fifty-percent ownership stake each. The LLC Agreement provides for a four-member board of directors, to which both members have the right to appoint two directors. Carole served as co-president of SHN between 2000 and June 2, 2014 (except from January 15, 2013 to March 16, 2013, when she served as SHN's sole president), and as one of the CSH-appointed directors of SHN from 2000 until June 2, 2014. Jeff also served as a CSH-appointed director from 2010 until October 27, 2014. Robert has been a Nederlander-appointed director of SHN since 2000 and its co-president since 2009. [18] Raymond Harris has served ***45** as the other Nederlander-appointed director since 2012.

As of 2010, SHN was operating three theaters in San Francisco: the Golden Gate Theatre, the Orpheum Theatre, and the Curran. SHN owned, and still owns, the Golden Gate and Orpheum, but, at that time, it leased the Curran. Producers prefer the Curran for "sit-down" productions—those that play for an extended time, sometimes for multiple years—because it most closely resembles a traditional Broadway theater. In 2009, Lurie had offered to sell the Curran to SHN for $30 million. After negotiations with Robert, Lurie lowered the price to $17.5 million in January 2010. Robert refused to purchase the Curran because he believed the price was still too high. Carole, however, viewed the Curran "as a special place" and decided to purchase it herself. The parties agreed that Carole had asked for Robert's permission to purchase the Curran, and that he gave his approval. But the parties disputed whether that approval was contingent on leasing the Curran back to SHN following the expiration of the Lurie lease on December 31, 2014. On December 15, 2010, Carole purchased the Curran through CSH Curran for $16.6 million, which she then rebranded as "SHN Curran Theatre." [19]

After Walter Shorenstein died in 2010, Carole began to feel that Robert was not interested in building a relationship with her. She was also worried about succession plans for SHN, and she "felt maligned, and, indeed, somewhat bullied that [she] was the one who bought" the Curran. [20] Accordingly, Carole "began to focus on obtaining sole control of the Company." [21]

In 2010 or 2011, Carole began instructing Greg Holland, who had been hired as SHN's CEO in 2001, not to communicate with Robert or Harris unless she and Jeff were present or part of the conversation. Yet, during that time, Carole and Holland were meeting together three or four times per week outside the presence of any Nederlander representatives. Concerned

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with Carole's instructions, Holland hired a personal attorney to advise him on the direction Carole had been giving him. At trial, he testified that Carole would often say that she viewed SHN as her company.[22] Carole also felt that she was doing most of the SHN-related work, and she thought the LLC Agreement should better reflect her work on SHN's behalf.

In January 2012, Carole emailed Thomas Hart, one of her business associates and managers of her trusts, saying:

> [I]t just seems that the partnership has grown and evolved since it was originally drawn up ... and goodness, within me, dare I say, the Organization would be quite different, we should perhaps look at the whole document ... it's important that I maintain CONTROL ... so I might suggest this is the IDEAL time to completely restructure the Partnership Agreement ....[23]

Carole also emailed Jeff and Hart in October 2012, stating that the new Curran ***46** lease "should lead to [a] new management agreement."[24] And in January 2013, Carole emailed Hart, saying: "I think it is time together [sic] a new management agreement in place, Tom. Succession and fees are key. This is the appropriate time to involve [our lawyer] and get clarity. I firmly believe that to start with the [C]urran lease is foolish. We are in the prime spot."[25] In addition to tying the Curran lease to a new LLC agreement, Carole sent several emails in January 2013 proposing the idea of blocking SHN's ability to make distributions until a new LLC agreement was in place. The trial court, citing testimony from Holland about Carole physically blocking an exit to a January 14, 2013 SHN board meeting, found that Carole "acted on her desire for more control."[26]

As Carole contemplated methods to leverage a new LLC agreement, Hart and Harris had been negotiating a new lease of the Curran to SHN. But in an executive session of SHN's January 28, 2014 board meeting, the Hayses told Robert that they would not continue negotiating a lease on the Curran until a new LLC agreement was contemplated. Carole demanded a new LLC agreement "to be more reflective of the time in which [they] lived, in that [Robert] was never in San Francisco, in that [she] could never get [Robert] on the phone, in that it became apparent that [Robert and Holland] were in constant communication and aligning."[27] Carole even admitted at trial that had Robert offered to give her control through a new LLC agreement, she would have approved the Curran lease "in a heartbeat."[28]

After several follow-up emails between Robert and the Hayses in February 2014, including a threat of legal action against CSH, the Hayses filed suit in the Court of Chancery on February 24, 2014. In its Complaint, CSH sought a declaratory judgment that it would not be in breach of the LLC Agreement or Delaware law if it did not renew the Curran lease with SHN. Carole resigned as co-president and a director of SHN on June 2, 2014, as the relationship between the Nederlander and Shorenstein-Hays factions continued to deteriorate.[29] Jeff remained a director of SHN for several more months, where, after at least one board meeting, he communicated SHN information to Carole. He did not resign as a director of SHN until October 27, 2014.

During that time, the Hayses were also planning new ventures at the Curran. On August 1, 2014, Carole invested $1 million ***47** in the musical production *Fun Home*. In return, she gained an obligation on the part of *Fun Home* to "endeavor to present the opening engagement at the Curran in San Francisco, taking into consideration the schedule and availability of the Curran," and a promise that it would not present the production in any other San Francisco area theater without Carole's approval.[30] After SHN's lease of the Curran expired on December 31, 2014, the Hayses embarked on a multi-million-dollar renovation of the Curran. The Curran reopened in 2017, after which it staged award-winning Broadway shows like *Bright Star*, *Fun Home*, and *Eclipsed*.

As the litigation in the Declaratory Judgment Action continued in 2017, the Hayses booked two more Broadway hits. First, on December 11, 2017, Carole and the producers of *Dear Evan Hansen* entered into a production agreement to play at the Curran from December 5 to December 30, 2018. In that agreement, Carole guaranteed the producers at least $1.3 million per week in revenue.[31] Carole also promised the producers "financial protection in the event that [the Court of Chancery] enjoined the show from playing at the Curran."[32] Second, the Hayses booked *Harry Potter* for a "sit-down" production scheduled to play from the fall of 2019 through December 31, 2022. The agreement with

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Ambassador Theater Group ("Ambassador"), an international theater owner and operator, included:

> (1) only allowing the presentation of "an extended sit-down production of *Harry Potter*" unless a replacement production is "approved in writing in advance by [Carole]," (2) guaranteeing revenue for [Carole], (3) Ambassador agreeing to hire current Curran personnel, and (4) [Carole] maintaining control over physical alterations to the theater necessary for *Harry Potter*. [33]

Ambassador entered into a separate show license with *Harry Potter's* producers, which it signed simultaneously with its deal with CSH Curran on April 20, 2018. The producers of both *Dear Evan Hansen* and *Harry Potter* openly negotiated with multiple venues, including SHN theaters, that were competing against each other to stage the productions. [34]

On September 25, 2018, Nederlander brought the PI Action in the Court of Chancery. Nederlander argued that the defendants breached their contractual and fiduciary duties by entering into contracts to stage *Dear Evan Hansen* and *Harry Potter* in violation of the LLC Agreement. Nederlander sought to enjoin the defendants from presenting those plays at the Curran.

II. Key Terms of the LLC Agreement

At the center of this dispute on appeal is Section 7.02 of the LLC Agreement, which provides:

> SECTION 7.02. Cooperation and Non-Competition.
>
> (a) The Shorenstein Entity and the Nederlander Entity hereby agree to devote their efforts to maximize the economic success of the Company and to avoid any conflicts of interests between the Members. All actions of the Members and their representatives with regard to the Company and theater matters will be carried out in good faith and in a prompt and expeditious manner.
>
> ***48** (b) Until the termination of the Company pursuant to this Agreement, neither the Shorenstein Entity nor the Nederlander Entity will stage any Production that it controls (as defined in Section 7.03) within 100 miles of San Francisco unless (i) such Production has first played in one of the Theatres; or (ii) such Production has been rejected for booking at one of the Theatres by the other Member's representative on the Board of Directors; or (iii) the Company shares in the profits and/or losses of any booking pursuant to an agreement mutually acceptable to the Members. [35]

The "Shorenstein Entity" and "Nederlander Entity" are defined through a series of definitions, beginning with the preamble to the LLC Agreement:

> This Plan of Conversion and Operating Agreement (the "Agreement") of Shorenstein Hays-Nederlander Theatres LLC (the "Company") is entered into as of November 6, 2000 by and between CSH Theatres LLC, a Delaware limited liability company (*together with any Permitted Tranferees, as hereinafter defined, the "Shorenstein Entity"*), and Nederlander of San Francisco Associates, a California general partnership *(together with any Permitted Transferees, the "Nederlander Entity"*), as members. [36]

"Permitted Transferee" "means (a) an Affiliate of any Member or (b) in the case of a Nederlander Entity, a Nederlander Controlled Entity or any member of the Nederlander family." [37] An "Affiliate" is "a Person that, directly or indirectly through one or more intermediaries, Controls, is Controlled by or is under common Control with the subject Person." [38] "Control," "Controls," and "Controlled" are defined as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, through contract, or otherwise." [39] Further, a "Person" is defined as "an individual or a corporation, all types of partnership, trust, unincorporated organization, association, limited liability company or other entity." [40] "Members" means "the Shorenstein Entity and the Nederlander Entity and any additional Person who is admitted to the Company as a Member in accordance with this Agreement and is listed from time to time on the books and records of the Company." [41]

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Finally, two other provisions in Section 7 are relevant to this appeal. Section 7.03 defines "control over the production" as used in Section 7.02(b):

> SECTION 7.03. Most Favored Nation Treatment for Shorenstein and Nederlander Productions. If either the Shorenstein Entity or the Nederlander Entity or any Affiliate thereof has control over a Production, that Production and the relevant Theatre will be accorded "most favored nation" treatment by the other in theater licensing arrangements. For purposes of this Section 7.03, *"control over production" means the Person having the ability to determine where the* ***49** *Production plays and the terms and conditions of said engagement*. [42]

Section 7.06 sets forth the parties' general ability to engage in non-SHN business:

> SECTION 7.06. Outside Activities. Subject to the other provisions of this ARTICLE VII, including Section 7.02, any Member, any Affiliate of any Member or any officer or director of the Company shall be entitled to and may have business interests and engage in business activities in addition to those relating to the Company, and may engage in the ownership, operation and management of businesses and activities, for its own account and for the account of others, and may (independently or with others, whether presently existing or hereafter created) own interests in the same properties as those in which the Company or the other Members own an interest, without having or incurring any obligation to offer any interest in such properties, businesses or activities to the Company or any other Member, and no other provision of this Agreement shall be deemed to prohibit any such Person from conducting such other businesses and activities. Neither the Company nor any Member shall have any rights in or to any independent ventures of any Member or the income or profits derived therefrom. [43]

III. The Court of Chancery Proceedings

A. The Declaratory Judgment Action

CSH sued Nederlander in the Court of Chancery on February 24, 2014, seeking a declaratory judgment that CSH would not be in violation of the LLC Agreement if it did not renew the Curran lease. Nederlander counterclaimed against CSH and asserted third-party claims against CSH Curran, Carole, and Jeff, including breaches of the LLC Agreement and breaches of the Hayses' fiduciary duties, among other claims. As to the breach of the LLC Agreement, Nederlander asserted "that the Hayses were competing directly with SHN, misappropriated SHN's confidential information, and used the Curran as a means of attempting to seize control of the Company." [44] The related common law fiduciary claims [45] focused on "(1) the competing shows; (2) the withholding of the Curran lease, (3) alleged misuse of confidential information; and (4) waste of assets." [46] Nederlander sought relief in the form of damages, a permanent injunction, a declaratory judgment, and specific performance of renewal of the Curran lease.

CSH moved to dismiss Nederlander's claims. In its April 21, 2015, Motion to Dismiss Opinion, the Court of Chancery granted in part and denied in part CSH's motion to dismiss. [47] In that opinion, the ***50** court evaluated some of the contractual issues now relevant on appeal, and it held that the LLC Agreement was unclear in two respects. *First*, the court held that the definition of "Shorenstein Entity" was ambiguous. The court noted that a literal reading of the LLC Agreement's definitions includes "Affiliates" in the definition of "Shorenstein Entity." [48] As CSH pointed out, however, other provisions such as Section 7.03 refer to "the Shorenstein

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Entity ... or *any Affiliate thereof*," indicating that the parties may not have intended to bind Affiliates. Because the court held that CSH's interpretation was not the only plausible one, it declined to dismiss Nederlander's allegations of breach of the LLC Agreement. [49]

Second, the court held that the definition of "control" in Section 7.03 could have two potentially reasonable interpretations. CSH essentially argued that, because neither a producer nor theater owner could unilaterally set the terms of staging any play, "control" only encompasses actions in which the producer also owned the theater—although the court noted that "[i]t is questionable whether this extremely narrow interpretation is reasonable." [50] The court found Nederlander's interpretation to be reasonable in that, "[b]ecause the family entities appear to be in the business of running theaters, rather than producing plays, the language and structure of Sections 7.02 and 7.03 seemingly contemplate shows being under one of the entities' 'control' even though the entity controls only the venue." [51] Regardless, because the definition of "control" was possibly ambiguous, the court refused to dismiss that aspect of Nederlander's claims.

The parties proceeded to trial in late 2017, and the Court of Chancery issued its Declaratory Judgment Opinion on July 31, 2018. The Court of Chancery first held that Nederlander failed to meet its burden of showing that Carole promised to renew the lease of the Curran to SHN [52] or that the promise was otherwise enforceable. [53] The Court of Chancery also held that ***51** there were no contractual breaches, but that the Hayses breached their common law fiduciary duties while serving as directors and managers of SHN. The court first addressed the contractual claims. Looking to the plain text of the LLC Agreement, the court analyzed the definition of "Shorenstein Entity":

> The LLC Agreement defines the "Shorenstein Entity" as CSH Theatres "together with any Permitted Transferees." For the Shorenstein Entity, a Permitted Transferee is "an Affiliate." An Affiliate is "a Person that, directly or indirectly through one or more intermediaries, Controls, is Controlled by or is under common Control with the subject Person." Under the LLC Agreement, a Person is "an individual or a corporation, all types of partnership, trust, unincorporated organization, association, limited liability company or other entity." Control, Controls, or Controlled "means the possession, direct or indirect, of the power to direct or cause the direction of the management and polices of a Person, whether through the ownership of voting securities, through contract, or otherwise."
>
> Under these definitions in the LLC Agreement, the Hayses and any entities they control are Affiliates and part of the Shorenstein Entity and, therefore, are bound by Section 7.02(a). [54]

CSH objected to the court's interpretation of "Shorenstein Entity" because of the LLC Agreement's definition of "Members," which is defined as "the Shorenstein Entity and the Nederlander Entity," along with subsequently admitted members. If CSH is not synonymous with "Shorenstein Entity" and Nederlander is not synonymous with "Nederlander Entity," CSH argued, it would lead to absurd results in other provisions. The trial court recognized that it "may well be the case" that its interpretation could lead to absurd results, but it noted that if it were to adopt CSH's interpretation, the string of definitions stemming from "Shorenstein Entity" would "become mere surplusage." [55] The court also reasoned that the drafters of the LLC Agreement used "Members" in certain provisions and "the Shorenstein Entity and the Nederlander Entity" in others, "which suggests the terms mean different things." [56] The court held that CSH's argument raised an ambiguity at the most.

Because of that possible ambiguity, the trial court considered extrinsic evidence. Looking at the supplement to the partnership agreement executed in 1992 that was meant to guard against competition by the Nederlanders, the court concluded that "[t]he only way Walter and Carole's fears of competition by the Nederlanders are assuaged is if Nederlander Entity means more than just NSF Associates, which is consistent with the definition in the LLC Agreement." [57] That is, if the partnership agreement or LLC Agreement applied only to Nederlander and CSH, it would do nothing to limit Nederlander competition—" 'the most important thing' the agreement was meant to do." [58] Additionally, the court found that Nederlander's course of conduct favored the court's interpretation. For example, Nederlander Affiliates in the San Francisco area made offers to SHN to participate in some, but not all, shows. The court reasoned that those offers would only be necessary if Affiliates ***52** believed they were bound by Section 7.02. [59]

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Despite holding that the Hayses and their affiliated entities are part of the "Shorenstein Entity" bound by Section 7.02(a), the court held that "[w]hile Section 7.02(a) requires the 'Shorenstein Entity' to 'devote their efforts to maximize the economic success of the Company and avoid any conflicts of interest between the Members,' Section 7.06 contains an exception to this broad provision."[60] The trial court further held that "[t]his exception is itself limited by Section 7.02(b)."[61] In other words, the Shorenstein and Nederlander Entities may compete with SHN unless that competition violates Section 7.02(b)—that is, if it occurs in the form of staging a controlled production within one-hundred miles of San Francisco, assuming none of the exceptions in Section 7.02(b) applies.

The court held that, by staging *Fun Home*, Carole appeared to have violated the general prohibition in Section 7.02(b) on staging controlled productions within one-hundred miles of San Francisco because she had invested $1 million in the venture and received the right of first refusal to stage the production in the Bay Area.[62] Thus, Carole had "control" of *Fun Home* as defined in Section 7.03. Although *Fun Home* had not played at either of SHN's theaters, the court noted that there was no evidence in the record regarding whether the other exceptions to the one-hundred-mile prohibition applied, *e.g.*, whether the Nederlanders had rejected *Fun Home* or entered a profit-sharing agreement with CSH's presentation at the Curran. Because of those failures of proof, along with Nederlander's failure to prove damages related to the staging of *Fun Home*, the court held that Nederlander had not satisfied the final element in its breach of contract claim.[63]

As to the common law fiduciary claims, the court held that Carole breached her duty of loyalty as a director and co-president of SHN by (1) threatening fellow board members with refusing to approve the subscription series[64] unless Robert ***53** agreed to give her more control of SHN, (2) using her fiduciary position to prevent SHN from pursuing shows she wanted for her competing business, and (3) instructing Holland not to communicate with her co-president and fellow SHN directors.[65] Likewise, the court held that Jeff breached his common law fiduciary duties as a director of SHN by sharing confidential information with a director of a competitor company and attempting to secure confidential information to hire away SHN's employees. "These actions were not in the best interest of the Company; instead the Hayses took these actions, while acting in their capacities as fiduciaries of the Company, to advance their own interest at the expense of the Company."[66]

As to damages, Nederlander presented "one unified remedy theory" in which it alleged that the Hayses' conduct was part of a larger scheme to take control of SHN, or, if that failed, to sabotage and improperly compete with SHN.[67] The court held that it was unable to award damages for the parts of Nederlander's case that it was able to prove because "it has given me no way to separate the actual harm to the Company from the consequences of allowed **behavior** by the Hayses."[68] Specifically, the court observed that:

> [Nederlander] has not provided the Court with *any* information about the harm caused to the Company by (1) the Company's reliance on the purported promise to lease the Curran to the Company—e.g., the rebranding of the Curran and the booking of shows into the Curran after December 31, 2014; (2) the Hayses attempting to steal shows from the Company; (3) the Hayses presenting shows that violate Section 7.02(b); (4) Carole's threats and actions that violated her fiduciary duties while she was a manager of the Company; or (5) Jeff's disclosure of confidential information to Carole while he was a manager of the Company. *Any attempt by the Court to determine the harm caused by these actions would be entirely speculative conjecture, and thus, I award only nominal damages for the breaches of fiduciary duty*.[69]

On September 20, 2018, the Court of Chancery entered its final order and judgment in the Declaratory Judgment Action.[70] The court ruled in favor of CSH on its sole count of declaratory judgment, holding that it did not breach the LLC Agreement or any other duty by not renewing the Curran lease with SHN. As to Nederlander's Counterclaims, the court entered judgment on Count I (breach of common law fiduciary duties) in Nederlander's favor and awarded

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nominal damages. The court also enjoined the Hayses from using confidential SHN information to compete with SHN. Further, the court granted partial relief as to Count VI (declaratory judgment), in which the court declared that Section 7.02(b) applies to ***54** CSH and its Affiliates as a part of the Shorenstein Entity and that the Hayses breached their fiduciary duties as directors and managers of SHN. However, the court declared that CSH may operate the Curran in competition with SHN as long as it complies with Section 7.02(b). The trial court denied all other claims asserted under Count VI (declaratory judgment), and it dismissed all remaining counts in Nederlander's Counterclaims. [71] Finally, the court awarded attorney' fees and costs of $32,219.94 to Nederlander for Carole's bad faith **deposition** conduct. [72]

Following issuance of the post-trial decision and final judgment in the Declaratory Judgment Action, on August 6, 2018, Nederlander and SHN filed a Motion for Clarification. They argued that "the Opinion should be clarified to state that the Shorenstein Entity must comply with Section 7.02(b) with respect to *Dear Evan Hansen* and *Harry Potter*." [73] The trial court denied the motion, holding that "the existence of *Dear Evan Hansen* and *Harry Potter* is not new evidence about the definition of control under Sections 7.02(b) and 7.03 of the LLC Agreement," and that, "[i]nstead, these productions at the Curran are new potential breaches, and Counterclaim Plaintiff will have to litigate them as such." [74]

B. The PI Action

Accordingly, and on September 25, 2018, Nederlander filed the PI Action in the Court of Chancery to prevent the Hayses from staging *Dear Evan Hansen* and *Harry Potter* at the Curran, arguing that they controlled both productions and had breached Section 7.02(b). [75] In part of its analysis in the PI Decision, the court interpreted Nederlander's argument to mean that *staging* virtually any production at the Curran amounts to *control* as defined in Section 7.03. The court rejected that argument for several reasons.

First, the court held that Nederlander's interpretation would turn "large parts of Section 7 of the LLC Agreement into 'mere surplusage.' " [76] *Second*, although the court considered Section 7.02 unambiguous, it looked to extrinsic evidence for additional support. It noted that Section 4 of the partnership agreement barred staging *any* production, while Section 7.02(b) of the LLC Agreement narrowed the provision to *controlled* productions. The trial court concluded from that change "that 'stage' and 'control' do not have the same ***55** meaning." [77] *Third*, the court distinguished *Dear Evan Hansen* and *Harry Potter* from *Fun Home*—which the court held in the Declaratory Judgment Action was a Hays-controlled production—based on several important facts that Nederlander had acknowledged. Thus, because "[s]taging does not mean control under the LLC Agreement," the court held that Nederlander "failed to show a likelihood of success on the merits" necessary to win a preliminary injunction. [78] The court then entered final judgment as to Nederlander's alleged breach of Section 7.02(b) pursuant to Court of Chancery Rule 54(b).

IV. Claims on Appeal

Nederlander raises two arguments on appeal. *First*, as to the Declaratory Judgment Action, it argues that the Hayses breached their duty under Section 7.02(a) to maximize SHN's economic success by staging competing productions at the Curran. [79] Nederlander claims that the Court of Chancery erred by subjecting Section 7.02(a) to Section 7.06, which the court held allowed competition unless that competition violated Section 7.02(b). Nederlander did not appeal (and did not discuss in its opening brief) any of the trial court's rulings denying relief in the form of damages, declaratory relief (as to renewal of the lease), permanent injunctive relief, or disgorgement. *Second*, Nederlander argues, in the alternative, [80] that the court erred in the PI Action by holding that the Hayses did not "control" *Dear Evan Hansen* and *Harry Potter*, and that the trial court "mischaracterized" and "misunderstood" its arguments. Nederlander does not challenge any of the factual findings relating to that decision. [81]

***56** On cross-appeal, CSH contends that Nederlander's arguments are irrelevant because the trial court incorrectly held in the Declaratory Judgment Action that CSH's Affiliates, including the Hayses, are bound by Section 7.02. CSH also contends that Nederlander waived any claim under Section 7.02(a) because it abandoned that theory in the Declaratory Judgment Action.

V. Standard of Review

[1] **[2]** "This Court 'will uphold the trial court's factual findings unless they are clearly erroneous.' We review

questions of law and contractual interpretation, including the interpretation of LLC agreements, *de novo*." [82]

VI. Analysis

We first address the threshold question on cross-appeal, in which CSH argues that the Court of Chancery erred by holding that CSH Affiliates are included in the definition of "Shorenstein Entity." Next, we consider Nederlander's primary argument on appeal: that the Court of Chancery erred in its interpretation of Section 7.02(a) in the Declaratory Judgment Action. We conclude by addressing Nederlander's alternative argument that the court erred in the PI Action by holding that CSH does not "control" *Dear Evan Hansen* and *Harry Potter*.

We agree with Nederlander that the Court of Chancery misinterpreted Section 7.02(a), and we reverse that aspect of that decision. But we decline to order a remand in the Declaratory Judgment Action because Nederlander has not challenged the trial court's ruling in that action that it failed to prove damages relating to its contractual or fiduciary claims. Nor does it address on appeal in any way the denial of other possible forms of relief. However, reversal of the trial court's interpretation of Section 7.02(a) in the Declaratory Judgment Action impacts the decision in the PI Action. Although we are reluctant to remand the PI Action for the reasons stated below, we reverse and remand for further proceedings consistent with this Opinion.

A. We Affirm the Court of Chancery's Interpretation of "Shorenstein Entity" in the Declaratory Judgment Action

[3] On cross-appeal, CSH argues that the Court of Chancery erred in the Declaratory Judgment Action by holding that "Shorenstein Entity" includes CSH Affiliates, including the Hayses, and therefore Section 7.02 does not bind Affiliates of CSH. It relies on both the plain language of the LLC Agreement and extrinsic evidence. If CSH is correct that Section 7.02 binds only Nederlander and CSH, then Nederlander's arguments on appeal must fail.

[4] **[5]** **[6]** We interpret contracts "as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage," and "will not read a contract to render a provision or term meaningless or illusory." [83] "When the contract is clear and unambiguous, we will give effect to the plain-meaning of the ***57** contract's terms and provisions." [84] "When a contract's plain meaning, in the context of the overall structure of the contract, is susceptible to more than one reasonable interpretation, courts may consider extrinsic evidence to resolve the ambiguity." [85] Applying those principles, we affirm the Court of Chancery's interpretation of "Shorenstein Entity."

CSH advances two primary arguments in support of its position that "Shorenstein Entity" means only CSH. *First*, it argues that as a general principle, only formal parties—CSH and Nederlander—are bound by the terms of the LLC Agreement. As such, "Permitted Transferees" refers only to parties that may one day become "Members" and thereafter part of the Shorenstein Entity. *Second*, CSH argues that the trial court's interpretation creates absurdities and surplusage. For example, because the term "Members" in the LLC Agreement is defined as the Shorenstein and Nederlander Entities, the trial court's interpretation would grant Affiliates the same distribution and voting rights as Nederlander and CSH. Additionally, CSH argues that other sections of the LLC Agreement, such as Section 7.03, include terms like "the Shorenstein Entity or the Nederlander Entity *or any Affiliate thereof*," which would be superfluous if the entities include Affiliates by definition.

We reject both of CSH's arguments. Plainly read, "Permitted Transferees" is defined as "an Affiliate of any Member"—not an Affiliate of any Member who has received or will receive transferred membership interests. Contracts may impose obligations on affiliates in this context. [86] Additionally, the LLC Agreement contains some inconsistencies and contractual surplusage regardless of whose interpretation is applied. For example, CSH's interpretation renders the definition of "Shorenstein Entity" and "Nederlander Entity" in the preamble to the LLC Agreement mere surplusage, and the trial court's interpretation renders some of the language in provisions like Section 7.03 unnecessary. Further, as the trial court noted, the LLC Agreement uses both "Members" and "Nederlander Entity" or "Shorenstein Entity," which suggests that they have different meanings.

We agree with the Court of Chancery's initial determination in the Motion to Dismiss Opinion that those inconsistencies render the meaning of "Shorenstein Entity" and "Nederlander Entity" ambiguous. [87] Nonetheless, CSH argues that the extrinsic evidence supports its interpretation. [88] We disagree and instead find no fault with, ***58** and defer to, the trial court's evaluation of the extrinsic evidence. [89]

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In light of the previous litigation between the Nederlander and Shorenstein partners, the trial court noted that limiting competition from the Nederlanders was " 'the most important thing' the agreement was meant to do."[90] The court also reasoned that limiting the partnership and LLC Agreements to only the partner or member entities "would do nothing to limit competition" from the Nederlanders.[91] Indeed, under CSH's interpretation, it could set up a shell entity next door to the other theaters and compete directly with SHN's core business. Further, the trial court found that Nederlander Affiliates in or near San Francisco had made offers to SHN to participate in certain shows.[92] That is, the conduct of Nederlander Affiliates indicates that they considered themselves to be bound by Section 7.02. We agree with the Court of Chancery that Affiliates are bound by Section 7.02, and we affirm that aspect of the Declaratory Judgment Opinion.

B. The Court of Chancery Erred in Interpreting Sections 7.02(a) and 7.06

Nederlander argues on appeal that the Court of Chancery misinterpreted Section 7.02(a) of the LLC Agreement in the Declaratory Judgment Opinion by subjecting it to Section 7.06, which, the court held, allows competition between CSH and SHN subject to the limitations in Section 7.02(b). CSH argues that the court's determination was correct, but that we need not reach the merits of that argument because Nederlander abandoned its Section 7.02(a) claim below. We first address the threshold issues of abandonment and waiver in the Declaratory Judgment Action, followed by the merits of Nederlander's Section 7.02(a) argument. We conclude that Nederlander fairly raised its Section 7.02(a) argument in the Declaratory Judgment Action, but that the Court of Chancery erred in its interpretation of that provision.

1. Nederlander Fairly Presented its Section 7.02(a) Claim in the Declaratory Judgment Action

[7] CSH's contention that Nederlander did not fairly present its Section 7.02(a) argument in the Declaratory Judgment Action largely focuses on two points. *First*, CSH claims that Nederlander abandoned its Section 7.02(a) argument in its briefing. A review of the briefing below reveals that this argument is incorrect. In Count II of its counterclaims, Nederlander alleged that:

> Section 7.02(a) of the LLC Agreement requires members and their affiliates to devote their efforts to maximize SHN's economic success, avoid conflicts of interests between members, and act in regard to the Company and theatre matters in a good faith and prompt and expeditious manner.... By failing to act in good faith by withholding use of the Curran Theatre, lying in regard to the purchase-lease agreement, stalling lease renewal efforts, blocking theatre sponsorships and advertisements, wasting corporate assets, promoting their own interests to the detriment of SHN, directly competing with SHN, using ***59** SHN's confidential and proprietary information to further this competition, and attempting to seize control of the Company and unilaterally rewrite the terms of the LLC Agreement, CSH, through Mr. and Mrs. Hays, has breached the LLC Agreement.[93]

Nederlander likewise consistently advanced Section 7.02(a) in its pretrial briefing, either expressly or by referencing language found only in Section 7.02(a):

- "The LLC Agreement obligates the Shorenstein Entity (CSH) and its Affiliates (the Hayses and CSH Curran) to devote their efforts to maximize the economic success of SHN and to avoid any conflicts of interest between the Members. JX 10, LLC Agreement § 7.02(a). It provides further that all actions of CSH, its Affiliates, and their representatives must be carried out in good faith and in a prompt and expeditious manner."[94]
- "The Hays Group has breached the fiduciary and contractual duties owed to SHN and NSF.... [T]he Hays Group and CSH refused to act in the best interest of SHN and to maximize SHN's business. Most significantly, the Hays Group refused to lease the Curran Theater to SHN and, over the recommendation of their attorneys, established a competing business at the Curran."[95]

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- "The fiduciary duties CSH and the Hayses owed to [Nederlander] and SHN are mirrored in the LLC Agreement, which obligates the Shorenstein Entity to devote its efforts to maximize the economic success of SHN and to avoid any conflicts of interest between the Members.... The Hays Group willfully and in bad faith breached these obligations." [96]

Finally, Nederlander preserved its Section 7.02(a) arguments in its post-trial briefing:

- "Perhaps most egregious, the Hayses' position, if accepted, would permanently harm SHN, leaving the Company to face a lifetime of improper competition from a 50% owner, which started this unlawful competition while its principals were SHN officers or directors, with duties of loyalty and duties to maximize SHN's economic success." [97]

- "Section 7.02 of the LLC Agreement imposes duties on the Hays Group, including duties to 'maximize the economic success of [SHN]'; 'avoid any conflicts of interest between the Members'; act 'in good faith'; and avoid competition within 100 miles of San Francisco unless certain conditions (not met here) have been satisfied. Mr. Nederlander and Mr. Harris have always understood that Section 7.02 binds both the Nederlander and Shorenstein affiliates. Prior to trial, the Hayses admitted that, as directors, officers, or owners, they had duties to act in SHN's best interests, maximize the company's success, act in good faith, maintain SHN's confidential information, ***60** avoid conflicts between the Members, and not compete with SHN within 100 miles." [98]

- "These [fiduciary] duties are mirrored in the LLC Agreement. *See* ... § 7.02(a) (imposing duties to maximize SHN's economic success; avoid Member conflicts; and carry out actions in good faith) .... The evidence establishes conclusively that the Hays Group knowingly acted in bad faith, breached the duty of loyalty, and caused CSH to breach the contractual duties in the LLC Agreement by: Competing against SHN, and not acting in SHN's best interests, by presenting Broadway shows at the Curran that SHN sought to present ... [f]ailing to otherwise act in the best interests of SHN, and to maximize SHN's business, by refusing to renew the Curran lease; attempting to bar SHN's CEO from meeting with agents and producers .... None of these actions was in SHN's best interest. Rather, they were taken solely to benefit the Hayses and their competing business at the Curran. By putting their own interests ahead of SHN's interests, the Hays Group breached the LLC Agreement and the duty of loyalty (including the duty to act in good faith)." [99]

- "The Hayses were warned by counsel that operating the Curran outside of SHN would expose them to litigation risk, and the Hayses acknowledged that they had duties not to compete, to maximize SHN's economic interests, and to maintain SHN's information in confidence. They knowingly violated each of these duties." [100]

Although Nederlander's post-trial briefs clearly focused much more on Section 7.02(b) than Section 7.02(a), Nederlander fairly raised and preserved its Section 7.02(a) argument in its briefing in the Declaratory Judgment Action.

Second, CSH argues that Nederlander waived its Section 7.02(a) claim because Robert "unequivocally testified that Section 7.02(a) applies to 'just NSF' 'on the Nederlander side, and that NSF's Permitted Transferees 'didn't have to' 'devote[ ] their efforts to maximizing the success of SHN.' " [101] The Court of Chancery made no findings concerning the credibility or meaning of Robert's testimony on this point, and it declined to afford any weight to the "inordinate emphasis" the parties placed on fact witnesses' testimony on legal questions. [102] Further, read in its full ***61** context, Robert's testimony appears to be inconsistent on its face. [103] Based upon the record before us, we decline to conclude that Robert's inconsistent trial testimony effected a waiver of Nederlander's Section 7.02(a) argument.

2. The Court of Chancery Misinterpreted Section 7.02(a)

[8] Nederlander contends that the Court of Chancery erred because finding that "Section 7.06 allows competition, without regard to the obligations expressed in Section 7.02(a), contravenes the plain language of the LLC Agreement and deprives Section 7.02(a) of meaningful effect." [104] The court held that "[w]hile Section 7.02(a) requires the 'Shorenstein Entity' to 'devote their efforts to maximize the economic success of the Company and avoid any conflicts of interest between the Members,' Section 7.06 contains an exception to this broad provision." [105] The court then held that Section 7.02(b) limited Section 7.06. [106]

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We see two problems with the court's interpretation. *First*, Section 7.06 does not discuss *competition*. Rather, Section 7.06 provides that:

> SECTION 7.06. Outside Activities. *Subject to the other provisions of this ARTICLE* ***62** *VII, including Section 7.02*, any Member, any Affiliate of any Member or any officer or director of the Company shall be entitled to and may *have business interests and engage in business activities in addition to those relating to the Company*, and may engage in the ownership, operation and management of businesses and activities, for its own account and for the account of others, and may (independently or with others, whether presently existing or hereafter created) own interests in the same properties as those in which the Company or the other Members own an interest, without having or incurring any obligation to offer any interest in such properties, businesses or activities to the Company or any other Member, and no other provision of this Agreement shall be deemed to prohibit any such Person from conducting such other businesses and activities. Neither the Company nor any Member shall have any rights in or to any independent ventures of any Member or the income or profits derived therefrom. [107]

This provision speaks to the parties' rights to engage in outside business activities—it says nothing about the right to *compete* against SHN. [108]

Second, and even more problematic, the trial court held that Section 7.02(b), but not Section 7.02(a), limited Section 7.06. In doing so, the court ignored the language stating that Section 7.06 is *subject to* Section 7.02 in its entirety. Section 7.06's "subject to" provision does not exclude Subsection 7.02(a). The plain language reading of Section 7.06 is that individuals and entities bound by the LLC Agreement may engage in business unless that business interferes with the obligations in Section 7.02, including the obligation in Section 7.02(a) to maximize the economic success of SHN and avoid conflicts of interest.

[9] Even so, Section 7.02(a) must still be interpreted in light of Section 7.02(b), which is a more narrowly drafted provision. Usually, "[s]pecific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one." [109] We must therefore consider how those provisions interact and the extent to which Section 7.02(a) is qualified by Section 7.02(b).

One possible reading of Section 7.02(b) is that it qualifies Section 7.02(a) entirely as to competing productions. Under that reading, because Section 7.02(b) only limits controlled productions, it implicitly allows competing productions near San Francisco so long as they are not under the "control" of either entity. If so, the key question in Nederlander's Section 7.02(a) breach allegation is whether CSH "controls" the productions it stages at the Curran. Nederlander, however, advocates for another reading of Section 7.02(a)—one in which Section 7.02(a) is in harmony with Section 7.02(b), rather than entirely qualified by it. [110] Under that reading, either entity can ***63** stage a production it does not control *only* if staging that production would also not undermine the duty to maximize SHN's success. In other words, there is some competition not within Section 7.02(b)'s exceptions that is prohibited by Section 7.02(a).

Section 7.02 is at least arguably ambiguous. The Court of Chancery did not discuss the direct interaction between Sections 7.02(a) and (b), but it did make findings based on the extrinsic evidence that are relevant to the interpretation of Sections 7.02(a) and (b). [111] The trial court found that Walter Shorenstein initiated litigation in the early 1990s because James Nederlander was allegedly competing with their partnership in the areas surrounding San Francisco. The two partners settled that litigation in 1992. As a part of that settlement they included Section 4 of the partnership agreement, which the court found was "substantially similar" to Section 7.02 and included the duty to "devote their efforts to maximize the economic success of the Partnership and avoid conflicts of interest." [112] The trial court found that limiting competition was " 'the most important thing' the agreement was meant to do." [113] Additionally, the historic

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Curran Theatre was one of three theaters controlled by SHN in San Francisco. These three theaters were close in proximity and were part of the entity's core business. [114]

Those findings, combined with Section 7.02(a)'s plain language that the Shorenstein and Nederlander Entities must devote their efforts to maximizing SHN's economic success, are fundamentally inconsistent with the trial court's conclusion that Sections 7.02(b) and 7.06 generally allow competition that could undermine the economic success of SHN. Although the outer contours of Section 7.02(a)'s requirement that the Shorenstein and Nederlander Entities "devote their efforts to maximize the economic success" of SHN may be unclear, at its essence, Section 7.02(a) establishes a contractual duty to SHN to not engage in competitive activities that would undermine the economic success of SHN, or that would create conflicts of interest between the Members. Thus, CSH cannot itself or through its Affiliates use the Curran to compete with the core business of SHN if such competition would not maximize the economic success of SHN, unless the competition involves "controlled productions" falling within one of Section 7.02(b)'s exceptions. [115]

***64** Although we hold that the trial court erred in its interpretation of Section 7.02(a), we decline to order a remand in the Declaratory Judgment Action. Nederlander has not challenged on appeal the trial court's award of nominal damages based on Nederlander's "unified remedy theory." [116] Nederlander does not attempt to explain how damages from a breach of Section 7.02(a), which it interprets to be a contractual duty of loyalty, would differ from the nominal damages the trial court found for the Hayses' breach of the common law fiduciary duty of loyalty. Further, Nederlander has not challenged any other aspect of the court's damages analysis. [117] Nor has it appealed the denial of any other forms of relief.

[10] As for the PI Action, it is a much closer question as to whether Nederlander fairly presented and preserved its Section 7.02(a) argument. Nederlander quoted Section 7.02(a) in its PI complaint and stated that "the Shorenstein Entity is bound by the provisions of the LLC Agreement," including Section 7.02(a). [118] The complaint further alleges that the Shorenstein Entity breached "the contractual anti-competition" provisions set forth in the LLC Agreement, including Section 7.02(a). [119] The subsequent briefing, however, is largely silent on Section 7.02(a). [120] In addition, Nederlander never directly referenced Section 7.02(a) during oral argument in the PI Action.

Nederlander raises a practical point: Nederlander stated in oral argument on appeal that it did not "focus on" its Section 7.02(a) claim in the PI Action because it ***65** would "not [be] very persuasive to say we're going to succeed on the merits on a claim [where the Vice Chancellor] already entered judgment against us" in the Declaratory Judgment Action. [121] Counsel's hesitation to press its Section 7.02(a) argument in the PI Action is perhaps understandable. But Nederlander's delay in challenging that ruling is less understandable if it intended to press its Section 7.02(a) theory in the PI Action. For example, Nederlander chose not to move for re-argument of its Section 7.02(a) argument in the Declaratory Judgment Action—even though it sought clarification of other issues in that action. And it did not promptly appeal the Declaratory Judgment Opinion to seek a review of its Section 7.02(a) claim of error. Instead, Nederlander took the full thirty days to file an appeal. Further, Nederlander filed a new action challenging *Dear Evan Hansen* and *Harry Potter* that focused on Section 7.02(b), and only stated in a footnote to its reply brief in the PI Action that "SHN and NSF reserve their rights to enforce Defendants' conduct that violates Section 7.02(a)." [122]

Given those facts and Nederlander's request (made only in the PI Action) that this Court issue an expedited decision before July 1, 2019, we are tempted to deny Nederlander an opportunity to press its Section 7.02(a) theory on remand in the PI Action as to *Dear Evan Hansen* and *Harry Potter*. [123] However, given the complicated procedural posture and timing of events in the two related cases, and the fact that the trial court entered partial final judgment only upon Count I of Nederlander's complaint in the PI Action, [124] we reject the Hayses' claim that Nederlander has completely waived Section 7.02(a), and we order a remand in the PI Action so that the impact of this court's reversal of the Section 7.02(a) ruling in the Declaratory Judgment Action may be considered. As to its other claims in the PI Action, Nederlander only tangentially mentioned them in a footnote of its opening brief in that action, [125] and, thus, the trial court declined to rule on them. [126] Although it appears to us that ***66** the trial court concluded that those claims had been abandoned for all purposes, because we remand the PI Action, we ask the trial court to determine whether any of those claims, and which remedies, if pressed by Nederlander, remain viable.

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We remind the parties that the trial court has wide discretion to appropriately narrow proceedings on remand, particularly given the extensive proceedings that have already taken place. And more specifically, given Nederlander's apparent choice to defer any challenge to the Section 7.02(a) ruling until *after* obtaining the ruling in the PI Action, we think, absent new and compelling factual developments, that the trial court would be well within its discretion to deny any renewed request for expedited preliminary injunction proceedings as to the two productions at issue in the PI Action. [127]

C. We Find No Error in the Court of Chancery's Interpretation and Application of Section 7.03 in the PI Action

[11] Nederlander contends on appeal that the Court of Chancery erred in its interpretation and application of "control," as defined in Section 7.03, as to *Dear Evan Hansen* and *Harry Potter* in the PI Action. [128] Specifically, Nederlander claims that the trial court "misunderstood" and "consequently mischaracterized" its argument to mean that the Hayses control any production that they stage at the Curran, and that it therefore "never considered the facts supporting [its] claim or the merits of the claim." [129] We reject Nederlander's claim of error for two reasons. *First*, the trial court did not "misunderstand" or "mischaracterize" Nederlander's arguments. Rather, it addressed the very arguments that Nederlander presented. *Second*, the trial court actually did consider the relevant facts and the merits of Nederlander's control arguments.

As to the first issue, Nederlander argues that the trial court erred by interpreting its argument to mean that the Hayses "control every play that is staged (*i.e.* presented) at the Curran if they engage in the 'making of the agreement' or if they retain any influence over programming," and thus, "in essence, [Nederlander] argues that [the Hayses] control any production ***67** that they stage." [130] Instead, Nederlander claims to have argued that, between the two extremes of passive ownership of a theater and total control of both the production and theater, [131] there "lies a broad middle space where the issue of control over production becomes highly fact-dependent," and that "the specific rights the Hayses had obtained for themselves in connection with staging DEH and Harry Potter were sufficient to give the Hayses *joint control* over those productions." [132]

But on the question of what constitutes "joint control," Nederlander argued below that "[p]roducers and theater operators *jointly* determine the location and terms" and that it is merely "the *making of an agreement* between a theater operator and producer that provides them *both* with control over the engagement." [133] Nederlander also argued: "It is undisputed that theater operators and producers jointly control the terms of the engagement. Even where a producer has substantial leverage, the theater operator remains free to accept, reject, or attempt to negotiate the terms of the engagement." [134] As to what kind of staging at the Curran would *not* result in joint control, Nederlander offered the long-term Lurie lease as an example:

> [The Hayses] argue that NSF's interpretation makes the phrase "control over production" meaningless because NSF's interpretation encompasses every show that will play at the Curran. [The Hayses] are wrong. As the Court is aware, the Curran was leased for decades by the Luries to SHN. The Luries owned the [Curran], but they did *not* control any production that played at the theater because they (unlike [the Hayses]) agreed to a lease that ceded control over particular shows and their terms to SHN. [135]

From those statements, the trial court interpreted Nederlander's argument to mean that control "exist[s] under the LLC Agreement anytime Defendants 'stage' (*i.e.*, present) a show directly (rather than through a passive lease with another party controlling all programming such as the choice of production, pricing, marketing, etc.)." [136] We hold that this was a reasonable ***68** interpretation of Nederlander's position, and we find no error with the trial court's analysis of those arguments.

As to the second issue, the Court of Chancery fully considered the merits of Nederlander's argument. In doing so, it cited the relevant facts and distinguished them from its interpretation and application of Section 7.03 to *Fun Home* in the Declaratory Judgment Action—a ruling and analysis that Nederlander has not contested. [137] In fact, Nederlander,

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in its opening brief on appeal, affirmatively states that it "agrees with the trial court's interpretation of 'control over the production' in the" Declaratory Judgment Action, and that "the court properly concluded that the Hayses had 'control' over Fun Home." [138] Regarding *Dear Evan Hansen*, the court recognized Nederlander's argument that the Hayses controlled "[t]he financial terms, the number of performances, the dates, the duration of the show," "[t]icketing fees, for example, facility fees," "[s]eat sales, sale dates, [and] the dynamic pricing arrangement." [139] Similarly, as to *Harry Potter*, the court cited Nederlander's arguments that the Hayses had "control over terms and conditions," including "that [Carole] had to approve the manager of [the] operation ... [and got] priority seating requirements for subscribers," and that she "had final say over physical renovations to the [Curran]." [140]

But the trial court noted that, unlike in *Fun Home*, "the Defendants had no independent right or authority to cause *DEH* or *Harry Potter* to play at the Curran or to set the terms for either play," and that "*DEH* or *Harry Potter* could have chosen to play at an SHN theater without breaching any obligation to any of the Defendants." [141] The terms that the Hayses and the producers did agree upon were the "product of negotiations that occurred simply because Hays's affiliate owns the Curran and she had the ability to say no to a request to use the Curran on terms that she did not find agreeable." [142] Additionally, the trial court expressly found that the producers of *Dear Evan Hansen* and *Harry Potter* "openly negotiated with multiple venues" in San Francisco, and that "the parties engaged in an open competition to show both *DEH* and *Harry Potter*." [143] Thus, the court concluded, "the facts of *Fun Home* do not apply." [144]

Based on those factual findings—which Nederlander did not challenge below and has not challenged on appeal—the court held that Nederlander had "failed to show ***69** a likelihood of success on the merits" [145] and entered final judgment as to Nederlander's alleged breach of Section 7.02(b) pursuant to Court of Chancery Rule 54(b). [146] We agree with the Court of Chancery's analysis and affirm that aspect of the PI Decision.

VII. Conclusion

For the foregoing reasons, we AFFIRM in part, and REVERSE in part, the Court of Chancery's July 31, 2018 opinion, and we AFFIRM in part, REVERSE in part, and REMAND the Court of Chancery's November 30, 2018 opinion for further proceedings consistent with this Opinion. This Court expects the parties to work together in a cooperative manner in the proceedings on remand so that any remaining issues can be appropriately narrowed and resolved by the trial court in an efficient manner.

Addendum

[12] Finally, we comment on one last point that was addressed by the trial court, but is not an issue raised by the parties on appeal, namely, the **deposition** misconduct by Carole Shorenstein Hays. [147] In *Paramount Communications Inc. v. QVC Network Inc.*, [148] this Court addressed, in an Addendum, **deposition** misconduct by a *lawyer* at a **deposition**. This Addendum addresses a less frequently discussed corollary concerning the duty **of counsel** who is faced with a *deponent's* **inappropriate** conduct at a **deposition**.

In *Paramount*, the Supreme Court, *sua sponte*, addressed misconduct by out-of-state counsel who was representing a director of Paramount Communications in a **deposition**. That attorney was barred in Texas, was not admitted *pro hac vice*, and did not otherwise appear in the Delaware proceeding representing any party. No member of the Delaware bar was present at the **deposition** representing any of the defendants or the stockholder plaintiffs.

After examining the **deposition** transcript, the Supreme Court held that the attorney had abused the privilege of representing a witness in a Delaware proceeding by: (a) improperly directing the witness not to answer certain questions; (b) being extraordinarily rude, uncivil, and vulgar; and (c) obstructing the ability of the questioner to elicit testimony to assist the court in the pending matter. [149]

The Supreme Court found the unprofessional **behavior** to be "outrageous and unacceptable." [150] After quoting portions of the **deposition** transcript, we stated:

> As noted, this was a **deposition** of Paramount through one of its directors. Mr. Liedtke was a Paramount

> witness in every respect. He was not there either as an individual defendant or as a third party witness. Pursuant to Ch. Ct. R. 170(d), the Paramount defendants should have been represented at the **deposition** by a Delaware lawyer or a lawyer admitted *pro hac vice*. A Delaware lawyer who moves the admission *pro hac* ***70** *vice* of an out-of-state lawyer is not relieved of responsibility, is required to appear at all court proceedings (except **depositions** when a lawyer admitted *pro hac vice* is present), shall certify that the lawyer appearing *pro hac vice* is reputable and competent, and that the Delaware lawyer is in a position to recommend the out-of-state lawyer. Thus, one of the principal purposes of the *pro hac vice* rules is to assure that, if a Delaware lawyer is not to be present at a **deposition**, the lawyer admitted *pro hac vice* will be there. As such, he is an officer of the Delaware Court, subject to control of the Court to ensure the integrity of the proceeding. [151]

This Court stated that counsel attending the **deposition** on behalf of the Paramount defendants had an obligation to ensure the integrity of the proceeding. We stated further that a Delaware lawyer, or a lawyer admitted *pro hac vice*, would have been expected to put an end to the misconduct in the **deposition**. [152] As in *Paramount*, although this Addendum has no bearing on the outcome of the case, we are compelled to address Hays's misconduct and the role of her counsel when faced with such a situation.

The following are excerpts of her **deposition** testimony. Most of these excerpts were reprinted at the end of the Court of Chancery's Declaratory Judgment Opinion and formed the basis for the trial court's award attorneys' fees and costs: [153]

Q. Have you ever been deposed before?

A. *Yes*.

Q. How many times?

A. *Once*.

Q. When?

A. *I believe it was a while ago*.

Q. What was the matter about?

A. *It was a difference of opinions*.

Q. I'm sorry, go ahead. Were you done with your answer?

A. *Yes*.

Q. A difference of opinion about what?

A. *How best to proceed in one's lives*.

Q. Was it involving a lawsuit?

A. *Oh, definitely*. [154]

....

Q. Did you ever meet with your counsel in advance of this **deposition**?

A. *Oh, absolutely*.

Q. How much time did you spend with your counsel to prepare for the **deposition**?

A. *Sufficient*.

Q. How much is sufficient?

A. *The appropriate amount needed*.

Q. Can you give me an estimate of the amount of time?

A. *It was completely enjoyable*.

Q. How many times did you meet with your counsel to prepare for the **deposition**?

A. *Preparation is always a good thing*.

Q. That wasn't my question. How many times did you meet with your counsel to prepare for the **deposition**?

A. *I met with them – I'm not understanding the question*.

Q. You told me you met with your counsel to prepare for the **deposition**.

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A. *Sure*.

Q. How many times?

***71** A. *Well, see, I think of time as a continuum. So I think I met with them from the beginning to the end. And the beginning was the start, and then there was the rehearsal, and then there was the preview, and now it's what I think of as the performance. So, in my mind, I'm answering what you're asking. If you could be more specific. Do you want hours?*

Q. Yes.

A. *Oh, I don't wear a watch. So I know the sun coming up in the morning and the moon coming up at night*.

Q. Can you tell me the number of times that you met with your counsel to prepare for the **deposition**? I'm looking for a number.

A. *Well, I gave you that*.

Q. What was the number?

A. *The number was the beginning to the end*.

Q. How many times?

A. *You know, I think – I don't recall*.

Q: Did you review any documents to prepare for the **deposition**?

A. *Oh, certainly.*

Q. What documents did you review?

A. *The ones that were put in front of me.*

Q. What were they?

A. *Documents.*

Q. Can you recall any of them?

A. *Yes.*

Q. Tell me which ones.

A. *Many.*

Q. Great. Tell me.

A. *Many, many, many*.

Q. Tell me about them.

A. *Well, they were full of words and communications and –*

Q. Can you identify any of them by date or what type of document it is, or who the sender or recipient was?

A. *No.* [155]

....

Q. Did you go to college?

A. *Well, yes*.

Q. Where?

A. *I mean tuition was paid*.

Q. Where did you go?

A. *Oh, I had books from a lot of different places*.

Q. Did you enroll at any of those places?

A. *Oh, sure*.

Q. Where did you enroll?

A. *Many, many universities – not that many – a few*.

Q. So you enrolled in a few universities?

A. *Throughout my years, sure*.

Q. Which universities?

A. *Well, one was here, NYU*.

Q. Any others?

A. *Stanford. I don't recall*.

Q. Did you graduate from NYU?

A. *No*.

Q. Did you –

A. *Well, maybe. It's unclear*.

Q. You're not sure?

A. *You mean do I have a diploma? No. Did I receive enough credits to graduate, is that your question?*

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Q. That's a question, that's fine.

A. *Is that your question?*

Q. Sure.

A. *You know, it's been said that I have –*

***72** Q. It's been said that you have what? That you have graduated?

A. *It's been said that*.

Q. Do you have a degree from NYU?

A. *Do I have something like a piece of parchment?*

Q. No. Did you finish the requirements –

A. *Did I receive –*

Q. If you could wait until I finish my question.

A. *Sorry*.

Q. Did you complete the coursework and earn enough degrees [sic] to earn a degree? I don't care if you have a piece of paper on your wall. I want to know, did you earn a degree?

A. *I don't recall*.

Q. You don't recall whether you have a degree from NYU?

A. *Correct*. [156]

....

Q. When did you attend NYU?

A. *Oh, goodness. You see, definitely, definitely in my youth*.

Q. Can you be more specific?

A. *No*.

Q. For how many years did you attend NYU?

A. *Again, time is a compendium. So I was there a while*.

Q. Can you be more specific?

A. *No*.

Q. Since you completed your studies at NYU, have you had employment anywhere?

A. *How do you define "employment"?*

Q. You've never used the word employment in your life?

A. *I'm just wondering how you define it*.

Q. Have you used the word employment in your life, ever?

A. *I'm asking you*.

Q. You don't get to ask the questions. I get to ask the questions.

A. *Oh, sorry*.

Q. Have you ever used the word employment in your life?

A. *I've used many words*.

Q. Have you used the word employment in your life?

A. *It's a word I'm familiar with*.

Q. What is your understanding of the word employment?

A. *Well, I think it has to do with – I'm not sure*.

Q. You're not sure what the word employment means?

A. *Yeah*.

Q. Have you ever worked for any kind of company or somebody who might be referred to as an employer?

A. *Possibly*.

Q. You're not sure?

A. *I would say sure*.

Q. Who have you worked for? And if you could give this to me in chronological order.

A. *Oh, that's – I could give it to you as best I could*.

Q. Sure.

A. *Okay. So I've worked – just in terms of work or in terms of remuneration?*

Q. Work.

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A. *So you – well, I've worked on political campaigns*.

Q. And you consider those political campaigns to be your employer?

***73** A. *Well, I – I considered it to be work. That to me was the question posed to me*.

Q. Let's see if we can start again.

A. *Okay*.

Q. I'm looking for your employment history. This isn't a trick question. Are you able to give me your employment history?

A. *I don't know*.

Q. Have you ever worked at SHN?

A. *I have a deep association with it, yes*.

Q. When you say "a deep association," have you ever worked at SHN?

A. *That's my answer*.

Q. Yes or no, have you worked at SHN? I don't understand your answer.

A. *I answered the question*.

Q. I don't understand your answer. Can you please answer it again?

A. *I'm comfortable with my answer*.

Q. Okay. So you're unwilling to tell me whether you've ever worked at SHN?

A. *My answer reflects the question posed to me*.

Q. I don't even know what that means. My question is, have you ever worked at SHN, yes or no?

A. *I find my answer to be most inclusive*.

Q. I don't understand what that --

A. *And embracing*. [157]

....

Q. Have you ever been arrested?

A. *I don't recall*.

Q. You might have been arrested and you just don't remember?

A. *I've led a long life, very colored*.

Q. Sitting here today, can you tell me whether any of that color involved being arrested?

A. *I don't recall*.

Q. Do you know what SHN is?

A. *They're letters in the alphabet*.

Q. Do you know of a company that goes by SHN?

A. *I certainly have a deep, deep association with it*.

Q. What is SHN, beyond letters in the alphabet? I'm referring to the company.

A. *It's a company – it's a company*.

Q. Is it in the theatre business?

A. *It's a company that has people associated with it*.

Q. Is it in the theatre business?

A. *How do you define "theatre"?*

Q. I just want to make clear, I'm asking you if SHN is in the theatre business, and you can't answer that question without further explanation?

A. *Can you ask the question again?*

Q. Sure. Is SHN in the theatre business?

A. *There's many different types of theatres. Are we today in the theatre business? This is perhaps a piece of theatre that's being recorded. So I think, again, I need more context*. [158]

....

Q. When was SHN founded?

A. *At the beginning*.

Q. In what year?

A. *The year it was founded*.

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Q. Can you give me a year?

A. *No*.

Q. Who founded it?

A. *I was there*.

***74** Q. What do you mean when you say you were there?

A. *I was there at the very beginning when it was – at the very day one*.

Q. Does that make you a founder?

A. *Does giving birth to a child make you a mother?*

Q. Yes, but that wasn't my question. My question was, the fact that you were there, does that make you a founder?

A. *I believe it's semantics*.

Q. Yeah, well, we're here today about semantics and words matter.

A. *Sure*.

Q. So my question is, was your father a founder of SHN?

A. *My – I am the daughter of my father*.

Q. By definition, you are the daughter of your father. My question was, is your father a founder of SHN?

A. *My father and my mother raised me in an environment to have a great love and appreciation of the arts and introduced me to many, many people*.

Q. My question was, is your father a founder of SHN?

A. *That wasn't close, that wasn't close, the answer?*

Q. No.

A. *No?*

Q. No.

A. *Tell me again, was my father –*

Q. Was your father, Walter Shorenstein, a founder of SHN?

A. *He certainly cleared a path for me, and I can't – I don't know what that word means*.

Q. You don't know what the word founder means?

A. *No*. [159]

....

Q. No, my question is specific to this meeting. Did you say during this meeting that you were unappreciated?

A. *Well, I think when you ask for a thank you and you don't get a thank you – so under-appreciated is so ...*

Q. Mrs. Hays, my question isn't about what the word means. My question is, at this meeting, did you –

A. *You're getting yourself agitated*.

Q. Did you say the words – and please stop commenting on me – did you say the words I'm unappreciated or underappreciated? That's my question. Did you say I'm unappreciated, I'm not getting enough appreciation? Did you say something like that?

A. *You're smiling, so I'll answer it. Sure, I did*. [160]

....

Q. Then you write: "Feeling duped by the Stuart Thompsons." Who is Stuart Thompson?

A. *A person who works in the business*.

Q. What does he do?

A. *He's a general manager and producer*.

Q. Of what shows?

A. *Many shows*.

Q. Can you give me his most successful shows?

A. *No*.

Q. Can you give me any of the shows?

A. *I don't recall*.

Q. You don't recall any shows that Mr. Thompson has produced? Is that a no? You were shaking your head.

A. *I don't recall*.

***75** Q. Okay. Had you been duped by Stuart Thompson?

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A. *I don't recall*.

Q. It refers to Oskars, O-S-K-A-R-S. What is that a reference to?

A. *I don't recall*.

Q. And feeling I was just a slob with Felix. Who is Felix?

A. *I don't recall*.

Q. You understand you're under oath, right?

A. *I recall*.

Q. You recall that you're under oath?

A. *I recall*.

Q. And you're going to tell me you don't know – you can't tell me a single show that Stuart Thompson has produced?

A. *Something I'm sure would be in the deep recesses of my mind. Should we sit and tell – would that be a value to why we're here? Would you like me to do that? Because I can*. [161]

....

Q. Why did you write "Yipppppe de da"?

A. *I like using that word*.

Q. What meaning were you trying to convey?

A. *Yipppppe de da, doo da, you know, a jazz term*.

Q. And what does that mean when it's used in an e-mail like this?

A. *Different beats along the way*.

Q. That's what you meant to convey –

A. *Trumpets, yeah*.

Q. You meant to convey to your husband trumpets?

A. *Sure*.

Q. And what was the significance of trumpets?

A. *Good tone*.

Q. What does it have to do with Bullets over Broadway?

A. *Bullets over Broadway is very, very interesting, because you know what, I was wrong. So when I said more often than not I'm right, here is an example where I'm wrong. It closed on Broadway and lost its 12 to $15 million investment. So I think the Nederlanders should be more than elated that I'm not part of their esteemed venerable organization of picking hits, because had I done it, whoa, Yipppppe de da*. [162]

....

Q. And is it right that the plan is for the season to include Broadway-style shows?

A. *Those were her words. This was a proposal*.

Q. Was that – I'm sorry?

A. *This was a proposal*.

Q. Was that your plan, to show Broadway-style shows?

A. *I'm always open to ideas*.

Q. Is Fun Home a Broadway-style show?

A. *I'm always open to ideas, and I'm always open to great art, and I'm always open to great artists, and I always work in a way when the art is first – when it's not evident. So I maintain that what I personally do or what one does in life is with the artist, and whether it's within 10 blocks in New York City, or downtown, or in Berlin, or London, as long as what I, Carole Shorenstein Hays, do, is immaterial to any of this*. [163]

....

***76** Q. After that conversation before it opened, have you ever discussed with anyone the idea of bringing Hamilton to the Curran Theatre?

A. *You know, I would love everything that I love to be at the Curran. So would I have loved Hamilton to be at the Curran, you betcha*.

Q. Did you talk to anyone about it?

A. *I talked to the butcher, the baker, the candlestick maker*.

Q. But did you talk to the people who have any connection with Hamilton?

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A. *I talk. I talk. You know, I talk. Hamilton went where it went. So I think that I am doing right by me and SHN is doing right by them. And this idea of scorched earth and I'm not allowed to talk to certain people is really kind of un-American.* [164]

....

Q. What other plays that we haven't discussed have you tried to bring to the Curran?

A. *I'm always in conversation and none – and I stand by what I say, that I wish everyone, everyone well and my success is no reflection on SHN's [success or] failure. They truly maintain that I had nothing whatsoever to do with this business. So why are you so focused on who I am? I just find it really fascinating that on the one hand I know nothing, but on the other hand everything I know is stolen, perched, poached. So I think you better really think about the questions in a crisper way.* [165]

....

Q. And tell me about the shows that, are there any shows that you're in discussions with now that have not yet been announced?

A. *For?*

Q. The Curran. And again, we can limit this to Broadway.

A. *That will be announced at – you know, it's all subjection, isn't it? Because these are shows, and this is what I do and have always done with my own personal money, I invest in artists, I nurture them. They come to Broadway, they work, they go over places. It's interesting how you just said Broadway. See, it's such a Nederlander thing, because I am like in Brooklyn, downtown, and you don't ask me about that. You wouldn't ask me about Hamilton if when I had the conversation with Oskar Eustis – so it's a very Nederlander mindset that suddenly what is on Broadway is their fiefdom – and I say, whoa, wait a second, bring it on then, you guys tell me because, you know what –*

Q. Mrs. Hays, I'm just trying to get a list. I started with Broadway because you told me earlier my question was too broad. I know that Fun Home is playing. I know Eclipsed is playing. We've talked about a number of other shows. Are there other Broadway-style shows that you have had conversations with people about bringing them to the Curran?

A. *I always have conversations –*

Q. What shows?

A. *– with people. There are numerous shows.*

Q. Tell me.

A. *I don't want to. I don't think it's any of your business whatsoever. I am pleased to answer the question. I am not hiding information. But it's my own money. I'm like free and clear. Why do* ***77** *I have to keep answering when I've just simply tried to get from Bob Nederlander who is behind him, who the successors are, and suddenly you have the right, the glee, the kaboom to ask me to go is that your personal e-mail – yes, we're going to emotionally water board you, we're going to keep you down as far as you can go, as though that's like what we do under the name of the law that's what you went to law school for and that you will go home and tell your wife you had a great day – that's what we're doing?*

I'm just simply trying to do my life at the Curran, and to do community programs. Let's talk about that. Let's talk about things that I wanted to do at SHN that I couldn't, because they weren't interested in.

I will be having – the reason I'm doing Eclipsed is because it has, it is about the Liberian kidnapped girls. Do you know about that? I'm sure you've heard about that. This is a show that no one would bring to Broadway except someone like me who believed in it, and it's a show that my son has really picked up, and it's about art and activism, and we at the Curran, we at the Curran are going to open our doors to bring in school kids to see shows maybe for the first time, to see, to do that.

That's what I want to do, and that's what I want to talk about. And you want to just take my, me and my and just keep bashing it against the wall, and I'm happy to stay until the lights come up and the lights go down. Don't bother me at all. Because I've been doing this 30 years. And you know what, I'm like Judy Garland, I can keep, keep, keep, – I got another song in me, and I know when I walk throughout the community, they're thrilled of what I'm doing.

It's – they don't look at me as being combative. They're thrilled I have a love of the Curran. I've never – I've never and I've always said to Bob Nederlander and to

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> *Greg Holland and to everyone else, this is a wonderful, wonderful, wonderful, business.* [166]

This is a representative but incomplete identification of Hays's ridiculous and problematic responses to questions. It appears from the cover page of the **deposition** transcript that the only Delaware lawyer present was an attorney representing the nominal defendant, SHN. [167] Two attorneys appeared at the **deposition** on behalf of Hays, including Brian T. Frawley, a partner with Sullivan & Cromwell LLP, and an associate from that firm. [168] They were both admitted *pro hac vice* in the Court of Chancery proceedings. Frawley took the lead in defending Hays's **deposition**. From our reading of the record (the transcript), it appears that Frawley made no attempt to put an end to Hays's flagrantly evasive, nonresponsive, and flippant answers. In fact, at one point, the examiner implored Frawley to control his own client but was rebuffed:

> MR. DOLUISIO: I just want to know for the record, Mr. Frawley, I don't want this **deposition** to go multiple days. It will. I'm getting non-responsive answers and now I'm getting speeches. I'm trying not to be rude. I think you recognize what I'm going through here.
>
> MR. FRAWLEY: I think you frankly deserve that one, but we'll go on.
>
> ***78** MR. DOLUISIO: I asked her where she was employed.
>
> MR. FRAWLEY: That's not really what you asked her. But are you done, Carole.
>
> THE WITNESS: Uh-huh. [169]

The trial court appropriately awarded attorneys' fees and costs for Hays's willful bad faith litigation tactics. The **deposition** appears to have been a colossal waste of time and resources due to her **behavior**, which made a mockery of the entire **deposition** proceeding. Although this award of fees and costs is not challenged on appeal, we write to remind counsel that they have a responsibility to intercede and not sit idly by as their client engages in abusive **deposition** misconduct. [170]

[13] **Depositions** are court proceedings, and counsel defending the **deposition** have an obligation to prevent their deponent from impeding or frustrating a fair examination. Although counsel can be caught off guard by a client's unexpected, sanctionable outburst, that is not what happened here. Rather, Hays's flippant, evasive, ridiculous answers and speech-making continued throughout the entirety of the **deposition**, which began at 9:38 a.m. and concluded at 7:13 p.m. An attorney representing a client who engages in such **behavior** during the course of a **deposition** cannot simply be a spectator and do nothing. [171] Here, Hays's counsel made no apparent effort to curb her misconduct.

[14] Delaware counsel moving the admission of out of state counsel *pro hac vice* also bear responsibility in such a situation. They must ensure that the attorney being admitted reviews the Principles of Professionalism for Delaware Lawyers, but they must also ensure that the out-of-state counsel understands what is expected of them in managing **deposition** proceedings ***79** outside the courthouse so that the litigation process is not abused. [172] Such abusive tactics do a disservice to our busy trial courts, to all involved in the litigation process, and ultimately they impair the truth-seeking function of the discovery process. It is hard to imagine that any reliable factual information could be mined from the Hays **deposition** fiasco.

Perhaps this episode can be used positively as a lesson to those training new lawyers on **deposition** skills. Lawyers have an obligation to ensure that their clients do not undermine the integrity of the **deposition** proceedings by engaging in bad faith litigation tactics; they cannot simply sit and passively observe as their client persists in such conduct. Given the restrictions on conferring with a client during **deposition** proceedings, these points obviously should be addressed beforehand in the **deposition** preparation.

All Citations

213 A.3d 39

Footnotes

1 *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, Consol. Nos. 596, 2018 and 620, 2018 (Del. Jan. 9, 2019) (ORDER) (consolidating the separate appeals from C.A. No. 9380 and C.A. No. 2018-0701).

2 To avoid confusion, this Opinion refers to certain individuals by their first names. We intend no disrespect or familiarity.

3 The Shorenstein-Hays family controls CSH through CJS Trust-A, which is one of two trusts relevant to this dispute that Carole's father, and the patriarch of the Shorenstein family, Walter Shorenstein, set up for Carole's benefit. The other trust is CSH Doule Trust. Carole, her husband, their two children, and Thomas Hart manage those trusts.

4 Carole purchased the Curran indirectly through CSH Doule Trust. CSH Doule Trust owns CSH Curran LLC, which Carole and Hart manage through CSH Doule LLC, the sole member of CSH Curran.

5 The demand for a declaratory judgment pursuant to 10 *Del. C.* § 6501 was the sole count in CSH's complaint. *See* App. to Opening Br. at A364–68 (CSH Complaint).

6 Nederlander's counterclaims and third party claims included counts of breach of fiduciary duty against the Hayses (Count I), breach of the LLC Agreement against CSH (Count II), fraudulent inducement against CSH and Carole (Count III), breach of contract against CSH and Carole (Count IV), promissory estoppel against CSH, CSH Curran LLC, and the Hayses (Count V), and declaratory judgment with respect to the LLC Agreement pursuant to 10 *Del. C.* § 6501 (Count VI). *Id.* at A422–27 (Nederlander Counterclaims and Third Party Complaint).

7 *CSH Theatres, L.L.C. v. Nederlander of San Francisco Assocs.*, 2018 WL 3646817, at *37 (Del. Ch. July 31, 2018) [hereinafter *Declaratory Judgment Opinion*].

8 App. to CSH Answering Br. at B494 (Mot. for Preliminary Injunction).

9 The defendants included CSH, CSH Curran LLC, Curran Live, LLC, CSH Productions, LLC, the Hayses, and Thomas Hart. In addition to Count I, Nederlander also alleged a breach of contractual fiduciary duties against CSH (Count II), aiding and abetting a breach of contractual fiduciary duties against all defendants but CSH (Count III), and breach of common law fiduciary duties against CSH, the Hayses, and Thomas Hart (Count IV).

10 *Nederlander of San Francisco Assocs. v. CSH Theatres LLC*, 2018 WL 6271655, at *11 (Del. Ch. Nov. 30, 2018) [hereinafter *PI Decision*].

11 Nederlander also has not challenged the trial court's finding in the PI Action that Nederlander abandoned its claims that are not within the scope of the partial final judgment.

12 The Court of Chancery's factual findings are largely unchallenged on appeal, so we rely on them in this Opinion.

13 A 1978 letter of understanding signed by James Nederlander and Walter Shorenstein states that their “initial purpose [was] solely the operation of the Curran.” App. to Opening Br. at A184 (1978 Letter of Understanding).

14 *Id.* at A250 (First Amended Complaint dated October 29, 1990).

15 *Declaratory Judgment Opinion*, 2018 WL 3646817, at *3.

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16 *Id.* at *26.

17 *Id.* (quoting Robert's trial testimony). Testimony from some of the key witnesses in this litigation is consistent with the court's finding that the Shorensteins were concerned about competition from the Nederlanders. Robert testified that "Walter [Shorenstein] was adamant that this be included." App. to Nederlander Reply Br. at AR239, p. 834 (Robert's Oct. 25, 2017 Testimony). Raymond Harris, a Nederlander-appointed director of SHN and Nederlander's Chief Financial Officer, submitted an affidavit stating that "a provision limiting such competition was injected into the LLC Agreement at the request of Mr. Shorenstein due to his concerns that another Nederlander entity might compete by presenting productions within a 100-mile radius of San Francisco." App. to Opening Br. at A649 (Harris Affidavit). Likewise, when Carole was asked as a witness at trial whether she "insist[ed] that a clause be put in the operating agreement to prevent competition by the Nederlanders," Carole replied, "[w]e were very concerned about it, so yes." App. to Nederlander Reply Br. at AR234, p. 263 (Carole's Oct. 23, 2017 Testimony).

18 Robert had also served previously as president and CEO of the Nederlander Organization, which owns and operates nine Broadway theaters in New York City and at least fifteen others around the United States, including Broadway San Jose in San Jose, California.

19 *Declaratory Judgment Opinion*, 2018 WL 3646817, at *6.

20 *Id.* at *7.

21 *Id.*

22 *Id.* ("Greg testified that Carole would often express the opinion that, 'she had created the company, that it was her company, that it was all her money that had created the company, and that ... it was really majority her company.' ").

23 *Id.*

24 *Id.* Carole testified at trial that she considered it "silly business to agree to a lease without a new management agreement." *Id.*

25 *Id.*

26 *Id.* at *8. According to Holland's testimony:

> Carole stood in front of the door and told us that no one was leaving until she got what she want[ed]. And then she just started saying that she wanted to control the company. No one had thanked her for buying the Curran Theater for the company, and she didn't feel she deserved to be treated that way. [Robert] thanked her several times. She kept pressing that she -- you know, she deserved to have control of the company, that I wasn't providing her information. And after what felt like a long, long period of time, [Robert] agreed that she would be the sole president of SHN for a 60-day period, and that he wanted -- part of that job for her would be that she would increase sponsorships and lower costs.

Id.

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27 *Id.* at *9.

28 *Id.*

29 *See* *id.* at *11 (quoting an email from Carole to Jeff on August 2, 2014, saying that they should go at Robert and Holland "with 'guns ablaze' ").

30 *Id.* at *12.

31 *PI Decision*, 2018 WL 6271655, at *3.

32 *Id.*

33 *Id.* at *4.

34 *Id.* at *11.

35 App. to Opening Br. at A304–05 (LLC Agreement § 7.02).

36 *Id.* at A285 (LLC Agreement Preamble) (emphasis added).

37 *Id.* at A288 (LLC Agreement § 1.01).

38 *Id.* at A286 (LLC Agreement § 1.01).

39 *Id.* at A287 (LLC Agreement § 1.01).

40 *Id.* at A288 (LLC Agreement § 1.01).

41 *Id.* at A287 (LLC Agreement § 1.01).

42 *Id.* at A305 (emphasis added) (LLC Agreement § 7.03).

43 *Id.* (LLC Agreement § 7.06).

44 *CSH Theatres, LLC v. Nederlander of San Francisco Assocs.*, 2015 WL 1839684, at *8 (Del. Ch. Apr. 21, 2015) [hereinafter *Motion to Dismiss Opinion*].

45 The common law fiduciary claims and allegations of a breach of the LLC Agreement overlapped below. *See* *id.* at *8 n.37 ("Indeed, the parties' briefing sometimes conflated the analysis of the breach of the LLC Agreement Count with the breach of fiduciary duty Count, making it difficult to disentangle these distinct theories of alleged wrongdoing.").

46 *Id.* at *11.

47 The Court of Chancery dismissed Count I (breach of fiduciary duty against the Hayses) to the extent Nederlander alleged waste, dismissed Count III (fraudulent inducement) entirely, and dismissed Count V (promissory estoppel) as to Jeff. *Id.* at *23. The court denied CSH's motion to dismiss as to the remaining Counts.

48 *Id.* at *10 ("The definitions [in the LLC Agreement] reveal the problem: the family entities (the Members) are defined to include Permitted Transferees, which itself is defined to include Affiliates. Thus, according

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to Nederlander, any time the family entities are referred to in a provision of the LLC Agreement, Affiliates definitionally are included.... [CSH] contend[s] that the reference in the definition of the Shorenstein Entity to the term Permitted Transferee contemplates some form of future transfer from CSH to, for example, a successor entity within the defined set of Permitted Transferees. That successor entity would assume the Shorenstein Entity's interest in SHN. In other words, at any given point in time, the 'Member' of SHN on the CSH side would be either the initial Shorenstein Entity or a Permitted Transferee, but not both.... The LLC Agreement, read literally, defines the Shorenstein Entity to include Affiliates. Thus, even if [CSH's] interpretation is plausible, I cannot say that it is the only reasonable one.").

49 *Id.* ("Resolving all ambiguities in favor of Nederlander as the nonmoving party, I must recognize that the LLC Agreement could be construed to impose restrictions on Affiliates of CSH, including Mrs. Hays. It is reasonably conceivable, therefore, that, when CSH's Affiliates' **behavior** is included in the analysis, Nederlander could prove a breach of the LLC Agreement, such as a violation of the duty imposed in Section 7.02(a) requiring the Shorenstein Entity to work toward maximizing SHN's economic success.").

50 *Id.* at *13.

51 *Id.*

52 *Declaratory Judgment Opinion*, 2018 WL 3646817, at *15 ("Based on the testimony and all the other evidence presented at trial, I find that [Nederlander] has not shown by a preponderance of the evidence that Carole promised to rent the Curran to the Company after the expiration of the Lurie Lease.").

53 *Id.* at *15–19.

54 *Id.* at *23.

55 *Id.* at *25.

56 *Id.*

57 *Id.* at *26.

58 *Id.* (quoting Robert's trial testimony).

59 *Id.* at *27.

60 *Id.* at *24 (footnotes omitted).

61 *Id.*

62 *Id.* at *25 ("[Carole] entered into an investment agreement with the production *Fun Home* on behalf of her entity CSH Productions, LLC. As part of that agreement, *Fun Home* agreed that if the production went on tour it would not perform at any other Bay Area theater but the Curran as it was understood that an important inducement for [Carole's] significant investment in the Broadway Production is to obtain the first right to present the first commercial production of the Play in the Bay Area, preferably to launch the national tour. This concession constitutes control over the production as defined in Section 7.03 because it allows Carole the ability to determine where the Production plays and the terms and conditions of said engagement.

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Fun Home played at the Curran in 2017. This means Carole staged a production that she controlled within 100 miles of San Francisco." (citations and quotations omitted)).

63 *Id.* ("*Fun Home* did not play at either of the Company's theaters, but the post-trial briefs do not point to any evidence regarding whether the Nederlanders rejected *Fun Home* for the Company or if the Company shared in the profits and losses of *Fun Home*. [Nederlander] has the burden to prove its case by a preponderance of the evidence. Even if there is evidence in the record that shows Carole did not adhere to Section 7.02(b), [Nederlander] has not offered any evidence regarding its damages relating to *Fun Home* and, thus, has not satisfied the final element for its breach of contract claim." (citations omitted)).

64 The subscription series is a significant income-generator for SHN. " 'A subscription, really everywhere in the country for Broadway, is five to seven shows that are put in a package that you buy at once, similar to a sports season ticket. Subscribers get special benefits, typically discounts, opportunity to get gifts, better seats than everywhere else.' " *Id.* at *9 n.123 (quoting Holland's trial testimony).

65 *Id.* at *27. The common law fiduciary duty breaches are not at issue in this appeal.

66 *Id.*

67 *Id.* at *29. This theory alleged "breaches of both contractual and fiduciary duties." *Id.*

68 *Id.*

69 *Id.* at *30 (emphasis added). Further, Nederlander's expert witness, Dr. John Hekman, did not calculate damages for "poaching" individual shows. *See* App. to CSH Answering Br. at B337 (Dr. John Hekman Testimony).

70 *See* *CSH Theatres, LLC v. Nederlander of San Francisco Assocs.*, 2018 WL 4522728 (Del. Ch. Sept. 20, 2018).

71 Following the Motion to Dismiss Opinion, the remaining claims consisted of Counts II (breach of the LLC Agreement), IV (breach of contract), and V (promissory estoppel).

72 *See* Addendum; Ex. C to Opening Br. (Nov. 1, 2018 Order).

73 App. to CSH Answering Br. at B446 (Order Denying Mot. for Clarification).

74 *Id.* at B446–47.

75 Nederlander moved for expedited proceedings, which the trial court granted on October 5, 2018 in a telephonic hearing.

76 *PI Action*, 2018 WL 6271655, at *11; *see also* *id.* at *10 ("If, as Plaintiff contends, to stage a production is to control it, Section 7.02's limits on a member or affiliate's ability to 'stage a Production that it controls (as defined in Section 7.03)' is repetitive, because 'that it controls (as defined in Section 7.03)' adds nothing to the sentence. This interpretation creates surplusage." (citations omitted)); *id.* ("[Nederlander's] interpretation would reduce Section 7.06 to only allowing competition when the member or affiliate is a passive, uninvolved investor. This interpretation would make large parts of Section 7.06—for example, the language regarding

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the ability to operate and manage a business for its own account and others' accounts—unnecessary surplusage.”).

77 *Id.* at *10.

78 *Id.* at *11.

79 The issues concerning the renewal of the Curran lease and the staging of *Fun Home* are not at issue on appeal. Further, Nederlander does not assert common law fiduciary claims on appeal. Rather, Nederlander frames its argument concerning improper competitive conduct as a violation of a contractual duty of loyalty under Section 7.02(a). *See* Opening Br. at 24 (“That language [in Section 7.02(a)] expressly imposes upon the parties a contractual and fiduciary duty of loyalty to SHN.” (citations omitted)); Oral Argument Video at 15:20–15:44, https://livestream.com/DelawareSupremeCourt/events/8670837/videos/191018409 (Q: “And as I read your brief, your fiduciary duty argument is, on appeal, limited to the contractual fiduciary duties as opposed to the common law fiduciary duties?” A: “Right. We are arguing that the contractual fiduciary duty of loyalty that's in the contract comports with and is coterminous with duty of loyalty under common law. But the source of that duty on what we're appealing is the contractual duty.”).

80 *See* Opening Br. at 4–5 (“If this Court credits [the Section 7.02(a)] Argument and reverses on that basis, that would dispose of both appeals. Argument II is made on the alternative assumption that, even if this Court were to reject Argument I, the court nonetheless reversibly erred in denying the injunctive relief sought in the [PI Action].”).

81 *See* Nederlander Reply Br. at 35 n.92 (“NSF does not dispute any of the trial court's factual findings. NSF's procedural decision to seek a final judgment on those facts does not, as Appellees suggest, waive its right to argue that the court misinterpreted NSF's legal theory based on those facts.”); Oral Argument Video at 14:31–15:20, https://livestream.com/DelawareSupremeCourt/events/8670837/videos/191018409 (Q: “In the PI Action, you're not challenging the court's actual factual findings, are you? Rather, you're saying she misconstrued your position in your argument?” A: “The principal error by the trial court in the PI finding was to misconstrue the term ‘control,’ that's essentially a legal interpretation question. What does the contract mean? We respectfully believe she got it wrong. Against the right standard, our facts speak for themselves. She didn't dispute the individual factual findings ... she just said this body of evidence didn't meet a test that, with all respect, the court came up with on its own—pre-existing contractual right, which isn't in the agreement, wasn't argued by either side.”).

82 *CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 816 (Del. 2018) (quoting *Gatz Props., LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1212 (Del. 2012)).

83 *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (internal quotations omitted).

84 *Id.* at 1159–60.

85 *Salamone v. Gorman*, 106 A.3d 354, 374 (Del. 2014) (citing *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 55 (Del. Ch. 2001)).

86 *See* *Medicalgorithmics S.A. v. AMI Monitoring, Inc.*, 2016 WL 4401038, at *18 (Del. Ch. Aug. 18, 2016) (holding that where an agreement included “Affiliates” within the definition of “Parties,” the agreement imposed obligations on a contractually-defined affiliate that was under the control of a party to the agreement); *MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *12 (Del. Ch. Dec. 30, 2010) (where an agreement defined the term “affiliate” to include “any entity which either party now or hereafter, directly or

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indirectly, owns or controls," the court held that the phrase "now or hereafter" unambiguously contemplated that the agreement would apply to later-acquired or formal entities owned or controlled by the parties to the agreement).

87 *See* *Motion to Dismiss Opinion*, 2015 WL 1839684, at *9–*10.

88 Specifically, CSH points to Robert's trial testimony, Section 4 of the partnership agreement (which CSH argues applied only to the partners), and the conduct of Nederlander's alleged Affiliates, such as Broadway San Jose.

89 *See* *Declaratory Judgment Opinion*, 2018 WL 3646817, at *25 ("[A]t most, Counterclaim Defendants have raised an ambiguity in the contract that allows me to look at extrinsic evidence, and the extrinsic evidence supports [Nederlander]'s interpretation of Section 7.02.").

90 *Id.* at *26 (quoting Robert's trial testimony).

91 *Id.*

92 *Id.* at *27.

93 App. to Opening Br. at A423 (Nederlander's Counterclaims and Third Party Complaint).

94 *Id.* at A569 (Nederlander Pretrial Opening Br.).

95 *Id.* at A570–71 (citing Section 7.02(a)) (internal citations omitted).

96 *Id.* at A615 (citing Section 7.02(a)) (Nederlander Pretrial Answering Br.).

97 *Id.* at A762–63 (Nederlander Post-Trial Opening Br.).

98 *Id.* at A785 (internal citations omitted).

99 *Id.* at A810–12 (internal citations omitted).

100 *Id.* at A840 (internal citations omitted).

101 CSH Answering Br. at 39 (internal citations omitted).

102 *Declaratory Judgment Opinion*, 2018 WL 3646817, at *22 n.248 ("Both parties put an inordinate emphasis on the witnesses' opinions about various legal questions. None of the witnesses are experts on Delaware law, and even if they were, questions of legal interpretation are reserved for the Court. Thus, I do not allocate weight to the legal opinions of fact witnesses."). We agree with the trial court's observation on that point. Additionally, CSH's reliance on *Oxbow Carbon & Minerals Holdings v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482 (Del. 2019) is misplaced. In *Oxbow*, we quoted a principal's testimony concerning his understanding of an LLC agreement that was consistent with, and an example of, a position that a party and its counsel actually took in the Court of Chancery. That position was directly inconsistent with a new argument that party raised on appeal. *Id.* at 508–09. Here, Robert's testimony was vacillating and inconsistent. To the extent his testimony suggests that Affiliates are not bound by Section 7.02(a), that testimony was inconsistent with the position that Nederlander argued below and which it has consistently maintained on appeal. *See* App. to CSH Answering Br. at B431 (Nederlander's Post-Trial Oral Argument) (acknowledging Robert's testimony

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in a slide deck but clarifying that it did "Not Comport with Plain Language" and does not change the "Plain Language of the LLC Agreement"); *id.* at B438 (stating that Robert's testimony was "inconsistent with [its] interpretation").

103 *See, e.g.*, App. to CSH Answering Br. at B267–75 (Robert's Oct. 25, 2017 Testimony) (Q: "There was no obligation that was imposed here on other members of the Nederlander family; right?" A: "We took care of that. It was an obligation, basically, in the Nederlander family and the Shorenstein family." Q: "Well, let me just be clear about something. When this deal was signed in 1992 ... May 22, 1992, you personally, Robert E. Nederlander, Sr., you didn't think you were required to devote your efforts to maximizing the economic success of the partnership, did you?" A: "Robert Nederlander personally? No. I didn't think so." ... Q: "You didn't yourself get involved in the day-to-day negotiations of [the LLC Agreement], did you?" A: "I was concerned that we carry forward some of those documents - - I haven't looked at this in some time - - which basically says, in effect, that everybody is bound by this, relatives and otherwise. That's why the Shorenstein entity and the Nederlander entity are bound by this. This is not something that - - I have to look at it, but 'Permitted Transferees' in the case of - - are any member of the Nederlander family. Nederlander family, I think, is - - I haven't looked at it - - is the descendants of David Nederlander. And that includes all the Nederlanders. So Walter [Shorenstein] was protected, that any Nederlander entity is bound by this. Any Nederlander descendent is bound by this. Just like any Shorenstein entity is bound by this, including family members."); *id.* at B293–94 (Robert's Nov. 28, 2017 Testimony) (Q: "You said [in the October 25, 2017 cross-examination] that your brother, Jimmy Nederlander, and your nephew, Jimmy, Jr., were not required by Section 7.02(a) to devote their efforts to maximizing the success of SHN. Correct?" A: "Yes." Q: "Is it also correct that your two sons, Robert, Jr. and Eric, were not required by this contract, Section 7.02(a), to devote their efforts to maximizing the economic success of SHN?" A: "They're not involved in it." Q: "So they're not required. Correct?" A: "They're not - - I don't know where you're going with this. You're trying to confuse me with taking sentences out of context." ... Q: "Is it correct, Mr. Nederlander, that neither of your two sons, Bob, Jr. and Eric, were ever required by Section 7.02(a) to devote their efforts to maximize the economic success of SHN?" A: "They weren't required to do that.").

104 Opening Br. at 32.

105 *Declaratory Judgment Opinion*, 2018 WL 3646817, at *24 (footnotes omitted).

106 *Id.* ("This plain language of the contract, when read through the lens of *generalia specialibus non derogant*, creates a detailed scheme governing competition." (footnotes omitted)).

107 App. to Opening Br. at A305 (LLC Agreement § 7.06) (emphasis added).

108 *See* *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2008 WL 902406, at *8 (Del. Ch. Apr. 3, 2008) ("One plausible definition is that 'competitive' refers to a situation where 'two or more commercial interests [try] to obtain the *same* business from third parties.' " (quoting BLACK'S LAW DICTIONARY 302 (8th ed. 2004))); *id.* at *8 n.66 (recognizing another plausible definition of "competitive" "as a '[r]ivalry between two or more businesses striving for the same customer or market' " (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 376 (4th ed. 2000))).

109 *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005).

110 Oral Argument Video at 5:02–6:18, https://livestream.com/DelawareSupremeCourt/events/8670837/videos/191018409 (Q: "Is there competitive conduct that does not fall within [Section7.02(b)] that is still prohibited by [Section 7.02(a)]?" A: "Yes. Exactly at the heart of this issue.... [T]he meaning of that [Section

7.02(a)], you cannot engage in activity that harms SHN. You must avoid conflicts of interest. That means you can't compete against the business. Competition against the business is antithetical to a duty to maximize. [Section 7.02(b)], therefore—we get to the question of the real heart of it—what does 7.02(b) mean in that construct? The way we look at it, [Section 7.02(b)] is a specific application of the parties' agreement not to compete applying to specific facts that the parties anticipated. Because they had experience with those facts. If you had a controlled production, the parties' agreement was very simple. You cannot put a controlled production within one-hundred miles of San Francisco unless you comply with one of three exceptions.”).

111 *See supra* p. 51–52.

112 *Declaratory Judgment Opinion*, 2018 WL 3646817, at *26.

113 *Id.* (quoting Robert's trial testimony).

114 *See* App. to Opening Br. at A184 (1978 Letter of Understanding) (stating that the “initial purpose” of the partnership was “solely the operation of the Curran.”).

115 *See* *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 442 (Del. 1996) (stating that it is a “fundamental proposition that directors may not compete with the corporation” and that doing so violates the duty of loyalty); *Cantor Fitzgerald, L.P. v. Cantor*, 2000 WL 307370, at *22 (Del. Ch. Mar. 13, 2000) (holding that a contractual duty of loyalty was necessary to prevent partners from competing in the “very business that is central to [the partnership's] success”), *overruled on other grounds*, *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 686 (Del. 2013). The trial court expressly found that the “Counterclaim defendants admit they are Affiliates of the Shorenstein Entity.” *Declaratory Judgment Opinion*, 2018 WL 3646817, at *23 n.263.

116 *See supra* p. 53–54.

117 Nederlander requested disgorgement of CSH's profits from SHN and mitigation costs. *See* App. to Opening Br. at A830–32 (Nederlander Opening Post-Trial Br.). The trial court noted that those remedies were related to the Curran lease claims, on which the court ruled in favor of CSH and which are not at issue on appeal. *Declaratory Judgment Opinion*, 2018 WL 3646817, at *28, *29 n.320 (“I do not address [Nederlander's] request for disgorgement of corporate distributions, mitigation costs, and specific performance of the Promise or oral lease renewal because I find that no contract or lease renewal exists.”). Nederlander has not challenged that finding.

118 App. to CSH Answering Br. at B467–68, B471 (PI Complaint).

119 *Id.* at B484 (“By permitting, authorizing, working in furtherance of and/or contracting to stage productions at the Curran over which they exercise control – including without limitation *Dear Evan Hansen* and *Harry Potter* – without first satisfying one of the three exceptions set forth in Section 7.02(b), CSH, CSH Curran, CSH Productions, Curran Live, Carole Shorenstein Hays, Jeff Hays, and Thomas Hart breached the contractual anti-competition provisions set forth in Sections 7.02(a), 7.02(b), and 7.06 of the LLC Agreement and the related, implied covenant of good faith and fair dealing.”).

120 *See* App. to Opening Br. at A1094 (Nederlander Opening PI Br.) (stating that Sections 7.02(b) and 7.03 “are consistent with Section 7.02(a), which requires the Shorenstein Entity to ‘devote their efforts to maximize the economic success’ of SHN, avoid conflicts, and act in good faith”); *id.* at A1222 (Nederlander Reply PI Br.)

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(stating, in a footnote, that "SHN and NSF reserve their rights to enforce Defendants' conduct that violates Section 7.02(a) of the LLC Agreement").

121 Oral Argument Video at 6:50–7:25, https://livestream.com/DelawareSupremeCourt/events/8670837/videos/191018409.

122 App. to Opening Br. at A1222 (Nederlander Reply PI Br.).

123 Mot. to Expedite at 6. Nederlander explained that the showing of *Harry Potter* also requires that the Curran undergo extensive modifications to alter the appearance and structure of the theater, which are set to begin as early as July 1, 2019. *Id.*

124 *Nederlander of San Francisco Assocs. v. CSH Theatres LLC*, 2018 WL 6790280, at *1 (Del. Ch. Dec. 21, 2018) [hereinafter *PI Action Rule 54(b) Order*].

125 App. to Opening Br. at A1100 (Nederlander Opening PI Br.) ("NSF has also brought claims for breach of fiduciary duty and aiding and abetting breaches of fiduciary duty. There is also a reasonable probability of success on those two claims. CSH is a member and 50% owner of SHN. Given its significant control over SHN and various terms in the LLC Agreement, CSH owes common law and contractual fiduciary duties. As such, the individual defendants who ultimately control CSH likewise owe fiduciary duties. Moreover, Delaware law recognizes a claim for aiding and abetting breach of fiduciary duty, including contractually created fiduciary duties. Here, CSH owed and breached contractual and common law fiduciary duties. Even if the other Defendants did not breach duties they owed directly, they knowingly participated in CSH's breaches by causing or participating in the transactions that violated those duties. Accordingly, they are liable as aiders and abetters." (internal citations omitted)).

126 *PI Decision*, 2018 WL 6271655, at *11 ("Nederlander raises in a footnote [of its opening brief in the PI Action] that it has brought claims for breach of fiduciary duty and aiding and abetting and that these have a 'reasonable probability of success' because CSH is a member and fifty percent owner of SHN, leading to 'common law and contractual fiduciary duties.' ... [Nederlander] addresses the issue so summarily in its footnote that it lends no assistance to its argument about reasonable probability of success on the merits. [Nederlander] does not mention the issue at all in its sections on Irreparable Harm or Balance of the Equities. Finally, because [CSH and its Affiliates] objected to the issue as not properly raised, and because [Nederlander] did not respond to that objection either in its Reply Brief or at Oral Argument, it appears that [Nederlander] has abandoned this argument. Thus, I decline to rule on the fiduciary duty claim."). Nederlander has not challenged this holding on appeal.

127 Nederlander's decision to not seek immediate re-argument or immediate appellate review of the trial court's interpretation of Section 7.02(a) in the Declaratory Judgment Action likely provides a sufficient basis to reject any request by Nederlander for a second bite at expedited preliminary injunction proceedings in the PI Action as to the two challenged productions. Additionally, we note that the Hayses opposed Nederlander's request for expedition of the PI Appeal, pointing out that CSH was "set to turn over the Curran to a third-party tenant pursuant to a lease beginning on July 1, 2019, and the producers of *Harry Potter* have announced that the show will not open until sometime in the fall of 2019." Opposition to Mot. to Expedite ¶ 7.

128 Section 7.03 defines "control" as "having the ability to determine where the Production plays and the terms and conditions of said engagement." App. to Opening Br. at A305 (LLC Agreement § 7.03).

129 Opening Br. at 37, 40.

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130 *PI Decision*, 2018 WL 6271655, at *8.

131 Nederlander describes that spectrum of control as follows:

> On one end of the spectrum, the theater owner may contract away all control over the operations of the theater, giving a third party complete freedom to operate and stage productions with no involvement from the theater owner. This paradigm includes the "long-term, passive lease" that described the terms of SHN's lease of the Curran from the Lurie family. On the opposite end of the spectrum, the theater owner maintains complete control over all theater operations, including the right to operate the theater to stage all productions that the owner itself produces. Under the former paradigm arrangement, the owner has no control over any production staged at the theater, because the owner has contracted away any right to determine where that production plays or any terms and conditions of the production. Under the latter paradigm arrangement, the theater owner has complete control over every production staged at the theater. That is because the owner, as the theater owner, wearing its hat as the proprietor, operator and producer, would incontestably have the ability to determine where each production plays and its terms and conditions
>
> Opening Br. at 38–39.

132 *Id.* at 39, 41 (emphasis added).

133 App. to Opening Br. at A1224 (Nederlander PI Reply Br.) (emphasis added).

134 *Id.* at A1225 (citations omitted).

135 *Id.* (citations omitted).

136 *PI Decision*, 2018 WL 6271655, at *10; *see also* *id.* ("[Nederlander] argues that this control can occur at any time prior to the staging of the show, whether two years before staging the show (based on something like the right of first refusal in *Fun Home*) or two days before the staging of the show (based on a contract allowing the production to play). Therefore, [Nederlander] argues, the control over the productions of *DEH* and *Harry Potter* that Defendants gained through the contracts they signed booking those productions to play at the Curran is sufficient to make the productions subject to Defendants' 'control' as defined in Section 7.03*. This, [Nederlander] explains, is because Defendants were involved in negotiating the terms and could have rejected them at any time, preventing* DEH *and* Harry Potter *from playing at the Curran.*" (emphasis added) (citations omitted)).

137 *Id.* at *9 ("I must now evaluate [Nederlander's] contention that the circumstances surrounding the production of *DEH* and *Harry Potter* evidence control—the ability to determine where to produce the plays and the terms and conditions of said engagement.").

138 Opening Br. at 37.

139 *PI Decision*, 2018 WL 6271655, at *9 (internal quotations omitted).

140 *Id.* (internal quotations omitted).

141 *Id.* at *9, *11.

142 *Id.* at *9.

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143 *Id.* at *11.

144 *Id.*

145 *Id.*

146 *PI Action Rule 54(b) Order*, 2018 WL 6790280, at *1.

147 We comment on this matter "under our 'exclusive supervisory responsibility to regulate and enforce appropriate conduct of ... all lawyers, litigants, witnesses, and others' participating in a Delaware proceeding." *Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 507 (Del. 2005) (quoting *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994)).

148 637 A.2d 34 (Del. 1994).

149 *Id.* at 53.

150 *Id.* at 55.

151 *Id.* at 55–56.

152 *Id.* at 56.

153 The citations within the excerpts quoted above are to the pages of Hays's **deposition** transcript [hereinafter "Hays Dep."].

154 Hays Dep. 6:23–7:16.

155 *Id.* at 11:19–14:16.

156 *Id.* at 15:21–18:2.

157 *Id.* at 18:9–22:3.

158 *Id.* at 23:7–24:19.

159 *Id.* at 24:24–27:2.

160 *Id.* at 157:20–158:14.

161 *Id.* at 282:21–284:16.

162 *Id.* at 310:13–311:21.

163 *Id.* at 328:2–25.

164 *Id.* at 357:15–358:10.

165 *Id.* at 360:9–25.

166 *Id.* at 364:8–368:6.

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167 App. to Nederlander Reply Br. at AR002 (Hays Dep. Tr.).

168 *Id.*

169 Hays Dep. 57:12–58:3. Hays's appellate counsel did not help matters during oral argument before this Court when he was questioned about his client's **deposition behavior**. Aside from repeatedly interrupting the Court and talking over the Court when the Court was raising the matter near the end **of counsel's** allotted time for oral argument, counsel for Hays failed to acknowledge the **inappropriateness** of Hays's conduct and then even tried to make an excuse for her by simply—and incorrectly—telling the Court that this was Hays's first **deposition**. *See* Oral Argument at 38:06–39:40, https://livestream.com/accounts/5969852/events/8670837/videos/191018409/player 39:30; *see also* Hays Dep. 6:23–25 (Q. "Have you ever been deposed before?" A. "Yes.").

170 *See* *Kaung*, 884 A.2d at 508 (holding that **deposition** misconduct can be "just as outrageous and unacceptable when accomplished by a non-lawyer consultant or a witness at a **deposition**," and stating that "[f]or future guidance and deterrence, we emphasize that sanctions may be imposed upon anyone participating in a Delaware proceeding who engages in abusive litigation tactics"); *see also* *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 194–95 (E.D. Pa. 2008) (sanctioning both the deponent and counsel for extremely abusive, obstructive and vulgar **deposition** conduct of the client, and where client's counsel "persistently failed to intercede" and "sat idly by as a mere spectator to [the client's] abusive, obstructive, and evasive **behavior**").

171 We recognize that conferences between the attorney and deponent during the **deposition** should not occur except to "assert a privilege against testifying or on how to comply with a court order." Ct. Ch. R. 30(d)(1). Parties may also make a motion "upon a showing that the examination is being conducted or defended in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party." Ct. Ch. R. 30(d)(3); *see also* *Hall v. Clifton Precision*, 150 F.R.D. 525, 531–32 (E.D. Pa. 1993) (ruling that "[c]ounsel and their witness-clients shall not engage in private, off-the-record conferences during **depositions** or during breaks or recesses, except for the purpose of deciding whether to assert a privilege").

172 *See* Ct. Ch. R. 170(b) ("The admission of an attorney pro hac vice shall not relieve the moving attorney from responsibility to comply with any Rule or order of the Court."); Ct. Ch. R. 170(c)(ii) ("Any attorney seeking admission pro hac vice shall certify the following ... [t]hat the attorney shall be bound by the Delaware Lawyers' Rules of Professional Conduct and has reviewed the Principles of Professionalism for Delaware Lawyers, as effective on November 1, 2003, and as amended."); Del. Principles Professionalism for Lawyers A(4) ("A lawyer should represent a client with vigor, dedication and commitment. Such representation, however, does not justify conduct that unnecessarily delays matters, or is abusive, rude or disrespectful. A lawyer should recognize that such conduct may be detrimental to a client's interests and contrary to the administration of justice."). These obligations apply with equal force to lawyers who are permitted to practice in this state under a *pro hac vice* admission. *See* Ct. Ch. R. 170 (c)(ii); *Lendus, LLC v. Goede*, 2018 WL 6498674, at *8 (Del. Ch., Dec. 10, 2018) (holding that revocation of *pro hac vice* admission is an appropriate sanction for "conduct that is repugnant to this Court's ideals of civility and candor"); *State v. Mumford*, 731 A.2d 831, 835–36 (Del. Super. 1999) (holding that an attorney's failure to control witness's offensive **behavior** during **deposition** warranted revocation of *pro hac*

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2020 WL 6588643

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~.
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Jetta **ALBERTS**, Plaintiff,
v.
ALL ABOUT **WOMEN**, P.A. a Delaware corporation, Regina Smith, D.O., and Christiana Care Health Services, Inc., Defendants.

C.A. No. N18C-07-212 JRJ
|
Date Submitted: July 21, 2020
|
Date Decided: November 10, 2020
|
Corrected: November 24, 2020*

Upon Plaintiff's Motion to Strike Errata Corrections: **GRANTED**

Attorneys and Law Firms

Randall E. Robbins, Esquire, Randall J. Teti, Esquire, Ashby & Geddes, Wilmington, Delaware, Attorneys for Plaintiff.

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OPINION

Jurden, P.J.

I. INTRODUCTION

***1** This is a medical negligence action arising from a myomectomy performed on Plaintiff Jetta **Alberts** ("Plaintiff") at Christiana Hospital on September 6, 2017 that ultimately resulted in the loss of her uterus at the age of twenty-five.[1] On June 3, 2020, Plaintiff deposed Diane McCracken, M.D., an owner of Defendant All About **Women**, P.A., (collectively, with Dr. Regina Smith, D.O., "Defendants") and the supervising attending physician who was responsible for Plaintiffs postoperative care.[2] Following that deposition, and as a result of Dr. McCracken's testimony, the Plaintiffs OB/GYN expert supplemented his expert opinions, opining, among other things, that Dr. McCracken breached the standard of care with respect to the clinical assessment of the Plaintiff.[3] Almost a month later, Dr. McCracken submitted an *errata* sheet setting forth multiple "desired corrections" ("corrections") to her deposition testimony (collectively, the "*Errata* sheet"). Plaintiff moves to strike a number of these corrections, arguing they significantly "manipulate, supplement, or change" Dr. McCracken's deposition answers.[4]

For the following reasons, Plaintiff's Motion to Strike *Errata* Corrections is **GRANTED**.

II. FACTS AND PROCEDURAL HISTORY

A. Plaintiff's Medical Negligence Claims

Plaintiff alleges Defendants breached the standard of care by failing to timely recognize Plaintiff experienced post-operative internal bleeding in the two days following her myomectomy.[5] By the time Defendants discovered the bleeding, Plaintiff had lost almost two-thirds of her blood volume and had to undergo an emergency hysterectomy.[6] According to Plaintiff, the standard of care required Defendants to be cognizant of her full clinical picture and immediately recognize the signs and symptoms of internal bleeding throughout post-operation day one ("POD1") and the morning of post-operation day two ("POD2").[7] Plaintiff claims that had the Defendants met the standard of care, Plaintiff would not have experienced such significant blood loss and would not have had to undergo the hysterectomy.[8]

B. Plaintiff's Motion to Strike the McCracken *Errata* Sheet Corrections

***2** On June 3, 2020, Plaintiff took Dr. McCracken's deposition.[9] After receiving a copy of Dr. McCracken's deposition transcript, Plaintiff's OB/GYN expert, Dr. Daniel Small, M.D., supplemented his expert disclosure ("Supplemental Disclosure") to add that, in his expert opinion, (1) Dr. McCracken breached the standard of care owed to Plaintiff when she failed to recognize the "obvious signs, symptoms and labs consistent with internal bleeding" until POD2,[10] (2) Dr. McCracken's testimony that "potentially any of us or potentially none of us" responsible for Plaintiff's care would know the elements of the clinical information necessary to diagnose Plaintiff's condition, falls below the standard of care,[11] and (3) Dr. McCracken's testimony regarding what a "clinical picture" means is a "grossly inaccurate representation of the meaning of clinical picture, and falls far below the knowledge and skill ordinarily employed by an attending OB/GYN and the use of reasonable care and diligence in the postoperative care of a myomectomy patient[.]"[12]

Two weeks after Plaintiff produced Dr. Small's Supplemental Disclosure, and almost one month after her deposition, Dr. McCracken submitted an *Errata* sheet substantively supplementing and changing her deposition testimony.[13] In response, Plaintiff filed the instant motion.

The corrections on the *Errata* sheet Plaintiff moves to strike are as follows:[14]

Dep. Tr.	Question Asked	Testimony	Desired Corrections

38:12–19 **1.**	Q: Does [Ashley August, P.A.] communicate to you about all patients or just ones where she perceives there's an issue?	A: She typically would – if we have the list in front of us I would say are there any issues? And she would say yes, you know, this person's blood pressure is elevated and this person wants to go home early or something like that. So we wouldn't necessarily go through details of every single patient if the patients are stable.	A: She typically would – if we have the list in front of us I would say are there any issues? And she would say yes, you know, this person's blood pressure is elevated and this person wants to go home early or something like that. So we wouldn't necessarily go through **all the** details of every single patient if the patients are stable.
48:6 **2.**	Q: And would it be significant to you whether [the myomectomy] was open or laparoscopic?	A: Not necessarily significant. I mean that's, that's just – it's still an abdominal surgery and carries many of the same risks either way. You know, typically recovery is a little longer for an open [myomectomy], but it has in the first day or two similar recovery so...	A: Not necessarily significant. I mean that's, that's just - - it's still an abdominal surgery and carries many of the same risks either way. You know, typically recovery is a little longer for an open [myomectomy], but it has in the first day or two similar recovery so **it would be a similar post operative course.**

79:9–10 **3.**	Q: [I]'m asking you about September 7th when you were the supervising physician for Jetta **Alberts** on post-op day one. In that situation would the drop in hemoglobin from 13.2 to 7.1 be relevant to the clinical picture?	A: It would not have changed anything. If I had a patient that's otherwise clinically stable with normal vitals, eating, making urine and a drop to hemoglobin to 7 and no obvious signs of hemorrhage or bleeding, that wouldn't change anything in the clinical picture at that time.	A: It would not have changed anything. If I had a patient that's otherwise clinically stable with normal vitals, eating, making urine and a drop to hemoglobin to 7 and no obvious signs of hemorrhage or bleeding, that wouldn't change anything **~~in~~** **that we do with** the clinical picture at that time. **We would continue to monitor it.**
87:1 **4.**	Q: Do you know whether [Plaintiff] was eating?	A: No, I don't. I was not made aware of the nausea so those weren't questions that I had a chance to ask.	A: No, I don't. I was not made aware **by the nurse** of the nausea so those weren't questions that I had a chance to ask.

127:7 **5.**	Q: Who taking care of [Plaintiff] would know the important pieces of clinical information?	A: Well, again, I guess it depends on what their role was. So the nurse would know the vitals and might know a low blood count or might not. The residents might know that, might not. So probably everybody has parts of that clinical information. I think everybody might find more pieces that are more – like people might deem certain pieces important and others not. So everybody might have their own clinical perspective as to what pieces are important and what aren't.	A: Well, again, I guess it depends on what their role was. So the nurse would know the vitals and might know a low blood count or might not. The residents might know that, might not. So probably everybody has parts of that clinical information. I think everybody might find more pieces that are more – like people might deem certain pieces important and others not. So everybody might have their own clinical perspective as to what pieces are important and what aren't. **It is based on the clinical presentation of each individual patient. Depending on that particular presentation, each provider may need to do further investigation in the chart. For example, if one was advancing their diet, it may not be necessary to look back to see when they started advancing their diet.**

127:18 **6.**	Q: How do all of those important pieces get brought together to form a diagnosis?	A: I mean I think that's the role of the clinician when they see the patient, to see what's going on and what are all of the pieces and how do I think it fits. But to say that every person or who's the person in charge of her that knows every little single piece of information is not, that's not realistic.	A: I mean I think that's the role of the clinician when they see the patient, to see what's going on and what are all of the pieces and how do I think it fits. But to say that every person or who's the person in charge of her that knows every little single piece of information is not, that's not realistic. **Again, the clinical picture of the patient is what drives the course of action of any clinician. For example, it [sic] the patient had normal vital signs, one would not necessarily look back to see if the patient ever had tachycardia because under that scenario it wouldn't necessarily be relevant to the patient's management moving forward.**

128:1 **7.**	Q: [W]ho knows the pieces of clinical information necessary to diagnose what is currently occurring with the patient?	A: Potentially any of us or potentially none of us.	A: Potentially any of us or potentially none of us. **know everything. However, we would all assess the clinical picture when we evaluate the patient and if there is anything that occurs during that evaluation which raises a question, we could then go into the patient's chart to further investigate that but each scenario is different.**

132:18 **8.**	Q: When you're talking about clinical picture, what are you talking about?	A: I mean clinical picture to me is how the patient is doing clinically. Are they sitting there awake and alert and breathing or are they lying on the floor without a pulse? Right?	A: I mean clinical picture to me is how the patient is doing clinically. Are they sitting there awake and alert and breathing or are they lying on the floor without a pulse? Right? **We assess each individual patient and depending on what the evaluation shows, we investigate further in the chart or order addition [sic] tests to ascertain what the care plan would be moving forward. In order to do that, we would typically look for something in the patient's presentation that is not typical for a normal post-operative course.**

III. PARTIES' CONTENTIONS

***3** Plaintiff argues that Dr. McCracken is using an *errata* sheet to improperly alter her testimony, and by doing so, has deviated from the purpose of an *errata* sheet-to correct typographical errors-not to rewrite harmful or incomplete testimony.[15] Plaintiff contends that allowing the type of changes Dr. McCracken seeks to make will render depositions no longer reliable.[16] Plaintiff further contends that Superior Court Rules 30(d) and (e) are in conflict with respect to the degree to which attorneys may be involved with the substance of a deponent's testimony, and the Court should resolve the conflict in a manner that advances justice and avoids absurd results.[17]

Defendants[18] argue that the *Errata* sheet "comports with the clear language of Rule 30(e)" as it clarifies and corrects various aspects of Dr. McCracken's testimony.[19] Defendants concede that some of Dr. McCracken's changes are substantive, but argue they are not contradictory and merely clarify her testimony.[20] According to Defendants, none of Dr. McCracken's changes to her testimony were made in response to Dr. Small's Supplemental Disclosure.[21] Finally, Defendants argue that even if the *Errata* sheet is improper, Plaintiff will have the opportunity to cross-examine Dr. McCracken on her changes at trial or may seek a deposition solely limited to the *Errata* sheet.[22]

IV. DISCUSSION

The meaning of the term "*errata* sheet" is derived from the word *erratum* which means "an error that needs correction."[23]

While Super. Ct. Civ. R. 30(e) allows a deponent to make changes to their deposition testimony in form or substance, it does not allow them to improperly alter what they testified to under oath. A deposition is not a practice quiz. Nor is it a take home exam.[24] An *errata* sheet exceeds the scope of the type of revisions contemplated by Rule 30(e) when the corrections "are akin to a student who takes her in-class examination home, but submits new answers only after realizing a month later the import of her original answers could possibly result in a failing grade."[25]

***4** The Plaintiff in this case posits:

> What is the point of a deposition if defense counsel asks questions of his client on cross-examination because of damaging testimony she gave to Plaintiff's counsel on direct on a key issue (here, clinical picture), gets more damaging sworn testimony from his client on that same key issue, but then gets to rewrite both of his client's answers to und[o] the damage?[26]

This is an excellent question.

It is beyond dispute that depositions play a critical role in the discovery process, trial preparation, and trial. They are one of the trial lawyer's most valuable tools. Among other things, they enable the parties to elicit facts and opinions through sworn testimony, which the parties in turn provide to their respective experts to secure expert opinions. In essence, the deposition allows a party to "pin down a witness" on key points. Not only is this sworn testimony used by the parties' experts, it is used at trial to impeach a witness who strays from or contradicts their deposition testimony. In short, plaintiffs and defendants rely heavily on depositions to develop trial strategy and prepare their cases for trial.[27] Because they are so important, deposition preparation, whether it be for a fact witness or an expert witness, is serious business. This is true for both sides, regardless of which party is taking or defending the deposition. A party should be able to rely on testimony obtained through a deposition because the deponent has sworn under oath that the testimony they are about to give is the truth.[28]

Generally speaking, there is a typical order to discovery in medical negligence cases: first fact witness depositions, then expert witness depositions.[29] This is so not only to ensure discovery is conducted in an orderly, effective, and efficient manner, but also for the simple reason that experts need to know the facts before they formulate their opinions. What is particularly troubling here is the disruptive nature, scope, and timing of Dr. McCracken's alterations to her deposition answers vis-à-vis the issuance of a supplemental expert opinion critical of the care she rendered to Plaintiff.

Two weeks after the McCracken deposition Plaintiff produced Dr. Small's Supplemental Disclosure in which he opined that Dr. McCracken breached the standard of care of a supervising attending OB/GYN by failing to be aware of her patient's pertinent clinical picture and clear signs of internal bleeding. According to Dr. Small, Dr. McCracken's deposition testimony that potentially any or potentially none of the members of the medical team responsible for Plaintiff's care would know the necessary clinical information to make a diagnosis is below the standard of care.[30] On her *Errata* sheet, Dr. McCracken significantly supplements and alters her responses in an apparent effort to make them less damaging. For example, her response to the straightforward question, "...who knows the pieces of clinical information necessary to diagnose what is currently occurring with the patient?" changes from, "[p]otentially any of us or potentially none of us[.]" to,

> ***5** [p]otentially any of us or none of us know everything. However, we would all assess the clinical picture when we evaluate the patient and if there is anything that occurs during that evaluation which raises a question, we could then go into the patient's chart to further investigate that...[.].[31]

By way of further example, after Dr. Small opined in his Supplemental Disclosure that Dr. McCracken's testimony that a patient's "clinical picture" means whether a patient is "awake and alert and breathing, or are they lying on the floor without a pulse" is a grossly inaccurate representation that evidences a lack of knowledge and skill required of an OB/GYN in the post-operative care of a myomectomy patient,[32] Dr. McCracken tries to rewrite her response by adding,

> [w]e assess each individual patient and depending on what the evaluation shows, we investigate further in the chart or order additional tests to ascertain what the care plan would be moving forward. In order to do that, we could typically look for something in the patient's presentation that is not typical for a

> normal post-operative course.[33]

Dr. McCracken's *Errata* sheet was provided two weeks after Dr. Smalls' Supplemental Disclosure was produced. Although an attorney is not permitted to consult or confer with their client about their testimony or anticipated testimony during the client's deposition, once the deposition is over, there is no such prohibition.[34] Allowing a deponent to use their *errata* sheet to work around the prohibition in Rule 30(d)(1) by altering sworn testimony in an attempt to undo damaging answers they gave at their deposition (or respond to an opposing expert's criticism), not only subverts the purpose of the deposition, but the discovery rules themselves.[35] It also increases the cost of litigation and prolongs discovery.[36] If the *errata* sheet gives the deponent a do-over as Defendants seem to maintain it does, deposition testimony, despite being sworn testimony, will no longer be reliable, making it almost meaningless.[37] Once the deposition is concluded, the deponent can confer with counsel, review the opposing expert reports, talk to other witnesses, and then supplement, alter, tailor and correct any response that is problematic for their side of the case.[38] This brings us back full circle to Plaintiff's question-does this not frustrate the intent of taking sworn testimony in a deposition?[39] The answer is, yes.

***6** As Plaintiff's counsel correctly notes,

> [t]he arguments advanced by [Defendants] in this case will not secure the just, speedy and inexpensive determination of every proceeding[40], but actually have the opposite effect that depositions will no longer be reliable The opportunity to resolve cases more quickly and more inexpensively through either settlements or motion practice will definitely be effected.[41]

After careful review of Dr. McCracken's deposition testimony, Dr. Small's Supplemental Disclosure, and Dr. McCracken's *Errata* sheet, it appears that her revisions to her deposition answers, (on pp. 5-8 of this opinion) are a tactical attempt to rewrite damaging deposition testimony.[42] Dr. McCracken's testimony occurred during a deposition at which she was questioned by Plaintiff's counsel and by her own attorney.[43] Her deposition transcript does not reflect confusion that the *Errata* sheet attempts to explain.[44] Moreover, the reasons she provides for her corrections do not indicate she was confused or misunderstood the questions.[45] The deposition transcript shows that when Dr. McCracken did not understand the questions, she would indicate so to her counsel and Plaintiff's counsel. Also important to note is, at the start of Dr. McCracken's deposition, Plaintiff's counsel said to her, "the most important ground rule is to please not answer a question unless you understand the question. Will you do that?"[46] She responded, "Yes."[47] Plaintiff's counsel also asked Dr. McCracken, "[i]f you do not understand the question, will you tell me that you do not understand the question?"[48] Again, Dr. McCracken answered affirmatively.[49] The sworn testimony she now seeks to alter was unambiguous and given in response to clear questions.[50] Ironically, her *Errata* sheet corrections-which are substantive additions and changes-address the very standard of care issues relating to the "clinical picture" addressed by Dr. Small's Supplemental Disclosure. And many of her new answers sound like expert opinions.[51]

***7** An *errata* sheet is not a license to change answers for damage control, or to add things the deponent wishes she had said. Here, the Plaintiff took a thorough deposition of Dr. McCracken, justifiably assumed the factual landscape was set as it pertained to Dr. McCracken, and moved on with discovery. Plaintiff had her expert take the time (at Plaintiff's expense) to review the McCracken testimony and prepare a Supplemental Disclosure, only to find out the landscape was altered.[52] The *Errata* changes are improper. "A tactic, the sole purpose of which is to subvert a procedural device prescribed by the Court's rules of civil procedure, simply cannot be countenanced."[53]

Defendants argue that even if the *Errata* changes are "improper," the Plaintiff's remedy is to cross-examine her on those changes at trial or seek a deposition solely limited to the *Errata* sheet. Defendants further argue there is no prejudice to Plaintiff.[54] The Court disagrees.[55] First, this case will be tried before a jury, not a judge. Unlike a trial judge in a bench trial, jurors lack the legal education, training, and experience to know and appreciate the significance of Dr. McCracken's substantive *Errata* sheet changes submitted weeks after her deposition, and after she rewrote her testimony ostensibly pursuant to a Court rule. According to Plaintiff, "it would be a very confusing process for a jury" and "[a]ll of [it] will get lost in an effective cross-examination."[56] The Court shares this concern.[57]

Second, deposing Dr. McCracken on the *Errata* sheet does not eliminate the prejudice to Plaintiff,[58] and, in this case, it would give carte blanche to deponents to rewrite their deposition testimony via an *errata* sheet.

Dr. McCracken's *Errata* changes are improper and beyond the scope of what is allowable under Rule 30(e) and must be stricken. Rule 30(e) cannot be interpreted to allow a deponent to rewrite their testimony in the manner and to the extent Dr. McCracken did here. To rule otherwise would be to turn depositions into practice quizzes and the *errata* sheets into group

projects.

V. CONCLUSION

For all the reasons explained above, Plaintiff's Motion to Strike *Errata* Corrections is **GRANTED**.

IT IS SO ORDERED.

All Citations

Not Reported in Atl. Rptr., 2020 WL 6588643

Footnotes	
*	The Court's decision was originally issued with a cover page stating "Memorandum Opinion." This has been corrected to read "Opinion."
1	D.I. 107 ¶ 1. A myomectomy is a surgical procedure to remove uterine fibroids. D.I. 1 ¶ 13.
2	*Id.* ¶ 3.
3	D.I. 107, Ex. Bat 3.
4	D.I. 107 ¶ 4. Dr. McCracken reserved the right to review and read her deposition transcript. D.I. 120 ¶ 1.
5	D.I. 107 ¶ 1
6	*Id.* ¶ 2.
7	*Id.*
8	*Id.* According to Plaintiff, a significant issue in this case is whether Defendants failed to recognize the signs and symptoms of internal bleeding throughout POD1 (9/7/17) and the morning of POD2 (9/8/17). The signs and symptoms included POD1 bloodwork showing a 6-point hemoglobin drop to 7.1 from Plaintiff's pre-op hemoglobin of 13.2, representing a loss of nearly 50% of her blood volume, together with persistent pain, persistent nausea and vomiting, fluid imbalance, and elevated heartrate, all consistent with internal bleeding. Plaintiff contends Defendants never checked the POD1 bloodwork results on POD1 that were posted to Plaintiff's chart at 9:07 a.m. according to CCHS's audit trail. It was not until POD2, when Plaintiff's hemoglobin level dropped to 4.7, that Defendants recognized Plaintiff was bleeding internally and had lost nearly 2/3 of her blood volume. She underwent the hysterectomy shortly thereafter. Plaintiff maintains that the standard of care required Defendants to, among other things, check the bloodwork results they ordered and to be aware of Plaintiff's total clinical picture. D.I. 107 ¶ 2.

9	*Id.* ¶ 3. Plaintiff originally sought to take Dr. McCracken's deposition in November 2019, but the parties were unable to agree to a common date until April, when COVID-19 struck. The parties agreed to a date in June in order to safely conduct the deposition. Hr'g: 3:23-6:4.
10	D.I. 107, Ex. B at 3. In his first expert disclosure, Dr. Small opined that the hospital's doctors, residents, and nurses, including Dr. Regina Smith, breached the standard of care by failing to timely respond to Plaintiff's internal bleeding until her risk level was dangerously high and failing to investigate and be aware of Plaintiff s whole clinical picture. *Id.* at 3, 5.
11	*Id.* at 6, citing McCracken Dep. at 127-28 (internal quotations omitted).
12	*Id.*
13	D.I. 107 ¶ 4. Defense counsel received the transcript of Dr. McCracken's deposition on June 5, 2020. D.I. 120 ¶ 3. Plaintiff produced Dr. Small's Supplemental Disclosure on June 17, 2020. D.I. 99.
14	Desired corrections are in bold and underlined. For ease of reference, the Court has numbered the corrections. The actual *Errata* sheet with the corrections and reasons for the corrections can be found at D.I. 107, Ex. C.
15	D.I. 107 ¶¶ 6, 8; *see also* Hr'g 45:3-8. Plaintiff's Counsel asks the Court to consider: "...what was the intent of the *Errata* changes? Was it to rewrite depositions and change the reliability of the deposition and the reliability of the discovery process?"
16	Hr'g. 33:16-20.
17	Hr'g 34:15-35:1.
18	Defendant Christiana Care Health Services, Inc. takes no position on Plaintiff's Motion. D.I. 117.
19	D.I. 120 ¶ 4.
20	Hr'g 18:10-18; 44:11-21.
21	Hr'g 18:21-23.
22	D.I. 120 ¶ 10. According to Plaintiff, redeposing the witness would be an ineffective practice because she is now prepared to respond with the litigation talking points. Hr'g 35:2-10.
23	Black's Law Dictionary (11th ed. 2019) (defining *errata* sheet as "[a]n attachment to a deposition transcript containing the deponent's corrections upon reading the transcript and the reasons for those corrections.").

24	*Donald M. Durkin Contracting, Inc. v. City of Newark,* 2006 WL 2724882, at *5 (D.Del. Sept. 22, 2006) (citing *Garcia v. Pueblo Country Club,* 299 F.3d 1233, 1242 (10th Cir. 2002) ("The Rule [30(e)] cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination." (quoting *Greenway v. Int'l Paper Co.,* 144 F.R.D. 322, 325 (W.D.La. 1992))). In *Durkin,* a deponent executed an *errata* sheet "clarifying" her deposition testimony. The court in *Durkin* treated the *errata* sheet as an affidavit and analyzed it under the sham affidavit rule. *See id.,* at *3-5. Although the McCracken *Errata* sheet was not offered to overcome a summary judgment motion, *Durkin* is instructive to the extent it discusses F.R.C.P. 30(e) and the scope of the type of revisions contemplated by the Rule. *See Crumplar v. Super. Ct. ex rel. New Castle Cnty.,* 56 A.3d 1000, 1007 (Del. 2012) (deciding interpretations of Federal Rules of Civil Procedure provide "persuasive guidance" for interpretation of Superior Court Rules of Civil Procedure).
25	*Durkin,* 2006 WL 2724882, at *5.
26	D.I. 107 ¶ 7.
27	The Delaware Supreme Court stated in *Americas Mining Corp. v. Theriault,* "[t]he Court of Chancery noted that when witnesses 'get deposed, you learn things, and you might ask other people or shape your trial strategy differently.' " 51 A.3d 1213, 1238 (2012); *see also Hoey v. Hawkins,* 332 A.2d 403, 406 (Del. 1975) ("Discovery and pretrial practices usually result in the narrowing and clarifying of issues so as to shorten trials and to bring about a greater degree of clarity and justice in the presentation of facts to juries.").
28	Super Ct. Civ. R. 30(b)(4).
29	*See* Hr'g 8:18-9:3.
30	D.I. 107, Ex. B ¶ 10a, quoting McCracken Dep. 127:19-128:5.
31	Correction No. 7, *supra* p. 8.
32	D.I. 107, Ex. B ¶ 10(b).
33	Correction No. 8, *supra* p. 9. As Plaintiff points out, Correction No. 8 is Dr. McCracken's third attempt at a response to a straightforward question. *See* Mot. at 4-6 (Dr. McCracken provided an answer "first in response to Plaintiff's counsel, second in response to her own counsel, and third in converting the *Errata* [s]heet into a take home deposition").

34	Super. Ct. Civ. R. 30(d)(1) prohibits the attorney(s) for a deponent from consulting or conferring with the deponent regarding the substance of the testimony already given or anticipated to be given, from the commencement until the conclusion of a deposition, including any recesses or continuances lasting less than five calendar days. Super. Ct. Civ. R. 30(e) does not prohibit a deponent's attorney from consulting or conferring with a deponent about their *errata* sheet. At oral argument, the Court, in response to Plaintiff's argument that Rule 30(d) and (e) are in conflict (Hr'g 34:15-17), raised this with Defense counsel: The Court: So, theoretically, after the deposition a fact witness gets the transcript, reviews it. There's no prohibition against that witness talking to anybody about their deposition and getting assistance preparing the *errata* sheet, or is there? Hr'g 16:21-17:2. Defense Counsel: There's none to my knowledge. *Id.* 17:3-4. The Court: So there would be nothing to prohibit a witness who had been deposed from talking to their attorney about their testimony after seven days; right? *Id.* 42:7-10. Defense Counsel: Correct. The same for experts as well. *Id.* 42:11-12. The Court: That's a little troubling to me when you talk about *errata* sheets that add substantive testimony. *Id.* 42:13-15.
35	*See* Hr'g 10:14-17. The Court: "I don't understand how the discovery process can survive a ruling that says that it's okay to make substantive changes to an *errata* sheet of this extent[.]"; *see also* Hr'g 43:16-21. The Court: "I'm worried about a fact witness after trial that on an *errata* sheet adds substantive amendments and changes to her fact testimony after the period runs during which she's prohibited from having a discussion with the attorney about her testimony."; *In re Examworks Grp., Inc. S'holder Appraisal Litig.*, 2018 WL 1008439, at *5 (Del. Ch. Feb. 21, 2018) ("[T]he purpose[s] of discovery [are] to advance issue formulation, to assist in fact revelation, and to reduce the element of surprise at trial. These instrumental purposes in turn serve the overarching and well established policy underlying pretrial disclosure, which is that a trial decision should result from a disinterested search for truth from all available evidence rather than tactical maneuvers based on the calculated manipulation of evidence and its production." (internal citations omitted)).
36	Hr'g 28:19-29:6. The Court: "[t]he Plaintiff thinks that they have the landscape set with what that witness's testimony is, the fact testimony. They count on it. We move through discovery. They have their experts take the time and pay the expense to the expert to review that fact testimony and issue a supplemental disclosure, as they must if there are substantive changes to [an] expert's initial opinion, and then to find out, oh, wait a minute, there's more. Do you see the Court's trouble with the precedent that's set for all cases?"
37	Hr'g 10:4-13. The Court: "[T]his chronology is troubling to me, and the extensive changes to the substance of the testimony after the deposition, after the witness is able to be cross-examined by All About **Women's** counsel, after the expert disclosures have been made and supplemented, I mean, I can't imagine what havoc would be wreaked if this becomes the norm in cases because depositions will be meaningless because you can just supplement at will through an *errata* sheet."; *see also* Hr'g 30:3-13. The Court: The *errata* sheet's not meant to supplement the deposition, is it? That's not the true nature of an *errata* sheet. You know what *errata* means, right? There's an error. It doesn't mean that the witness wishes that he or she could have said something more... That's not the purpose of it. The purpose is to correct an error in testimony; right? Defense Counsel: Correct.

38	*See* Hr'g 10:14-17. The Court: "I don't understand how the discovery process can survive a ruling that says that it's okay to make substantive changes to an *errata* sheet of this extent[.]".
39	As the Court queried more than once during oral argument, "where does this stop?" Hr'g 8:17.
40	*See* Hr'g 33:8-15. Super. Ct. Civ. R. 1 states, "These rules shall govern the procedure in the Superior Court of the State of Delaware with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding."
41	Hr'g 33:16-23; *see also* Hr'g 35:2-14. Plaintiff's Counsel: "[i]t would be an absurd result to say that after a deposition a witness, who their attorney actually took the opportunity to question at the deposition to try to clear up matters, can then rewrite all those matters to literally hit the litigation talking points. These are the litigation talking points of their defense. And just to substitute them in every instance where the answer conflicts with the litigation talking points, as Your Honor noted, where does it end? *Errata,* as Your Honor noted, literally means an error in printing or writing. That's the definition of *errata*."
42	*See Durkin,* 2006 WL 2724882, at *5 (striking the errata corrections as not "clarifications" but alterations of the deponent's testimony on key issues and provided alternative theories and defenses that the defense was now attempting to advance at trial).
43	Hr'g 13:4-14. The Court: "So I understand what [Defendants are] saying, but isn't that the point of your ability to cross-examine your own fact expert after the plaintiff finishes with them? In case you did think that during the direct deposition exam there was some confusion on your witness's part? You have the opportunity, do you not, to go through on cross and ask questions so that you in your mind can clear up what misunderstanding there may have been. Isn't that the point of giving you cross-examination ability in a deposition?": *see also* Hr'g 22:23-23:18. The Court: "It seems most of the substantive corrections, additions, amendments to her deposition testimony focus on a better explanation of what is meant by clinical presentation and what that entails. I'm not clear on why if you thought questions were confusing or you thought that the questions were improper on cross-examination she didn't give these answers when you had the opportunity to question her. I don't understand. *How many bites at the apple does a fact witness get to give their sworn testimony?* I don't understand why we didn't get more elaboration on the clinical picture, because on pages 127 through 128 and again on page 132, significant substantive amendments to her deposition testimony regarding clinical presentation. You had that opportunity in response to the questions that I read on direct and on cross to elaborate to this degree, but she did not and she saved it for her *Errata* sheet. Why?" (emphasis added).
44	D.I. 107, Ex. C. In fact, nowhere on the *Errata* sheet does she state that the reason for her corrections is because she was confused or did not understand the question. Instead, she states: "more precise answer," "clarifies the answer," "more complete answer," "completes and clarifies my answer better[.]"; *see also* McCracken Dep. 38:12-19, 48:6, 79:9-10, 87:1, 127:7, 127:18, 128:1, 132:18.
45	D.I. 107, Ex. C.
46	McCracken Dep. 3:23-4:2.
47	*Id.*, 4:3.

48	*Id.*, 4:8-9.
49	*See id.*, 4:10.
50	*Id.* Dr. McCracken had to have known that she would be questioned about the Plaintiff's condition and the standard of care, and it was reasonable for Plaintiff's counsel to expect that Dr. McCracken would be prepared to offer definitive testimony about the Plaintiff's clinical picture.
51	*See* Correction Nos. 6-8, *supra* pp. 8-9; *see also* Hr'g 27:9-19. The Court: "it sounds to me like an expert opinion on standard of care. I mean, that's what it sounds like. It doesn't sound like a fact witness saying, well, here's who I think would have the information. But it modifies her answer in a pretty significant way and it's-I'm not even sure it's really responsive. So I find it interesting that she felt she had to amend that answer to add that language."; Hr'g 28:10-12. The Court: "[I]t really expands and it's substantive and it's not one isolated incident."
52	*See* Hr'g 28:19-29:6.
53	*In re Asbestos Litig.*, 2006 WL 3492370, at *4 (Del. Super. Ct. Nov. 28, 2006).
54	In so arguing, the Defendants rely on *Mediacom Del., LLC.,* 2018 WL 1286207, at *1. In that case, the judge, not a jury, was the finder of fact. It makes a difference. *See infra* note 52; *see also* Hr'g 31:6-13. ("The difference here is the disruption in the discovery process by what transpired here, the quantum and substantive nature of the *Errata* sheet, "corrections," and that fact that here there's going to be a jury of lay people, and *Mediacom* is an extremely experienced former Superior Court judge and Vice Chancellor who's the finder of facts."
55	*See* Hr'g 13:4-14.
56	Hr'g 38:5, 9-10.
57	*See* Hr'g 46:7-16. The Court: "...I'm also worried about how this plays in front of a jury, because then you get into a side show of trying to impeach the witness with the *Errata* sheet, and you get into the deposition testimony and it becomes cumbersome in my experience when this sort of thing happens, and it requires the Court to make sure the jury understands how depositions work, how *errata* sheets work and it adds time. It adds time and it takes juror attention."
58	*See* Hr'g 37:23-38:15; *see also* Hr'g 31:6-16; 33:16-23.

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Digital Technology in the Courtroom (via video rebroadcast)

James Casey, Esquire
Ohio Chapter of ABOTA

As the Bench Sees It: Ethics & Professionalism in Discovery Practice

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Magistrate Judge Sherry Fallon
U.S. District Court for the District of Delaware

Judge Paul Wallace
Superior Court of the State of Delaware

Judge Reneta Green-Streett
Superior Court of the State of Delaware

PRINCIPLES OF PROFESSIONALISM FOR DELAWARE LAWYERS

PREAMBLE

The Delaware State Bar Association and the Delaware Supreme Court have jointly adopted the Principles of Professionalism for Delaware Lawyers for the guidance of Delaware lawyers, effective November 1, 2003. These Principles replace and supercede the Statement of Principles of Lawyer Conduct adopted by the Delaware State Bar Association on November 15, 1991. They are not intended, nor should they be construed, as establishing any minimum standards of professional care or competence, or as altering a lawyer's responsibilities under the Delaware Lawyers' Rules of Professional Conduct. These Principles shall not be used as a basis for litigation, lawyer discipline or sanctions. The purpose of adopting the Principles is to promote and foster the ideals of professional courtesy, conduct and cooperation. These Principles are fundamental to the functioning of our system of justice and public confidence in that system.

PRINCIPLES

A. ***In general.*** A lawyer should develop and maintain the qualities of integrity, compassion, learning, civility, diligence and public service that mark the most admired members of our profession. A lawyer should provide an example to the community in these qualities and should not be satisfied with minimal compliance with the mandatory rules governing professional conduct. These qualities apply both to office practice and to litigation. A lawyer should be mindful of the need to protect the standing of the legal profession in the view of the public and should bring these Principles to the attention of other lawyers when appropriate.

1. **Integrity.** Personal integrity is the most important quality in a lawyer. A lawyer's integrity requires personal conduct that does not impair the rendering of professional service of the highest skill and ability; acting with candor; preserving confidences; treating others with respect; and acting with conviction and courage in advocating a lawful cause. Candor requires both the expression of the truth and the refusal to mislead others in speech and demeanor.

2. **Compassion.** Compassion requires respect for the personal dignity of all persons. In that connection, a lawyer should treat all persons, including adverse lawyers and parties, fairly and equitably and refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.

3. **Learning.** A lawyer's commitment to learning involves academic study in the law followed by continual individual research and investigation in those fields in which the lawyer offers legal services to the public.

4. **Civility.** Professional civility is conduct that shows respect not only for the courts and colleagues, but also for all people encountered in practice. Respect requires promptness in meeting appointments, consideration of the schedules and

commitments of others, adherence to commitments whether made orally or in writing, promptness in returning telephone calls and responding to communications, and avoidance of verbal intemperance and personal attacks. A lawyer should not communicate with a Court* concerning pending or prospective litigation without reasonable notice whenever possible to all affected parties. Respect for the Court requires careful preparation of matters to be presented; clear, succinct, and candid oral and written communications; acceptance of rulings of the Court, subject to appropriate review; emotional self-control; the absence of scorn and superiority in words or demeanor; observance of local practice and custom as to the manner of addressing the Court; and appropriate dress in all Court proceedings. A lawyer should represent a client with vigor, dedication and commitment. Such representation, however, does not justify conduct that unnecessarily delays matters, or is abusive, rude or disrespectful. A lawyer should recognize that such conduct may be detrimental to a client's interests and contrary to the administration of justice.

5. **Diligence.** A lawyer should expend the time, effort, and energy required to master the facts and law presented by each professional task.

6. **Public service.** A lawyer should assist and substantially participate in civic, educational and charitable organizations. A lawyer should render substantial professional services on a charitable, or pro bono publico, basis on behalf of those persons who cannot afford adequate legal assistance.

B. ***Conduct of Litigation***. In dealing with opposing counsel, adverse parties, judges, court personnel and other participants in the legal process, a lawyer should strive to make our system of justice work fairly and efficiently. A lawyer should avoid conduct that undermines the judicial system or the public's confidence in it, as a truth seeking process for resolving disputes in a rational, amicable and efficient way.

1. **Responsible choice of forum**. Before choosing a forum, a lawyer should review with the client all alternatives, including alternate methods of dispute resolution. A lawyer should not file or defend a suit or an administrative proceeding without as thorough a review of the facts and the law as is required to form a conviction that the complaint or response has merit.

2. **Pre-trial proceedings**. A lawyer should use pre-trial procedures, including discovery, solely to develop a case for settlement or trial and not to harass an opponent or delay a case. Whenever possible, stipulations and agreements should be made between counsel to reduce both the cost and the use of judicial time. Interrogatories and requests for documents should be carefully crafted to demand only relevant matter, and responses should be timely, candid and not evasive. Good faith efforts should be

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* As used in these Principles, "Court" includes not only state and federal courts, but also other tribunals performing an adjudicatory function including administrative hearing panels and boards as well as arbitration tribunals.

made to resolve by agreement objections to matters contained in pleadings, discovery requests and objections.

A lawyer should endeavor to schedule pre-trial procedures so as to accommodate the schedules of all parties and attorneys involved. Agreements for reasonable extensions of time should not be withheld arbitrarily.

Only those depositions necessary to develop or preserve the facts should be taken. Questions and objections at deposition should be restricted to conduct appropriate in the presence of a judge.

3. **Communications with the Court or Tribunal**. A lawyer should speak and write respectfully in all communications with the Court. All papers filed in a proceeding should be as succinct as the complexity of the matter will allow. A lawyer should avoid ex parte communications with the Court on pending matters, except when permitted by law. Unless specifically authorized by law, a lawyer should not submit papers to the Court without serving copies of all papers upon opposing counsel in such a manner that opposing counsel will receive them before or contemporaneously with the submission to the Court.

4. **Settlement**. A lawyer should constantly evaluate the strength of a client's legal position and keep the client advised. A lawyer should seek to settle any matter at any time that such course of action is determined to be consistent with the client's best interest after considering the anticipated cost of continuing the proceeding and the lawyer's good faith evaluation of the likely result.

5. **Appeal**. A lawyer should take an appeal only if the lawyer believes in good faith that the Court has committed error, or an appeal is otherwise required.

C. ***Out of state associate counsel***. Before moving the admission of a lawyer from another jurisdiction, a Delaware lawyer should make such inquiry as required to determine that the lawyer to be admitted is reputable and competent and should furnish the candidate for admission with a copy these Principles.

Written Discovery and Document Production

Donald M. Ransom, Esquire
Casarino Christman Shalk Ransom & Doss, P.A.

Lawrance Spiller Kimmel, Esquire
Kimmel, Carter, Roman, Peltz & O'Neill, P.A

Matthew E. O'Byrne, Esquire
Casarino Christman Shalk Ransom & Doss, P.A.

Short Biography for Donald M. Ransom, Esq.

Don Ransom is a Delaware native. He graduated from the University of Delaware and Villanova University School of Law and has been a member of the Delaware Bar since 1987. He has significant first chair trial experience, having tried over 40 jury trials to verdict, and has successfully argued cases before the Delaware Supreme Court and the U.S. Court of Appeals for the Third Circuit. He is a member of the American Board of Trial Advocates ("ABOTA") and a Master with the Rich S. Rodney Inn of Court where he serves on Mentoring Committee of the Rodney Inn's Executive Committee. He holds an AV rating in the Martindale-Hubbell Bar Register and is currently the Managing Director of Casarino Christman Shalk Ransom & Doss, P.A.

LSK Bio

Larry Kimmel is the managing partner at Kimmel, Carter, Roman, Peltz & O'Neill, P.A., a Delaware personal injury and workers' compensation law firm. His practice is primarily focused on personal injury, workers' compensation, nursing home neglect, and construction accidents.

Larry is a current Board Member and Past President of the Delaware Trial Lawyers Association (DTLA), as well as a member of the American Association for Justice (AAJ) (formerly ATLA). Larry is also a Delaware State Bar Association (DSBA) member and was formerly the Chairman of the Association's Workers' Compensation Section.

Larry has received numerous professional honors and awards, including the Delaware State Bar Association's Young Lawyers Distinguished Service Award for 2014, membership in The National Trial Lawyers Association's Top 100, Delaware Today Top Lawyer, Delaware Super Lawyer, and an AV Preeminent rating from Martindale-Hubbell.

Larry is the founder and former Chairman of the Jewish Federation of Delaware's Ben Gurion Society, a past Chairman of the Board of Trustees of the Blue-Gold Delaware High School Basketball All-Star Games, the Chairman of the Kimmel-Spiller Charitable Foundation, and an active volunteer with Gift of Life Delaware. He and his wife, Kimberly, are the proud parents of Juliette, Daniel and Brittany.

Matthew O’Byrne Bio

Matthew O’Byrne is a Native of New Jersey and was the Managing Director of Casarino Christmas Shalk Ransom & Doss, P.A. from 2015 to 2020. Mr. O’Byrne graduated from the University of Delaware and Rutgers School of Law – Camden and has been a member of the Delaware Bar since 2003. Mr. O’Byrne has successfully tried numerous jury trials to verdict throughout the State of Delaware and has argued before the Delaware Supreme Court. Mr. O’Byrne also serves as a panel hearing officer for the Delaware Department of Insurance. In this capacity, Mr. O’Byrne hears and rules on various disputes between insurance carriers and their insureds. He also serves on the board of directors for the Defense Counsel of Delaware in order to promote integrity, justice, and professionalism in the justice system by bringing together Delaware attorneys dedicated to the defense of civil actions. Mr. O’Byrne is also a member of the American Board of Trial Advocates.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAPTION

PLAINTIFF'S REQUEST FOR
PRODUCTION DIRECTED TO DEFENDANT

The Plaintiff requests the Defendant to produce for examination and copying at the office of the attorneys for the plaintiffs within thirty (30) days from the date of this request the following items:

(1) Everything identified in your answers to interrogatories;

(2) A copy of the liability insurance policy and the declarations' page in effect at the time of the accident in question and covering the vehicle operated by the defendant;

(3) Copies of any and all medical records in your possession to date;

(4) All electronic files or records such as e-mails, computer entries or logs, computer files, etc. that have been filed or entered in relation to the events that resulted in this litigation. If you claim that the file or record is privileged, identify the file or record and state the nature of the privilege;

(5) Any and all medical records regarding hospital treatment that the defendant may have had following the accident, including but not limited to laboratory reports.

/s/ ATTORNEY SIGNATURE

Dated: May 11, 2023

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAPTION

PLAINTIFF'S INTERROGATORIES
DIRECTED TO DEFENDANT[1]

1. Give the names and last known addresses of all persons who were present at the scene of the accident within twenty minutes after it occurred.

ANSWER

2. Give the names and last known addresses of persons from whom statements have been procured in regard to the facts alleged in the pleadings. As to each person named, state:

(a) the name and last known address of the person who took the statement;

(b) the date when the statement was taken;

(c) the names and last known addresses of all persons presently having copies of the statement;

(d) whether the statement was prepared in the general course of business or in anticipation of this litigation or preparation for trial;

(e) whether the statement was prepared under the supervision of or pursuant to the instructions of your attorney, and if so, the name and address of that attorney.

ANSWER

3. Give the name and address of each person who has been interviewed on your behalf. As to each person interviewed, state:

(a) the date of such interview;

[1] These are continuing interrogatories, the answers to which must be kept current.

(b) the name and last known address of each person who has a resume of such interview.

ANSWER

4. With reference to any report, memorandum or resume prepared by you or anyone acting on your behalf but not necessarily limited to any investigator, insurance adjuster or other person pertaining to any facts alleged of referred to in the pleadings, give the date of each such matter in writing and as to each date given, state:

(a) the name and address of the person or persons who prepared such writing, and the name, address identity of the employer of such person or persons;

(b) whether such writing was prepared by you or on your behalf;

(c) the number of pages of such writing;

(d) a general description of such matter in writing (as, for instance, two-page typed summary of an interview between investigator Jones and witness Smith dated January 1, 1966, or five-page report by investigator Smith concerning the results of his investigation of the facts of the accident, etc.);

(e) whether such writing was prepared under the supervision of or pursuant to the instructions of your attorney, and if so, the name and address of that attorney;

(f) the names and addresses of persons who have copies of such matter in writing.

ANSWER

5. Give the names and last-known addresses of all persons who have taken photographs with regard to any fact alleged in the pleading. As to each person named, state:

(a) the date when the photograph was taken;

(b) the subject of each photograph by giving a general description thereof;

(c) the name and last known address of each person who has custody of each such photograph.

ANSWER

6. State the name and address of every expert retained or employed by you in anticipation of this litigation or preparation for trial, whether or not you expect to call him as a witness at trial, and as to each state:

(a) the dates of initial employment;

(b) the date or dates of any reports, letters or other writings prepared by such person, a brief description of such writing (as two-page letter, three-page report, etc.), and the names and addresses of persons having copies of them;

(c) whether such expert rendered any service in connection with any aspect of any subject matter involved in this litigation, other than in anticipation of this litigation or preparation for trial, (as, for instance, giving medical attention required by the accident, designing machinery involved in the accident, etc.).

ANSWER

7. With respect to each expert, including but not limited to medical personnel, whom you expect to call at trial to testify, state the following:

(a) the associations or societies of which such expert is a member;

(b) the names and addresses of all hospitals, if any, on whose staff such expert has served, or with whom such expert has had courtesy privileges or to whom such expert has served as consultant including the applicable dates of same;

(c) the field of specialization of such expert, if any;

(d) the title, publisher, date and form of all documentary material published by such expert within his field of specialization, if any;

(e) the name, address, employer and address of the employer of such expert;

(f) a detailed explanation of the subject matter as to which such expert is expected to testify;

(g) a detailed explanation of the substance of the facts and opinions to which such expert is expected to testify;

(h) a detailed summary of the grounds for each opinion as to which such expert is expected to testify;

(i) a detailed explanation of such expert's educational and professional history;

(j) the title, publisher, date and form of those documentary materials which such expert believes to be the most authoritative with respect to the subject matter and opinions as to which he is expected to testify;

(k) the name, address, present employer, title, and specialty of each individual who instructed such expert in professional or graduate school with regard to any subjects related to such expert's present specialization and/or with regard to the subject matter as to which (s)he is expected to testify.

ANSWER

8. With respect to each piece of correspondence or report made by each expert identified in your answer to the preceding interrogatory concerning the facts and opinions as to which (s)he is expected to testify, state the following:

(a) the name and address of the expert making the report or correspondence;

(b) the name, address, and telephone number of each individual to whom such report or piece of correspondence was directed;

(c) the date of the report or piece of correspondence;

(d) the subject matter of the report or piece of correspondence;

(e) the name, address and telephone number of each individual who presently has in his custody, possession, or control a copy of the report or piece of correspondence.

ANSWER

9. Please state whether you had liability insurance in effect covering the accident in question and, if so, state:

(a) the name of the carrier;

(b) the policy number;

(c) the effective period;

(d) the maximum liability limits for each person and each accident.

ANSWER

10. At the time of the accident referred to in the complaint, if you were covered by any policy of re-insurance or excess liability insurance, state:

(a) the name of the carrier;

(b) the policy number;

(c) the effective period;

(d) the maximum liability limits for each person and each accident.

ANSWER

11. Please state whether the Defendant entered a guilty plea in any Court to motor vehicle violation arising out of the accident which is the subject matter of this litigation.

ANSWER

12. If the answer to the preceding interrogatory is in the affirmative, please state:

(a) the specific statutory violation; and

(b) the specific name and address of the Court in which such plea was entered.

ANSWER

13. State whether the Defendant was involved in any motor vehicle violation within the last 5 years preceding this accident and, if so, state for each:

(a) the date;

(b) the specific violation;

(c) the state in which the violation occurred;

(d) the Court rendering the conviction.

ANSWER

14. State whether the Defendant was involved in any motor vehicle accident in the last 5 years preceding this accident which is the subject matter of this litigation and, if so, state:

(a) the date;

(b) the state in which it occurred;

(c) a description of how the accident occurred.

ANSWER

15. Please state your date of birth, full motor vehicle license number at the time of the accident in question and indicate whether it is any different now.

ANSWER

16. If the Defendant had a license for the operation of any vehicle which contained any restrictions, state the nature of such restrictions and the dates when and places where such

restrictions applied.

ANSWER

17. If the Defendant ever had a license to operate any vehicle suspended, canceled, or revoked, state the name of the state suspending, cancelling, or revoking such license, the inclusive dates of the suspending, cancelling, or revoking of the license and the reasons for the suspending, cancelling, or revoking of the license.

ANSWER

18. State the make, model, year, and license number of the vehicle which you were operating at the time of the accident.

ANSWER

19. If you were not the owner of the vehicle which you were operating at the time of the accident, state the following:

(a) the factual circumstances of your use of the vehicle at the time of the accident;

(b) the name, address and telephone number of the individual, if any, who gave you permission to operate the vehicle at the time of the accident.

ANSWER

20. If at the time of the accident the Defendant was in the course of the business of or for any purpose of any other individual or entity, state the following:

(a) the name and address of each individual or entity for which you were acting;

(b) the name, address, employer, and address of the employer of each individual with knowledge or information with respect to your answer to sub-part (a) above;

(c) a detailed explanation of the nature of the business or purpose which you were pursuing at the time of the accident.

ANSWER

21. Do you claim that the brakes on your vehicle failed at the time of the accident?

ANSWER

22. If you claim that any unexpected mechanical failure caused or contributed to the cause of the collision, state:

(a) the precise portion of the vehicle;

(b) the reasons for this claim;

(c) the names and last known addresses of all persons having such knowledge;

(d) a specific description of everything in writing pertaining to this claim and the names and last known addresses of all persons in possession of such writing.

ANSWER

23. If you claim that this was an unavoidable accident state your reasons in detail and give the names and last known addresses of persons having such knowledge and a description of anything in writing concerning such claim as well as the name and address of the person in custody of such writing.

ANSWER

24. State in detail the facts upon which each affirmative defense, if any, of the answer to the complaint is based and the names and last known addresses of all persons having knowledge and a description of anything in writing concerning such defense as well as the name and address of the person in custody of such writing.

ANSWER

25. If you claim that the Plaintiff violated any state statute not previously listed in the answer, designate the statute and state in what manner it was violated.

ANSWER

26. State in detail your version of the manner in which the accident which is the subject matter of this litigation occurred.

ANSWER

27. Please state whether you had a conversation with the Plaintiff or any other party to this lawsuit concerning the accident at any time after the accident and if so, state:

(a) the name of the parties;

(b) the date;

(c) the subject matter;

(d) your best recollection of what everyone said;

(e) the names and last known addresses of anyone else who was present;

(f) where such conversation took place.

ANSWER

28. If the Defendant took any drug, narcotic, sedative, tranquilizer, or other form of medication within the 24-hour period preceding the occurrence alleged in the complaint, state:

(a) the identity of such a drug or medication;

(b) the date and times of the use of such drug or medication;

(c) the purpose of such drug or medication;

(d) the name and address of the physician or other medical personnel who recommended the use of such drug or medication;

(e) whether you were using such drug or medication at the time of the accident;

(f) whether you are presently using such drug or medication.

ANSWER

29. If in the 24-hour period preceding the occurrence alleged in the complaint, the Defendant consumed alcoholic beverages, describe each and every beverage in detail, the amount consumed, the time each was consumed.

ANSWER

30. If the Defendant did not have 20/20 unimpaired vision at the time of the accident without the use of corrective lenses, state the following:

(a) whether or not you were wearing corrective lenses at the time of the accident;

(b) the eyesight defect which exists without the use of corrective lenses;

(c) the eyesight defect which exists with the use of corrective lenses;

(d) the name and address of the doctor who prescribed any corrective lenses which you possessed at the time of the accident;

(e) the date of the prescription for any corrective lenses which you possessed at the time of the accident;

(f) the name and address of the doctor who gave you your last eye examination prior to the accident;

(g) the date of your last eye examination prior to the accident.

ANSWER

31. State the specific portion of the vehicle owned or operated by you which first came in contact with the Plaintiff, or the vehicle occupied by the Plaintiff, and state specifically what part of Plaintiff or the vehicle occupied by the Plaintiff first came in contact with the vehicle owned or operated by you.

ANSWER

32. Did you see the Plaintiff, or the vehicle occupied by the Plaintiff at any time prior to the collision?

ANSWER

33. If your answer to the foregoing is in the affirmative, state:

(a) your best judgment of the distance in the number of feet separating the vehicle occupied by the Plaintiff from your vehicle at the time you first observed it; and

(b) your best judgment of the speed in miles per hour by the vehicle occupied by the Plaintiff at the moment you first observed it on said occasion.

ANSWER

34. If the brakes on the vehicle owned or operated by you were applied prior to the collision, state the speed in miles per hour that said vehicle was traveling at the moment the brakes were first applied and the distance in the number of feet between your vehicle and the vehicle occupied by the Plaintiff at the time the brakes were applied.

ANSWER

35. State your best judgment of the speed in miles per hour of the vehicle owned or operated by you on the occasion of the said accident, each of the following points before reaching the point of impact:

(a) 200 feet;

(b) 150 feet;

(c) 100 feet;

(d) 50 feet;

(e) 25 feet;

(f) point of impact.

ANSWER

36. If your vehicle left skid marks or tire marks prior to the collision, state:

(a) the number of feet of such marks;

(b) the location, i.e., beginning in right southbound lane and ending in the left northbound lane;

(c) the tires involved, i.e., front right, rear left, etc.

ANSWER

37. State whether any horn or other signal was given by you or the operator of the vehicle owned by you as a warning to the Plaintiff or other persons involved in said accident prior to the time of the collision and if not, why not.

ANSWER

38. If you claim that there was any thing or condition to obstruct your vision or of the driving of the vehicle owned by you just prior to, or at the time of, the said collision, explain and describe in detail.

ANSWER

39. Describe the make, model, and year of your vehicle and give a detailed account of all the damage suffered by your vehicle as a result of the collision described in the complaint.

ANSWER

40. Give the names and addresses of all persons or firms who have prepared estimates for the repair of your vehicle resulting from this accident and attach copies of such estimates to this answer.

ANSWER

41. Give an itemized statement of the repairs made to your vehicle, showing the cost of:

(a) parts replaced;

(b) work done;

(c) all other charges.

ANSWER

42. If your vehicle was not repaired as a result of the present accident, state why and what disposition was made of it.

ANSWER

43. If you or anyone on your behalf has written to or spoken to any doctors, hospitals, or other persons trained in the healing arts, or, written to or spoken with any person or company who maintains any records concerning injuries or illnesses, concerning the physical condition of the Plaintiff, state as to each request for information:

(a) the person or institution to which the request was made;

(b) the date of the request;

(c) whether the request was verbal or in writing;

(d) the name and address of the person making the request;

(e) a summary of the information requested.

ANSWER

44. If you or anyone on your behalf has received doctors' or hospital reports or records bearing on Plaintiff's injuries state:

(a) the nature of such reports or records;

(b) at whose request they were prepared;

(c) the dates when they were made or prepared;

(d) the name and last known address of the persons making or preparing them;

(e) the name and last known address of the person or persons presently having custody of them.

ANSWER

45. Do you have any information tending to indicate:

(a) that Plaintiff was, within five years immediately prior to said occurrence, confined in a hospital, treated by a physician, or x-rayed for any reasons? If so, give the name and address of such hospital, physician, technician or clinic, the approximate date of such confinement or service and state in general the reason for such confinement or service;

(b) the Plaintiff has suffered personal injury prior to the date of said occurrence? If so, state when, where, and in general how she was injured and describe in general the injuries suffered;

(c) the Plaintiff had suffered either (1) any personal injury or (2) any illness since the date of the occurrence, if so for (1) state when, where, and in general how she was injured, and describe in general the injuries suffered, and for (2) state when she was ill and describe in general the illness;

(d) that Plaintiff has ever filed any suit for her own personal injuries;

ANSWER

46. If you contend the injuries sustained by the Plaintiff were caused or contributed to, by the conduct or actions of a person or entity other than Plaintiff or yourself, state:

(a) the name and address of the person or entity;

(b) a description of such conduct or actions;

(c) what facts are known to you who form the basis of such contention;

(d) state the names and last known addresses of all persons who have knowledge of such facts;

(e) a description of everything in writing regarding (a)-(d) above and the name and last known address of the person in custody of such writing.

ANSWER

47. If you or your attorney, agent, or insurance company had any surveillance done or made of Plaintiff, describe when, where, how, and identity in detail all written reports, photographs and/or movies and the name and the last known address of the person in custody of such items.

ANSWER

48. Do the answers to each and every one of the foregoing interrogatories, include not only the information known to you or your attorney, but also the information within the possession or control of yourself or your attorney?

ANSWERS

49. With regard to any payments made to or on behalf of the Plaintiff by the Defendant or the Defendant's insurer for any cause whatsoever, including but not limited to medical expenses, loss of income or the like, or property damage, state:

(a) the amount of each such payment;

(b) the reason for such payment, i.e., hospital bills, doctor's fee, loss of income, property damage, and so forth;

(c) the name and address of the payee;

(d) the date of said payment;

(e) the statutory basis for such payment, i.e., personal injury protection benefits under 21 Del. C §2118, and so forth.

ANSWER

50. With respect to each and every injury, illness, disease, problem or complaint (hereinafter collectively referred to as "injury" or "injuries") that Plaintiff contends were sustained as a result of the accident referred to in the complaint (hereinafter "accident"), state the following:

(a) whether the Defendant contends that any of said injuries were not caused by the accident;

(b) a detailed description of each and every injury that Defendant contends was caused by some event or condition which is not related to the accident and a description of the event or condition which the Defendant contends was the cause of each said injury, including the date on which the condition or event caused said injury;

(c) the names, addresses of the employers of all persons, including but not limited to physicians and other medical personnel, who have knowledge or information of the matter set forth in Defendant's answer to this interrogatory and as to each such person, state the following:

(i) a detailed description of the knowledge or information each person possesses.

(ii) the date on which such knowledge became known to such person and the manner in which it was communicated to him.

(iii) a description of all writings of any kind which refer or relate to the knowledge or information each person possesses, including the date on which the writing was prepared, the name and address of the person who prepared it and the name and address of each person who is in possession of the original or copy of said writing.

ANSWER

51. Has the Defendant or Defendant's attorney ever arranged with any doctor to have the Plaintiff examined or treated in connection with any injuries, illnesses, diseases, problems or complaints (hereinafter collectively referred to as "injuries" or "injury") which Plaintiff contends she sustained in the accident referred to in the complaint (hereinafter "accident")?

ANSWER

52. If the answer to the preceding interrogatory is in the affirmative, state separately, as to each doctor who either examined or treated the Plaintiff, the following:

(a) the name and address of the doctor who performed the examination or rendered the treatment;

(b) whether the doctor examined the Plaintiff and, if so, a detailed description of the type of examination that was conducted, stating specifically each and every part of Plaintiff's body that was examined;

(c) the date and the time of the examination and the name and the address of the place where the examination was performed;

(d) the total length of time in which the examination took place (e.g., fifteen minutes, thirty minutes, etc.);

(e) a detailed description of the findings made by the doctor with respect to each aspect of his/her examination of Plaintiff;

(f) the name and address of the person who employed the doctor to do the examination;

(g) the amount of money that the doctor was paid to do the examination, the name and address of the person who paid the amount and the date on which the payment was made;

(h) whether any tests of any kind, including but not limited to x-rays, EEG's, or laboratory studies, were administered to Plaintiff in conjunction with the examination and, if so, state the following as to each test that was performed:

(i) a detailed description of the test that was performed.

(ii) the date, time of day and place where the test was administered.

ANSWER

53. With respect to each report, document, record, or any other writing of any kind which relates or refers in any way to the matters set forth in Defendant's response to interrogatory no. 47, state the following:

(a) the date on which such writing was prepared, including the time of day, if known;

(b) the name address of the preparer of the writing;

(c) a detailed description of the contents of the writing;

(d) the name and address of all persons who are in the possession of the original or copies of said writing.

ANSWER

ATTORNEY SIGNATURE

DATED: May 11, 2023

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAPTION

PLAINTIFF'S INTERROGATORIES
DIRECTED TO DEFENDANT[1]

1. Is the Defendant properly named in the Complaint? If not, please state the Defendant(s)' proper and full names.

ANSWER

2. Is the Defendant the owner of the dog that harmed the Plaintiff? If not, please state the name and contact information of the dog's owner(s).

ANSWER

3. Give the names and last known addresses of all persons who were present at the scene of the incident within twenty minutes after it occurred.

ANSWER

4. Give the names and last known addresses of persons from whom statements have been procured in regard to the facts alleged in the pleadings. As to each person named, state:

a. the name and last known address of the person who took the statement;

b. the date when the statement was taken;

c. the names and last known addresses of all persons presently having copies of the statement;

d. whether the statement was prepared in the general course of business or in anticipation of this litigation or preparation for trial;

[1] These are continuing interrogatories, the answers to which must be kept current.

e. whether the statement was prepared under the supervision of or pursuant to the instructions of your attorney, and if so, the name and address of that attorney.

ANSWER

5. Give the name and address of each person who has been interviewed on your behalf. As to each person interviewed, state:

a. the date of such interview;

b. the name and last known address of each person who has a resume of such interview.

ANSWER

6. With reference to any report, memorandum or resume prepared by you or anyone acting on your behalf but not necessarily limited to any investigator, insurance adjuster or other person pertaining to any facts alleged of referred to in the pleadings, give the date of each such matter in writing and as to each date given, state:

a. the name and address of the person or persons who prepared such writing, and the name, address identity of the employer of such person or persons;

b. whether such writing was prepared by you or on your behalf;

c. the number of pages of such writing;

d. a general description of such matter in writing (as, for instance, two-page typed summary of an interview between investigator Jones and witness Smith dated January 1, 2016, or five-page report by investigator Smith concerning the results of his investigation of the facts of the accident, etc.);

e. whether such writing was prepared under the supervision of or pursuant to the instructions of your attorney, and if so, the name and address of that attorney;

f. the names and addresses of persons who have copies of such matter in writing.

ANSWER

7. Give the names and last known addresses of all persons who have taken photographs with regard to any fact alleged in the pleading. As to each person named, state:

a. the date when the photograph was taken;

b. the subject of each photograph by giving a general description thereof;

c. the name and last known address of each person who has custody of each such photograph.

ANSWER

8. State the name and address of every expert retained or employed by you in anticipation of this litigation or preparation for trial, whether or not you expect to call him as a witness at trial, and as to each state:

a. the dates of initial employment;

b. the date or dates of any reports, letters or other writings prepared by such person, a brief description of such writing (as two-page letter, three-page report, etc.), and the names and addresses of persons having copies of them;

c. whether such expert rendered any service in connection with any aspect of any subject matter involved in this litigation, other than in anticipation of this litigation or preparation for trial, (as, for instance, giving medical attention required by the accident, designing machinery involved in the accident, etc.).

ANSWER

9. With respect to each expert, including but not limited to medical personnel, whom you expect to call at trial to testify, state the following:

a. the associations or societies of which such expert is a member;

b. the names and addresses of all hospitals, if any, on whose staff such expert has served, or with whom such expert has had courtesy privileges or to whom such expert has served as consultant including the applicable dates of same;

c. the field of specialization of such expert, if any;

d. the title, publisher, date and form of all documentary material published by such expert within his field of specialization, if any;

e. the name, address, employer and address of the employer of such expert;

f. a detailed explanation of the subject matter as to which such expert is expected to testify;

g. a detailed explanation of the substance of the facts and opinions to which such expert is expected to testify;

h. a detailed summary of the grounds for each opinion as to which such expert is expected to testify;

i. a detailed explanation of such expert's educational and professional history;

j. the title, publisher, date and form of those documentary materials which such expert believes to be the most authoritative with respect to the subject matter and opinions as to which he is expected to testify;

k. the name, address, present employer, title, and specialty of each individual who instructed such expert in professional or graduate school with regard to any subjects related to such expert's present specialization and/or with regard to the subject matter as

to which he is expected to testify.

ANSWER

10. With respect to each piece of correspondence or report made by each expert identified in your answer to the preceding interrogatory concerning the facts and opinions as to which he is expected to testify, state the following:

a. the name and address of the expert making the report or correspondence;

b. the name, address, and telephone number of each individual to whom such report or piece of correspondence was directed;

c. the date of the report or piece of correspondence;

d. the subject matter of the report or piece of correspondence;

e. the name, address and telephone number of each individual who presently has in his custody, possession, or control a copy of the report or piece of correspondence.

ANSWER

11. Please state whether you had liability insurance in effect covering the accident in question and, if so, state:

a. the name of the carrier;

b. the policy number;

c. the effective period;

d. the maximum liability limits for each person and each accident.

ANSWER

12. At the time of the accident referred to in the complaint, if you were covered by any policy of re-insurance or excess liability insurance, state:

a. the name of the carrier;

b. the policy number;

c. the effective period;

d. the maximum liability limits for each person and each accident.

ANSWER

13. State your date of birth.

ANSWER

14. Please provide the last 4 digits of your social security number.

ANSWER

15. State in detail the facts upon which each affirmative defense, if any, of the answer to the complaint is based and the names and last known addresses of all persons having knowledge and a description of anything in writing concerning such defense as well as the name and address of the person in custody of such writing.

ANSWER

16. If you claim that the Plaintiff violated any state statute not previously listed in the answer, designate the statute and state in what manner it was violated.

ANSWER

17. State in detail your version of the manner in which the accident which is the subject matter of this litigation occurred.

ANSWER

18. Please state whether you had a conversation with the Plaintiff or any other party to this lawsuit concerning the accident at any time after the accident and if so, state:

a. the name of the parties;

b. the date;

c. the subject matter;

d. your best recollection of what everyone said;

e. the names and last known addresses of anyone else who was present;

f. where such conversation took place.

ANSWER

19. If you contend the injuries sustained by the Plaintiff were caused or contributed to, by the conduct or actions of a person or entity other than Plaintiff or yourself, state:

a. the name and address of the person or entity;

b. a description of such conduct or actions;

c. what facts are known to you who form the basis of such contention;

d. state the names and last known addresses of all persons who have knowledge of such facts;

e. a description of everything in writing regarding (a)-(d) above and the name and last known address of the person in custody of such writing.

ANSWER

20. If you or your attorney, agent, or insurance company had any surveillance done or made of Plaintiff, describe when, where, how, and identity in detail all written reports, photographs and/or movies and the name and the last known address of the person in custody of such items.

ANSWER

21. Do the answers to each and every one of the foregoing interrogatories, include not only the information known to you or your attorney, but also the information within the possession or control of yourself or your attorney?

ANSWER

22. With regard to any payments made to or on behalf of the Plaintiff by the Defendant or the defendant's insurer for any cause whatsoever, including but not limited to medical expenses, loss of income or the like, or property damage, state:

a. the amount of each such payment;

b. the reason for such payment, i.e., hospital bills, doctor's fee, loss of income, property damage, and so forth;

c. the name and address of the payee;

d. the date of said payment;

e. the statutory basis for such payment.

ANSWER

23. With respect to each and every injury, illness, disease, problem or complaint (hereinafter collectively referred to as "injury" or "injuries") that Plaintiff contends were sustained as a result of the accident referred to in the complaint (hereinafter "accident"), state the following:

a. whether the Defendants contend that any of said injuries were not caused by the accident;

b. a detailed description of each and every injury that Defendants contend were caused by some event or condition which is not related to the accident and a description of the event or condition which the Defendants contend were the cause of each said injury, including the date on which the condition or event caused said injury;

c. the names, addresses of the employers of all persons, including but not limited to physicians and other medical personnel, who have knowledge or information of the matter set forth in Defendants' answer to this interrogatory and as to each such

person, state the following:

i. a detailed description of the knowledge or information each person possesses.

ii. the date on which such knowledge became known to such person and the manner in which it was communicated to him;

iii. a description of all writings of any kind which refer or relate to the knowledge or information each person possesses, including the date on which the writing was prepared, the name and address of the person who prepared it and the name and address of each person who is in possession of the original or copy of said writing.

ANSWER

24. Has the Defendant or Defendant's attorney(s) ever arranged with any doctor to have the Plaintiff examined or treated in connection with any injuries, illnesses, diseases, problems or complaints (hereinafter collectively referred to as "injuries" or "injury") which Plaintiff contends she sustained in the accident referred to in the complaint (hereinafter "accident")?

ANSWER

25. If the answer to the preceding interrogatory is in the affirmative, state separately, as to each doctor who either examined or treated the plaintiff, the following:

a. the name and address of the doctor who performed the examination or rendered the treatment;

b. whether the doctor examined the plaintiffs and, if so, a detailed description of the type of examination that was conducted, stating specifically each and every part of Plaintiff's body that was examined;

c. the date and the time of the examination and the name and the address of the place where the examination was performed;

d. the total length of time in which the examination took place (e.g., fifteen minutes, thirty minutes, etc.);

e. a detailed description of the findings made by the doctor with respect to each aspect of his examination of Plaintiff;

f. the name and address of the person who employed the doctor to do the examination;

g. the amount of money that the doctor was paid to do the examination, the name and address of the person who paid the amount and the date on which the payment was made;

h. whether any tests of any kind, including but not limited to x-rays, EEG's, or laboratory studies, were administered to Plaintiff in conjunction with the examination and, if so, state the following as to each test that was performed:

i. a detailed description of the test that was performed.

j. the date, time of day and place where the test was administered.

ANSWER

26. With respect to each report, document, record, or any other writing of any kind which relates or refers in any way to the matters set forth in Defendants' response to interrogatory no. 20, state the following:

a. the date on which such writing was prepared, including the time of day, if known;

b. the name address of the preparer of the writing;

c. a detailed description of the contents of the writing;

d. the name and address of all persons who are in the possession of the original or copies of said writing.

ANSWER

27. Please state the following for the dog the Plaintiff alleges injured her on the date of the incident in question:

a. Name of dog;

b. Type (breed) of dog;

c. Height of dog;

d. Weight of dog;

e. Color of dog;

f. Age of dog.

ANSWER

28. Identify by name, and last known address and phone number, each and every individual who witnessed the incident alleged in the lawsuit or the events occurring immediately before or after the incident alleged in the lawsuit including, but not limited to, the Defendants, member/patient who the Plaintiff was visiting, and anyone else in the household at the time.

ANSWER

29. Identify by name, and last known address and phone number, each and every individual who has knowledge of any fact upon which you base your contention that someone other than you caused or contributed to the occurrence, injuries and damages that are the subject of this lawsuit.

ANSWER

30. Are you aware of any incident, other than the incident which is the subject of this litigation, wherein the subject dog ever bit or otherwise caused injury or damage to any other person? If so, provide the following relative to each such incident:

a. Date of the incident;

b. A general description of the circumstances of the incident;

c. Identify by name, last known address and phone number, of all persons who have knowledge of the incident;

d. Describe the incident or the damages that occurred in the incident.

ANSWER

31. Identify by name, last known address and phone number of any veterinarian, kennel, dog boarder or dog sitter who provided services, care, or treatment for the subject dog.

ANSWER

32. Identify by name, and last known address and phone number, each and every trainer of the dog mentioned in the lawsuit (including but not necessarily limited to obedience, agility, protection, service and aggression training).

ANSWER

33. If the dog was ever trained by a trainer, describe the conduct of the dog mentioned in the lawsuit that prompted you to see each and every animal behaviorist consulted in connection with the dog.

ANSWER

34. Identify the date you first had custody and/or ownership of the dog and, if the dog is still alive, where it is kept. If the dog is no longer alive, please state the date of

death and explain the circumstances by which the dog died.

ANSWER

35. Please state how Defendant obtained the dog and state the name and address of each person or organization from whom the dog was obtained.

ANSWER

36. Was protection one of your reasons for keeping the dog mentioned in the lawsuit?

ANSWER

37. Was the dog mentioned in the lawsuit in good health on the date of the incident alleged in the lawsuit? If no, list each and every sign and symptom pertaining to the dog on the date of the incident alleged in the lawsuit.

ANSWER

38. Basing your answer on what you have seen or heard from others, did the dog mentioned in the lawsuit ever growl at, snarl at, snap its teeth at, or lunge at any person?

ANSWER

39. Have you been accused of violating any state, county or municipal law because of any action of the dog mentioned in the lawsuit at any time?

ANSWER

40. Did you at any time display any signs on your premises that warned people about the dog mentioned in the lawsuit?

ANSWER

41. What actions were taken to socialize or train the dog mentioned in the lawsuit?

ANSWER

42. If you contend that someone other than you caused or contributed to the occurrence, state each and every fact upon which you base your contention that someone other than you caused or contributed to the occurrence, injuries and damages that are the subject of this lawsuit.

ANSWER

43. Identify by name, and last known address and phone number, each and every neighbor on each side of the residence of the dog mentioned in the lawsuit, behind the residence (on the next block), and across the street. This interrogatory includes each and every residence of the dog.

ANSWER

44. On how many occasions was the dog mentioned in the lawsuit kept separated from guests in your home prior to the date of the incident mentioned in the lawsuit?

ANSWER

45. State the reasons why the dog mentioned in the lawsuit was kept separated from guests in your home.

ANSWER

46. Please state in detail what you saw and did prior to the incident in question, during the incident, and immediately following the incident.

ANSWER

47. If you contend that Plaintiff committed any act or omissions that you contend cause, contributed to or brought about the incident underlying this lawsuit, please state the facts upon which such allegations are based, the names and address of all individuals who support your contention, and the legal basis, if any, upon which said contentions are based.

ANSWER

48. Please state in detail all actions you took or attempted to take to avoid Plaintiff being harmed by the dog.

ANSWER

49. Please state whether the Defendant, or any other person at Defendant's residence, rendered medical care, treatment or assistance to Plaintiff immediately after the dog attacked her. Please identify each person who rendered assistance by name and address, and describe all care and treatment rendered.

ANSWER

50. State if anyone other than Plaintiff has ever made any claim against Defendant that the Defendant's dog had injured someone. If so, please provide the approximate date of the claim, and the name and address of the person making such claim.

ANSWER

51. State whether the SPCA or any other civil agency ever contacted the Defendant concerning the dog. If so, please state the reason for contact, the date, name, address, and phone number for person(s) who contacted Defendant, reason for contact, and any action taken.

ANSWER

52. State whether Defendant still owns the dog involved in the attack on Plaintiff. If so, state what if any actions have been taken by the Defendant to keep this dog from injuring someone else.

ANSWER

53. State whether the dog is licensed by the State of Delaware, and if so, state when the dog was last licensed.

ANSWER

54. If another person was walking or in possession of the dog at the time of the alleged incident, other than the named Defendant, please state:

a) that person's name;

b) age;

c) height and weight

ANSWER

/s/ ATTORNEY SIGNATURE

DATED: May 11, 2023

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAPTION

PLAINTIFF'S REQUEST FOR
PRODUCTION DIRECTED TO DEFENDANT

The Plaintiff requests the Defendant to produce for examination and copying at the office of the attorneys for the Plaintiff within thirty (30) days from the date of this request the following items:

(1) Everything identified in your answers to interrogatories;

(2) A copy of the liability insurance policy and the declarations' page in effect at the time of the accident in question and covering the home and property owned by the Defendant;

(3) Copies of any and all medical records in your possession to date;

(4) Copies of any correspondence sent to any defense medical examiner concerning the Plaintiff;

(5) All electronic files or records such as e-mails, computer entries or logs, computer files, etc. that have been filed or entered in relation to the events that resulted in this litigation. If you claim that the file or record is privileged, identify the file or record and state the nature of the privilege;

(6) Any expert reports Defendants have obtained and/or intends to rely upon at trial;

(7) Copies of the license, registration, rabies vaccination records, and anything else in writing concerning the dog in question.

/s/ ATTORNEY SIGNATURE

DATED: May 11, 2023

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAPTION

PLAINTIFF'S' INTERROGATORIES
DIRECTED TO DEFENDANT[1]

1. Give the names and last known addresses of all persons who were present at the scene of the accident within twenty minutes after it occurred.

ANSWER

2. Give the names and last known addresses of persons from whom statements have been procured in regard to the facts alleged in the pleadings. As to each person named, state:

(a) the name and last known address of the person who took the statement;

(b) the date when the statement was taken;

(c) the names and last known addresses of all persons presently having copies of the statement;

(d) whether the statement was prepared in the general course of business or in anticipation of this litigation or preparation for trial;

(e) whether the statement was prepared under the supervision of or pursuant to the instructions of your attorney, and if so, the name and address of that attorney.

ANSWER

3. Give the name and address of each person who has been interviewed on your behalf. As to each person interviewed, state:

(a) the date of such interview;

(b) the name and last known address of each person who has a resume of such

[1] These are continuing interrogatories, the answers to which must be kept current.

interview.

ANSWER

4. With reference to any report, memorandum or resume prepared by you or anyone acting on your behalf but not necessarily limited to any investigator, insurance adjuster or other person pertaining to any facts alleged of referred to in the pleadings, give the date of each such matter in writing and as to each date given, state:

(a) the name and address of the person or persons who prepared such writing, and the name, address identity of the employer of such person or persons;

(b) whether such writing was prepared by you or on your behalf;

(c) the number of pages of such writing;

(d) a general description of such matter in writing (as, for instance, two-page typed summary of an interview between investigator Jones and witness Smith dated January 1, 1966, or five-page report by investigator Smith concerning the results of his investigation of the facts of the accident, etc.);

(e) whether such writing was prepared under the supervision of or pursuant to the instructions of your attorney, and if so, the name and address of that attorney;

(f) the names and addresses of persons who have copies of such matter in writing.

ANSWER

5. Give the names and last-known addresses of all persons who have taken photographs with regard to any fact alleged in the pleading. As to each person named, state:

(a) the date when the photograph was taken;

(b) the subject of each photograph by giving a general description thereof;

(c) the name and last known address of each person who has custody of each such

photograph.

ANSWER

6. State the name and address of every expert retained or employed by you in anticipation of this litigation or preparation for trial, whether or not you expect to call him as a witness at trial, and as to each state:

(a) the dates of initial employment;

(b) the date or dates of any reports, letters or other writings prepared by such person, a brief description of such writing (as two-page letter, three-page report, etc.), and the names and addresses of persons having copies of them;

(c) whether such expert rendered any service in connection with any aspect of any subject matter involved in this litigation, other than in anticipation of this litigation or preparation for trial, (as, for instance, giving medical attention required by the accident, designing machinery involved in the accident, etc.).

ANSWER

7. With respect to each expert, including but not limited to medical personnel, whom you expect to call at trial to testify, state the following:

(a) the associations or societies of which such expert is a member;

(b) the names and addresses of all hospitals, if any, on whose staff such expert has served, or with whom such expert has had courtesy privileges or to whom such expert has served as consultant including the applicable dates of same;

(c) the field of specialization of such expert, if any;

(d) the title, publisher, date and form of all documentary material published by such expert within his field of specialization, if any;

(e) the name, address, employer and address of the employer of such expert;

(f) a detailed explanation of the subject matter as to which such expert is expected to testify;

(g) a detailed explanation of the substance of the facts and opinions to which such expert is expected to testify;

(h) a detailed summary of the grounds for each opinion as to which such expert is expected to testify;

(i) a detailed explanation of such expert's educational and professional history;

(j) the title, publisher, date and form of those documentary materials which such expert believes to be the most authoritative with respect to the subject matter and opinions as to which he is expected to testify;

(k) the name, address, present employer, title, and specialty of each individual who instructed such expert in professional or graduate school with regard to any subjects related to such expert's present specialization and/or with regard to the subject matter as to which he is expected to testify.

ANSWER

8. With respect to each piece of correspondence or report made by each expert identified in your answer to the preceding interrogatory concerning the facts and opinions as to which he is expected to testify, state the following:

(a) the name and address of the expert making the report or correspondence;

(b) the name, address, and telephone number of each individual to whom such report or piece of correspondence was directed;

(c) the date of the report or piece of correspondence;

(d) the subject matter of the report or piece of correspondence;

(e) the name, address and telephone number of each individual who presently has in his custody, possession, or control a copy of the report or piece of correspondence.

ANSWER

9. Please state whether you had liability insurance in effect covering the accident in question and, if so, state:

(a) the name of the carrier;

(b) the policy number;

(c) the effective period;

(d) the maximum liability limits for each person and each accident.

ANSWER

10. At the time of the accident referred to in the complaint, if you were covered by any policy of re-insurance or excess liability insurance, state:

(a) the name of the carrier;

(b) the policy number;

(c) the effective period;

(d) the maximum liability limits for each person and each accident.

ANSWER

11. Please state whether the defendant entered a guilty plea in any Court to motor vehicle violation arising out of the accident which is the subject matter of this litigation.

ANSWER

12. If the answer to the preceding interrogatory is in the affirmative, please state:

(a) the specific statutory violation; and

(b) the specific name and address of the Court in which such plea was entered.

ANSWER

13. State whether the defendant driver was involved in any motor vehicle violation within the last 5 years preceding this accident and, if so, state for each:

(a) the date;

(b) the specific violation;

(c) the state in which the violation occurred;

(d) the Court rendering the conviction.

ANSWER

14. State whether the defendant driver was involved in any motor vehicle accident in he last 5 years preceding this accident which is the subject matter of this litigation and, if so, state:

(a) the date;

(b) the state in which it occurred;

(c) a description of how the accident occurred.

ANSWER

15. Please state your date of birth, full motor vehicle licensed at the time of the accident in question and indicate whether it is any different now.

ANSWER

16. If the defendant driver had a license for the operation of any vehicle which contained any restrictions, state the nature of such restrictions and the dates when and places

where such restrictions applied.

ANSWER

17. If the defendant driver ever had a license to operate any vehicle suspended, canceled, or revoked, state the name of the state suspending, cancelling, or revoking such license, the inclusive dates of the suspending, cancelling, or revoking of the license and the reasons for the suspending, cancelling, or revoking of the license.

ANSWER

18. State the make, model, year, and license number of the vehicle which you were operating at the time of the accident.

ANSWER

19. If you were not the owner of the vehicle which you were operating at the time of the accident, state the following:

(a) the factual circumstances of your use of the vehicle at the time of the accident;

(b) the name, address and telephone number of the individual, if any, who gave you permission to operate the vehicle at the time of the accident.

ANSWER

20. If at the time of the accident the defendant driver was in the course of the business of or for any purpose of any other individual or entity, state the following:

(a) the name and address of each individual or entity for which you were acting;

(b) the name, address, employer, and address of the employer of each individual with knowledge or information with respect to your answer to sub-part (a) above;

(c) a detailed explanation of the nature of the business or purpose which you were

pursuing at the time of the accident.

ANSWER

21. Do you claim that the brakes on your vehicle failed at the time of the accident?

ANSWER

22. If you claim that any unexpected mechanical failure caused or contributed to the cause of the collision, state:

(a) the precise portion of the vehicle;

(b) the reasons for this claim;

(c) the names and last known addresses of all persons having such knowledge;

(d) a specific description of everything in writing pertaining to this claim and the names and last known addresses of all persons in possession of such writing.

ANSWER

23. If you claim that this was an unavoidable accident state your reasons in detail and give the names and last known addresses of persons having such knowledge and a description of anything in writing concerning such claim as well as the name and address of the person in custody of such writing.

ANSWER

24. State in detail the facts upon which each affirmative defense, if any, of the answer to the complaint is based and the names and last known addresses of all persons having knowledge and a description of anything in writing concerning such defense as well as the name and address of the person in custody of such writing.

ANSWER

25. If you claim that the plaintiff violated any state statute not previously listed in the

answer, designate the statute and state in what manner it was violated.

ANSWER

26. State in detail your version of the manner in which the accident which is the subject matter of this litigation occurred.

ANSWER

27. Please state whether you had a conversation with the plaintiff or ant other party to this lawsuit concerning the accident at any time after the accident and if so, state:

(a) the name of the parties;

(b) the date;

(c) the subject matter;

(d) your best recollection of what everyone said;

(e) the names and last known addresses of anyone else who was present;

(f) where such conversation took place.

ANSWER

28. If the defendant driver took any drug, narcotic, sedative, tranquilizer, or other form of medication within the 24-hour period preceding the occurrence alleged in the complaint, state:

(a) the identity of such a drug or medication;

(b) the date and times of the use of such drug or medication;

(c) the purpose of such drug or medication;

(d) the name and address of the physician or other medical personnel who recommended the use of such drug or medication;

(e) whether you were using such drug or medication at the time of the accident;

(f) whether you are presently using such drug or medication.

ANSWER

29. If the defendant driver did not have 20/20 unimpaired vision at the time of the accident without the use of corrective lenses, state the following:

(a) whether or not you were wearing corrective lenses at the time of the accident;

(b) the eyesight defect which exists without the use of corrective lenses;

(c) the eyesight defect which exists with the use of corrective lenses;

(d) the name and address of the doctor who prescribed any corrective lenses which you possessed at the time of the accident;

(e) the date of the prescription for any corrective lenses which you possessed at the time of the accident;

(f) the name and address of the doctor who gave you your last eye examination prior to the accident;

(g) the date of your last eye examination prior to the accident.

ANSWER

30. State the specific portion of the vehicle owned or operated by you who first came in contact with the plaintiff or the vehicle occupied by the plaintiff, and state specifically what part of plaintiff or the vehicle occupied by the plaintiff first came in contact with the vehicle owned or operated by you.

ANSWER

31. Did you see the plaintiff or the vehicle occupied by the plaintiff at any time prior to the collision?

ANSWER

32. If your answer to the foregoing is in the affirmative, state:

(a) your best judgment of the distance in the number of feet separating the plaintiff of the vehicle occupied by the plaintiff from your vehicle at the time you first observed it; and

(b) your best judgment of the speed in miles per hour by the vehicle occupied by the plaintiff at the moment you first observed it on said occasion.

ANSWER

33. If the brakes on the vehicle owned or operated by you were applied prior to the collision, state the speed in miles per hour that said vehicle was traveling at the moment the brakes were first applied and the distance in the number of feet between your vehicle and the vehicle occupied by the plaintiff at the time the brakes were applied.

ANSWER

34. State your best judgment of the speed in miles per hour of the vehicle owned or operated by you on the occasion of the said accident, each of the following points before reaching the point of impact:

(a) 200 feet;

(b) 150 feet;

(c) 100 feet;

(d) 50 feet;

(e) 25 feet;

(f) point of impact.

ANSWER

35. If your vehicle left skid marks or tire marks prior to the collision, state:

(a) the number of feet of such marks;

(b) the location, i.e., beginning in right southbound lane and ending in the left northbound lane;

(c) the tires involved, i.e., front right, rear left, etc.

ANSWER

36. State whether any horn or other signal was given by you or the operator of the vehicle owned by you as a warning to the plaintiff or other persons involved in said accident prior to the time of the collision and if not, why not.

ANSWER

37. If you claim that there was any thing or condition to obstruct your vision or of the driving of the vehicle owned by you just prior to, or at the time of, the said collision, explain and describe in detail.

ANSWER

38. Describe the make, model, and year of your vehicle and give a detailed account of all the damage suffered by your vehicle as a result of the collision described in the complaint.

ANSWER

39. Give the names and addresses of all persons or firms who have made repair estimates for your vehicle resulting from this accident and attach copies of such estimates to this answer.

ANSWER

40. Give an itemized statement of the repairs made to your vehicle, showing the cost of:

(a) parts replaced;

(b) work done;

(c) all other charges.

ANSWER

41. If your vehicle was not repaired as a result of the present accident, state why and what disposition was made of it.

ANSWER

42. If you or anyone on your behalf has written to or spoken to any doctors, hospitals, or other persons trained in the healing arts, or, written to or spoken with any person or company who maintains any records concerning injuries or illnesses, concerning the physical condition of the plaintiff, state as to each request for information:

(a) the person or institution to which the request was made;

(b) the date of the request;

(c) whether the request was verbal or in writing;

(d) the name and address of the person making the request;

(e) a summary of the information requested.

ANSWER

43. If you or anyone on your behalf has received doctors' or hospital reports or records bearing on plaintiff's injuries state:

(a) the nature of such reports or records;

(b) at whose request they were prepared;

(c) the dates when they were made or prepared;

(d) the name and last known address of the persons making or preparing them;

(e) the name and last known address of the person or persons presently having custody of them.

ANSWER

44. Do you have any information tending to indicate:

(a) that plaintiff was, within five years immediately prior to said occurrence, confined in a hospital, treated by a physician, or x-rayed for any reasons? If so, give the name and address of such hospital, physician, technician or clinic, the approximate date of such confinement or service and state in general the reason for such confinement or service;

(b) the plaintiff has suffered personal injury prior to the date of said occurrence? If so, state when, where, and in general how he was injured and describe in general the injuries suffered;

(c) the plaintiff had suffered either (1) any personal injury or (2) ant illness since the date of the occurrence, if so for (1) state when, where, and in general how he was injured, and describe in general the injuries suffered, and for (2) state when he was ill and describe in general the illness;

(d) that plaintiff has ever filed any suit for his own personal injuries;

ANSWER

45. If you contend the injuries sustained by the plaintiff were caused or contributed to, by the conduct or actions of a person or entity other than plaintiffs or yourself, state:

(a) the name and address of the person or entity;

(b) a description of such conduct or actions;

(c) what facts are known to you who form the basis of such contention;

(d) state the names and last known addresses of all persons who have knowledge of such facts;

(e) a description of everything in writing regarding (a)-(d) above and the name and last known address of the person in custody of such writing.

ANSWER

46. If you or your attorney, agent, or insurance company had any surveillance done or made of plaintiff, describe when, where, how, and identity in detail all written reports, photographs and/or movies and the name and the last known address of the person in custody of such items.

ANSWER

47. Do the answers to each and every one of the foregoing interrogatories, include not only the information known to you or your attorney, but also the information within the possession or control of yourself or your attorney?

ANSWER

48. With regard to any payments made to or on behalf of the plaintiff by the defendants or the defendants' insurer for any cause whatsoever, including but not limited to medical expenses, loss of income or the like, or property damage, state:

(a) the amount of each such payment;

(b) the reason for such payment, i.e., hospital bills, doctor's fee, loss of income, property damage, and so forth;

(c) the name and address of the payee;

(d) the date of said payment;

(e) the statutory basis for such payment, i.e., personal injury protection benefits under 21 Del. C §2118, and so forth.

ANSWER

49. With respect to each and every injury, illness, disease, problem or complaint (hereinafter collectively referred to as "injury" or "injuries") that plaintiff contends were sustained as a result of the accident referred to in the complaint (hereinafter "accident"), state the following:

(a) whether the defendants contend that any of said injuries were not caused by the accident;

(b) a detailed description of each and every injury that defendants contend was caused by some event or condition which is not related to the accident and a description of the event or condition which the defendants contend was the cause of each said injury, including the date on which the condition or event caused said injury;

(c) the names, addresses of the employers of all persons, including but not limited to physicians and other medical personnel, who have knowledge or information of the matter set forth in defendants' answer to this interrogatory and as to each such person, state the following:

(i) a detailed description of the knowledge or information each person possesses.

(ii) the date on which such knowledge became known to such person and the manner in which it was communicated to him.

(iii) a description of all writings of any kind which refer or relate to the knowledge or information each person possesses, including the date on which the writing was prepared, the name and address of the person who prepared it and the name and address of each person who is in possession of the original or copy of said writing.

ANSWER

50. Have the defendants or defendants' attorneys ever arranged with any doctor to have the plaintiff examined or treated in connection with any injuries, illnesses, diseases, problems or complaints (hereinafter collectively referred to as "injuries" or "injury") which plaintiff contends he sustained in the accident referred to in the complaint (hereinafter "accident")?

ANSWER

51. If the answer to the preceding interrogatory is in the affirmative, state separately, as to each doctor who either examined or treated the plaintiff, the following:

(a) the name and address of the doctor who performed the examination or rendered the treatment;

(b) whether the doctor examined the plaintiff and, if so, a detailed description of the type of examination that was conducted, stating specifically each and every part of plaintiff's body that was examined;

(c) the date and the time of the examination and the name and the address of the place where the examination was performed;

(d) the total length of time in which the examination took place (e.g., fifteen minutes, thirty minutes, etc.);

(e) a detailed description of the findings made by the doctor with respect to each aspect of his examination of plaintiff;

(f) the name and address of the person who employed the doctor to do the examination;

(g) the amount of money that the doctor was paid to do the examination, the name

and address of the person who paid the amount and the date on which the payment was made;

(h) whether any tests of any kind, including but not limited to x-rays, EEG's, or laboratory studies, were administered to plaintiff in conjunction with the examination and, if so, state the following as to each test that was performed:

(i) a detailed description of the test that was performed.

(ii) the date, time of day and place where the test was administered.

ANSWER

52. With respect to each report, document, record, or any other writing of any kind which relates or refers in any way to the matters set forth in defendants' response to interrogatory no. 47, state the following:

(a) the date on which such writing was prepared, including the time of day, if known;

(b) the name address of the preparer of the writing;

(c) a detailed description of the contents of the writing;

(d) the name and address of all persons who are in the possession of the original or copies of said writing.

ANSWER

53. Did you consume any alcoholic beverage of any type during the 48-hour period preceding the occurrence of the collision? If so, specify the nature and amount of such alcoholic beverages, the time over which and place at which consumed, and give the names, last known addresses and telephone numbers of all persons with whom you were drinking.

ANSWER

54. State your height and weight at the time of the accident.

ANSWER

55. Describe what you had to eat and the amount (i.e.. 1 cup of cereal, 2 hamburgers) in the 12-hour period preceding the occurrence of the collision.

ANSWER

56. Were any field tests done by the police following the collision to determine if alcohol was a factor? If so, please state what tests were done.

ANSWER

57. Were you taken to the hospital following the collision? If so, please state the name and address of the hospital you were taken to. In addition, please advise if blood work was done at the hospital.

ANSWER

58. Have you ever pleaded guilty to, or have you been convicted of any crime, other than traffic violations, and if so, please state:

a. The nature of the offense;

b. The date;

c. The name and number of the court proceeding such as Justice of the Peace Court, Superior Court, etc.;

d. The sentence given you.

ANSWER

59. Have you ever entered or been committed to any institution, either public or private, for the treatment or observation of mental conditions, substance abuse or dependency, or disorders of any kind and if so, state:

a. The name and address of such institution;

b. The length of your stay and the dates thereof;

c. The purpose or reason for your entry to such institution;

d. The name and address of the doctor treating you for such condition.

ANSWER

/s/ ATTORNEY SIGNATURE

DATED: May 11, 2023

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAPTION

PLAINTIFF'S EXPERT INTERROGATORIES DIRECTED TO DEFENDANTS

1. With reference to any expert you expect to call to testify as a witness at the trial, state the name and address of such expert and, as to each expert named, state:

a. his/her area of expertise and occupation;

b. the subject matter on which the expert is expected to testify;

c. the substance of the facts and opinions about which the expert is expected to testify; and

d. as to each opinion given by said expert, provide a summary of the grounds for same.

ANSWER

2. State the total anticipated and/or actual charges paid by defense counsel for the written report(s) to be prepared or already prepared by your expert in connection with his/her examination of the plaintiff.

ANSWER

3. State the anticipated charge for the deposition or in-court testimony of your expert (s) will charge.

ANSWER

4. State the approximate percentage of income that your expert received in the last two (2) years, treating patients versus medical legal issues.

ANSWER

5. Of the approximate percentage of income which your expert derived in the last two (2) years from legal matters, which is the percentage of income derived from expert involvement in plaintiff versus defendant cases?

ANSWER

6. State the number of occasions in the past two (2) years that your expert has acted as an expert for Defendant or Defendant's counsel.

ANSWER

7. State the number of times in the past two (2) years that your expert has testified in personal injury cases.

ANSWER

8. State the number of times in the past two (2) years that your expert has testified in worker compensation cases.

ANSWER

9. As to each instance when your expert has testified in the past two (2) years, state:

a. The case name and citation;

b. Date of deposition/testimony

c. Names of those individuals in possession of the transcripts of testimony (in addition to the above information, please provide a copy of the transcript of testimony).

ANSWER

10. State, for the previous two (2) years, the total amount of money generated by your expert for performing defense medical examinations and/or testifying and/or being an expert for defense counsel.

ANSWER

11. If any expert which you intend to call at trial has testified in court or by way of oral deposition within the past five (5) years:

a. Describe the court involved;

b. The name of the case;

c. The date of the testimony;

d. The attorney calling the expert as a witnesses; and

e. The general area of expert testimony given.

ANSWER

/s/ ATTORNEY SIGNATURE

DATED: May 11, 2023

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAPTION

PLAINTIFF'S REQUEST FOR PRODUCTION DIRECTED TO DEFENDANT

The Plaintiff requests that the insurance company defendant produces for examination and copying at the office of the attorney for the plaintiff within thirty (30) days from the date of this request the following items:

(1) Everything identified in your answers to Interrogatories.

(2) Copy of plaintiff's policy with the defendant.

(3) Complete copy of defendant's agent's file, including all documents, declaration sheets, notes, and anything else in writing pertaining to the plaintiff's policy with the defendant.

(4) Any and all medical records obtained or reviewed by defendant or its agents.

(5) Any and all photographs.

(6) Any surveillance.

(7) Anything defendant intends to rely upon at trial.

/s/ ATTORNEY SIGNATURE

DATED: May 11, 2023

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAPTION

PLAINTIFF'S INTERROGATORIES DIRECTED TO DEFENDANT[1]

1. What is the name, address, telephone number and job title or capacity of the officer or agent answering these interrogatories?

ANSWER

2. If your insurance company issued a motor vehicle insurance policy to the plaintiff or plaintiffs which was in effect on _____, state the policy number, effective term of said policy, a breakdown of the coverages, and the premium for each such coverage.

ANSWER

3. What was the date of the plaintiff's first contact with your insurance company?

ANSWER

4. From the date of plaintiff's first contact with your insurance company to the present, state with respect to each such representative having said contact with plaintiff:

(a) the name, address and job title for each such person;

(b) the date of contact;

(c) the substance of all oral discussions;

(d) the job title of each such person;

(e) the scope and duties of each such person;

(f) whether each such person was an independent agent or captive agent;

(g) identify all writings pertaining to contacts with the plaintiff.

ANSWER

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[1] These are continuing interrogatories, the answers to which must be kept current.

5. What is the correct name of your insurance company which issued a motor vehicle policy to the plaintiff?

ANSWER

6. Subsequent to the issuance of the original policy, as described in the preceding Interrogatories, was the original policy amended, changed or otherwise modified?

ANSWER

7. If so, state:

(a) its substance;

(b) amounts of coverage;

(c) the premium;

(d) the date it became effective and its term;

(e) the name, address and job title at the time of change of each person involved in effecting said change;

(f) the manner of involvement of each person listed in your response to (e) above;

(g) the method and date used to inform the plaintiff of the modification.

ANSWER

8. Subsequent to the issuance of the original policy as described in the preceding Interrogatories, was the original policy renewed?

ANSWER

9. If so, state:

(a) the date it was renewed;

(b) whether the renewal was automatic or requested by the plaintiff;

(c) the name, address and job title at the time of renewal of your representative involved in its renewal;

(d) the premium and a breakdown of the coverages.

ANSWER

10. As to each denial and affirmative defense as set forth in your answer to the plaintiff's complaint, please state with particularity the facts, and identify all persons and such documents supporting each such denial and affirmative defense.

ANSWER

/s/ ATTORNEY SIGNATURE

DATED: May 11, 2023

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAPTION

PLAINTIFFS' REQUEST FOR
PRODUCTION DIRECTED TO DEFENDANT

The Plaintiff requests the Defendants to produce for examination and copying at the office of the attorneys for the plaintiff within thirty (30) days from the date of this request the following items:

(1) Everything identified in your answers to interrogatories;

(2) A copy of the liability insurance policy and the declarations' page in effect at the time of the accident in question;

(3) Copies of any and all medical records in your possession to date;

(4) Copies of any correspondence sent to any defense medical examiner concerning the plaintiff;

(5) Copy of the contract between the defendant and the landlord/tenant, for the building where the accident occurred, in effect on the date of the accident in question.

/s/ ATTORNEY SIGNATURE

DATED: May 11, 2023

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAPTION

PLAINTIFF'S INTERROGATORIES
DIRECTED TO DEFENDANT*

1. Give the names and addresses of all persons who were present at the scene of the incident within 20 minutes after it occurred.

ANSWER

2. Give the names and last known addresses of persons from whom statements have been procured in regard to the facts alleged in the pleading. As to each person named, state:

(a) The name and last known address of the person who took the statement;

(b) The date when the statement was taken;

(c) The names and last known addresses of all persons presently having copies of the statements;

(d) Whether the statement was prepared in the general course of business or in anticipation of this litigation or preparation for trial;

(e) Whether the statement was prepared under the supervision of or pursuant to the instructions of your attorney and, if so, the name and address of that attorney.

ANSWER

3. With reference to any report, memorandum or resume prepared by you or anyone acting on your behalf but not necessarily limited to any investigator, insurance adjuster or other person pertaining to any of the facts alleged or referred to in the pleading, give the date of each such matter in writing and as to each date given state:

(a) The name and address of the person or persons who prepared such writing, and the

name and address and identity of the employer of such person or persons;

(b) Whether such writing was prepared by you or on your behalf;

(c) The number of pages of such writing;

(d) A general description of such matter in writing (as, for instance, two-page typed summary of an interview between investigator Jones and witness Smith dated January 1, 1966, or five-page report by investigator Smith concerning the results of his investigation on the facts of the incident, etc.);

(e) Whether such writing was prepared under the supervision of or pursuant to the instructions of your attorney and, if so, the name and address of that attorney;

(f) The names and addresses of person who have copies of such matter in writing.

ANSWER

4. State the name and address of every expert retained or employed by you in anticipation of this litigation or preparation for trial, whether or not you expect to call him as a witness at trial, and as to each state:

(a) The dates of initial employment;

(b) The date or dates of any reports, letters or other writings prepared by such person, a brief description of such writing (as two-page letter, three-page report, etc.), and the names and addresses of person shaving copies of them;

(c) Whether such expert also rendered any service in connection with any aspect of any subject matter involved in this litigation, other than in anticipation of this litigation or preparation for trial, (as, for instance giving medical attention required by the incident, designing machinery involved in the incident, etc.).

ANSWER

5. With respect to each expert, including but not limited to medical personnel, that you expect to call at trial to testify, state the following:

(a) The associations or societies of which such expert is a member;

(b) The names and addresses of all hospitals, if any, on whose staff such expert has served, or with whom such expert has had courtesy privileges or to whom such expert has served as a consultant including the applicable dates of same;

(c) The field of specialization of such expert if any;

(d) The title, publisher, date and form of all documentary material published by such expert within his field of specialization, if any;

(e) The name, address, employer and address of the employer of such expert;

(f) A detailed explanation of the subject matter as to which such expert is expected to testify;

(g) A detailed explanation of the substance of the facts and opinion as to which such expert is expected to testify;

(h) A detailed summary of the grounds for each opinion as to which such expert is expected to testify;

(i) A detailed explanation of such expert's educational and professional history;

(j) The title, publisher, date and form of those documentary materials which such expert believes to be the most authoritative with respect to the subject matter and opinions as to which he is expected to testify;

(k) The name, address, present employer, title, and specialty of each individual who instructed such expert in professional or graduate school with regard to any subjects related to

such expert's present specialization and/or with regard to the subject matter as to which he is expected to testify.

ANSWER

6. With respect to each piece of correspondence or report made by each expert identified in your answer to the preceding interrogatory concerning the facts and opinions as to which he is expected to testify, state the following:

(a) The name and address of the expert making the report or correspondence;

(b) The name, address, and telephone number of each individual to whom such report or piece of correspondence was directed;

(c) The date of the report or piece of correspondence;

(d) The subject matter of the report or piece of correspondence;

(e) The name, address and telephone number of each individual who presently has in his custody, possession, or control a copy of the report or piece of correspondence.

ANSWER

7. At the time of the incident referred to in the Complaint, if you were covered by any policy of re-insurance or excess liability insurance, state:

(a) The name of the carrier;

(b) The policy number;

(c) The effective period;

(d) The maximum liability limits for each person and each incident.

ANSWER

8. State in detail the facts upon which each affirmative defense, if any, of the answer to the complaint is based and the name and last known addresses of all persons having knowledge and a description of anything in writing concerning such defense as well as the name and address of the person in custody of such writing.

ANSWER

9. If you claim that the plaintiff violated any state statute not previously listed in the answer, designate the statute and state in what manner it was violated.

ANSWER

10. State in detail your version of the manner in which the incident which is the subject matter of this litigation occurred.

ANSWER

11. Please state whether you had a conversation with the plaintiff or any other party to this lawsuit concerning the incident at any time after the incident and if so, state:

(a) The names of the parties;

(b) The date;

(c) The subject matter;

(d) Your best recollection of what everyone said;

(e) The names and last known addresses of anyone else who was present;

(f) Where such conversation took place.

12. If you or anyone on your behalf has written to or spoken with any doctors, hospitals, or other persons trained in the healing arts, or, written to or spoken with any person or company who maintains any records concerning injuries or illnesses, concerning the physical condition of the plaintiff, state as to each request for information:

(a) The person or institution to whom the request was made;

(b) The date of the request;

(c) Whether the request was verbal or in writing;

(d) The name and address of the person making the request;

(e) A summary of the information requested.

ANSWER

13. If you or anyone on your behalf has received doctor's or hospital reports or records bearing on plaintiff's injuries, state:

(a) The nature of such reports or records;

(b) At whose request they were prepared;

(c) The dates when they were made or prepared;

(d) The names and last known addresses of the person or persons making or preparing them;

(e) The name and last known address of the person or persons presently having custody of them.

ANSWER

14. Do you have any information tending to indicate:

(a) That plaintiff was, within five years immediately prior to said occurrence, confined in a hospital, treated by a physician or x-rayed for any reason?

If so give, the name and address of such hospital, physician, technician or clinic, the approximate date of such confinement or service and state in general the reason for such confinement or service;

(b) That plaintiff had suffered personal injury prior to the date of said occurrence? If so, state when, where, and in general how he was injured and describe in general the injuries suffered;

(c) That plaintiff had suffered either (1) any personal injury or (2) any illness since the date of the occurrence; if so for (1) state when, where, and in general the injuries suffered; and for (2) state when he was ill and describe in general the illness;

(d) That plaintiff has ever filed any suit for his won personal injuries? If so, give the Court in which filed, the year filed and the title and docket number of said case.

ANSWER

15. If you contend the injuries sustained by the plaintiff were caused or contributed to, by the conduct or actions of a person or entity other than plaintiffs or yourself, state:

(a) The name and address of the person or entity;

(b) A description of such conduct or actions;

(c) What facts are known to you which form the basis of such contention;

(d) State the names and last known addresses of all persons who have knowledge of such facts;

(e) A description of everything in writing regarding (a) - (d) Above and the name and

last known address of the person in custody of such writing.

ANSWER

16. If you or your attorney, agent or insurance company had any surveillance done or made of plaintiff, describe when, where, how, and identify in detail all written reports, photographs and/or movies and the name and last known address of the person in custody of such items.

ANSWER

17. Do the answers to each and every one of the foregoing interrogatories, include not only the information known to you or your attorney, but also all the information within the possession or control of yourself or your attorney?

ANSWER

18. With regard to any payments made to or on behalf of the plaintiff by the defendants or defendant's insurer for any cause whatsoever, including but not limited to medical expenses, loss of income or the like, state:

(a) The amount of each such payment;

(b) The reason for such payment;

(c) The name and address of the payee;

(d) The date of the said payment;

(e) The statutory basis for such payment, i.e., personal injury protection benefits under 21 Del. C. Section 2118, and so forth.

ANSWER

19. With respect to each and every injury, illness, disease, problem or complaint (hereinafter collectively referred to as "injury" or "injuries") that plaintiff contends he sustained as a result of the incident referred to in the complaint (hereinafter "incident"), state the following:

(a) Whether the defendants contend that any of said injuries were not caused by the incident;

(b) A detailed description of each and every injury that defendants contend was caused by some event or condition which is not related to the incident and a description of the event or condition which the defendants contend was the cause of each said injury, including the date on which the condition or event caused said injury;

(c) The names and addresses of the employers of all persons, including but not limited to physicians and other medical personnel, who have knowledge or information of the matters set forth in defendants' answer to these interrogatories and as to each such person, state the following:

(i) A detailed description of the knowledge or information each person possesses;

(ii) The date on which such knowledge became known to such person and the manner in which it was communicated to him;

(iii) A description of all writings of any kind which refer or relate to the knowledge or information each person possesses, including the date on which the writing was prepared, the name and address of the person who prepared it and the name and address of each person who is in possession of the original or copy of said writing.

ANSWER

20. Have the defendants or defendants' attorneys ever arranged with any doctor to have the plaintiff examined or treated in connection with any injuries, illnesses, diseases, problems or complaints (hereinafter collectively referred to as "injuries" or "injury") which plaintiff contends he sustained in the incident referred to in the Complaint (hereinafter "incident") ?

ANSWER

21. If the answer to the preceding interrogatory is in the affirmative, state separately, as to each doctor who either examined or treated the plaintiff, the following:

(a) The name and address of the doctor who performed the examination or rendered the treatment;

(b) Whether the doctor examined the plaintiff and, if so, a detailed description of the type of examination that was conducted, stating specifically each and every part of plaintiff's body that was examined;

(c) The date and time of the examination and the name and address of the place where the exam was performed;

(d) The total length of time in which the examination took place (e.g., 15 minutes, 30 minutes, etc.);

(e) A detailed description of the findings made by the doctor with respect to each aspect of his examination of plaintiff;

(f) The name and address of the person who employed the doctor to do the examination;

(g) The amount of money that the doctor was paid to do the examination, the name and address of the person who paid the amount and the date on which the payment was made;

(h) Whether any tests of any kind, including but not limited to x-rays, EEG's or laboratory studies, were administered to plaintiff in conjunction with the exam and, if so, state

the following as to each such test:

(i) A detailed description of the test that was performed;

(ii) The date, time of day and place where the test was administered;

(iii) The name and address of the person who performed the test;

(iv) The name and address of the person who requested that the test be administered;

(v) The results of each test;

(i) A detailed description of all injuries that the doctor found the plaintiff to have sustained as a result of the accident referred to in the Complaint and the basis for such findings;

(j) A detailed description of all injuries that the doctor found the plaintiff to have sustained as a result of some event or condition which is unrelated to the incident, and the basis for such findings;

(k) The opinion that the doctor reached, if any, as to whether plaintiff sustained any permanent injury or disability or residual symptoms as a result of plaintiff's involvement in the incident, and if so, state the following:

(i) The part of plaintiff's body that sustained the permanent injury or disability;

(ii) A description of the permanent residual symptoms that plaintiff has;

(iii) The basis for said opinion;

(l) The opinion that the doctor reached, if any, as to whether plaintiff needs future medical treatment, including but not limited to surgery, and if so, a description of the type of treatment or surgery that plaintiff requires and an estimate of the cost of hospital and medical services that relate to such treatment, if known.

ANSWER

22. Was any person responsible for supervising the area in which plaintiff was injured at the time of the accident?

ANSWER

23. If so, for each person, state:

(a) His name and address;

(b) His job title;

(c) A description of his duties;

(d) His location at the time of the accident.

ANSWER

24. Was there any person on duty in the area where plaintiff was injured at the time of the accident?

ANSWER

25. If so, for each such person, state:

(a) His name and address;

(b) His job title;

(c) A description of duties;

(d) His location at the time of the accident.

ANSWER

26. Plaintiff alleges that the presence of some slippery substance/condition on the floor caused her to fall and injure her. Do you contend that the presence of some slippery substance/condition did not cause plaintiff to fall?

27. If so, state:

(a) What you contend caused plaintiff to fall;

(b) On what facts you base such contention;

ANSWER

28. Were you, or any of your employees, aware of the presence of water or some other slippery substance or condition on the floor prior to the accident?

ANSWER

29. If so, for each who was aware of its presence, state:

(a) His name;

(b) The circumstances from which he received such notice;

(c) A description of the notice received;

(d) The time and place he received such notice;

(e) Whether he took any action as a result of such notice and, if so, the name or other means of identification, and address of each person who informed him;

(f) Whether he took any action as a result of such notice and, if so, a description of the action that was taken and the time at which it was taken.

ANSWER

30. For what length of time prior to the accident had the water or some other slippery substance or condition been on the floor at the scene of the accident?

ANSWER

31. Was any person responsible for seeing that the water or some other slippery substance, or condition, did not collect on the floor during business hours?

ANSWER

32. If so, for such person, state:

(a) His name;

(b) His duties in respect to the accumulation of such matter on the floor;

(c) Whether he had removed any matter from the floor on the day of the accident and, if so, a description of what he removed, and the time at which it was removed.

ANSWER

33. Does the area of the premises where the accident occurred have a particular designation?

ANSWER

34. If so, what designation?

ANSWER

35. Describe the location in such area where the accident occurred.

ANSWER

36. Of what type of material was the floor surface made at the scene of the accident?

ANSWER

37. What is the trade name of the material?

ANSWER

38. Was any abrasive or nonskid material in use on the floor at the scene of the accident?

ANSWER

39. If so, what material?

ANSWER

40. Was any polishing substance applied to the floor at any time prior to the accident?

ANSWER

41. If so, state:

(a) The name of the polishing substance;

(b) The manner of its application;

(c) The frequency of its application;

(d) The date it was last applied prior to the accident and the name and address of the person who applied it.

ANSWER

42. What was the color of the floor. or floor covering, in the area where the accident occurred?

ANSWER

43. Was an inspection made prior to the accident to determine whether the area where plaintiff was injured was in a safe condition for use by the public?

ANSWER

44. If so, state:

(a) The frequency of such inspections;

(b) The date and time of the last inspection prior to the accident;

(c) The name, address and job title of the person who made the last inspection;

(d) A description of, or the substance of, the findings that were made on the last inspection;

(e) Whether any instructions were given as a result of the last inspection to remove, clean or alter anything in the area of the accident and, if so, a description of the instructions, and the name of each person to whom such instructions were given.

ANSWER

45. Was any inspection made of the scene of the accident subsequent to the accident?

ANSWER

46. If so, state:

(a) The date and time it was made;

(b) The name, address and job title of each person who made the inspection;

(c) What findings were made;

(d) What, if any, corrective actions were made.

ANSWER

47. Was any warning given to plaintiff or any other person concerning any danger in the area where the accident occurred?

ANSWER

48. If so, for each warning, state:

(a) A description of, or the substance of, the warning that was given;

(b) The name, or other means of identification, and address of the person who gave the warning;

(c) The name, or other means of identification, and address of each person to whom it was given;

(d) The form in which it was given.

(e) The reason it was given.

ANSWER

49. Either prior to or subsequent to the accident in question, has any other accident occurred on your premises in the same area as, or in a similar manner to the accident in which plaintiff was injured?

ANSWER

50. If so, for each accident, state:

(a) The date and time it occurred;

(b) A description of how it occurred;

(c) The name, or other means of identification, and address of the person to whom it occurred;

(d) The location in which it occurred;

(e) Whether any safety precaution was taken as a result of it and, if so, a description of safety precaution.

ANSWER

51. With respect to each such accident, state:

(a) Whether a lawsuit was filed;

(b) The names of the parties to said suit;

(c) A complete description of the Court and its civil action number;

(d) The name of the attorneys for the parties.

ANSWER

/s/ ATTORNEY SIGNATURE

DATED: May 11, 2023

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAPTION

PLAINTIFF'S INTERROGATORIES DIRECTED TO DEFENDANTS

1. For the 48 hours prior to the incident, concerning Defendant Driver, state:

(a) The amount of hours driven;

(b) The amount of miles driven;

(c) The route(s) driven;

(d) The places she stopped; and

(e) The amount of time spent at each stop.

ANSWER

2. On the date of the incident, concerning Defendant Driver, state:

(a) Where was she traveling from;

(b) Where was she intending to go;

(c) The route(s) she drove:

(d) The amount of hours driven;

(e) The amount of miles driven; and

(f) The amount of time driving.

ANSWER

3. State whether Defendant Driver has ever paid any fines to the Federal Motor Carrier Safety Administration or any Federal entity. If the answer is "yes", state:

(a) Date(s);

(b) Place(s);

(c) Nature surrounding each fine;

(d) The FMCSR violation(s) resulting in an enforcement action;

(e) The total amount settled for each violation; and

(f) The FMCSA Case Number for each violation.

ANSWER

4. Did you see the Plaintiff or the vehicle occupied by the Plaintiff at any time prior to the collision? If yes, state:

(a) your best judgment of the distance in the number of feet separating the vehicle occupied by the Plaintiff from your vehicle at the time you first observed it; and

(b) your best judgment of the speed in miles per hour by the vehicle occupied by the Plaintiff at the moment you first observed it on said occasion.

ANSWER

5. State whether any horn or other signal was given by you or the operator of the vehicle owned by you as a warning to the Plaintiff or other persons involved in said accident prior to the time of the collision and if not, why not.

ANSWER

6. State the full name (maiden name, if applicable), alias(es), date of birth, marital status (name of spouse) of the operator of Defendant's vehicle at the time the cause of action arose and currently, residence and business addresses at time of cause of action and currently and social security number.

ANSWER

7. If a corporation: registered corporation name, principal place of business and registered address for service of process at the time the cause of action arose and currently.

ANSWER

8. If a partnership: registered partnership name, principal place of business and registered address for service of process at the time the cause of action arose and currently as well as the identities and residence addresses of each partner at the time the cause of action arose and currently.

ANSWER

9. If you (and/or your operator) were/are employed, state:

(a) By whom, at the time the cause of action arose and currently;

(b) Your title or position and accompanying duties and responsibilities at the time the cause of action arose and currently; and

(c) The length of your employment as of the time the cause of action arose and currently.

ANSWER

10. If at the time of the alleged incident, you (or your operator) possessed a valid license to operate a motor vehicle, state:

(a) The Commonwealth or State issuing it;

(b) The issuance date and expiration date;

(c) The operator's number of such license; and

(d) The nature of any restriction(s) on said license.

ANSWER

11. Identify:

(a) Your applicable motor vehicle insurance carrier at the time the cause of action arose;

(b) Your applicable liability insurance benefits coverage limits; and

(c) Your applicable umbrella and/or excess liability insurance benefits coverage limits at the time the cause of action arose.

ANSWER

12. If you (or your operator) ever had a driver's license suspended or revoked, state:

(a) When, where and by whom it was suspended or revoked;

(b) The reason(s) for such suspension or revocation;

(c) The period of such suspension or revocation; and

(d) Whether such suspension or revocation was lifted and if so, when.

ANSWER

13. If you (or your operator) have had a claim made against you for the negligent operation of a motor vehicle within the last five (5) years, state:

(a) Your applicable motor vehicle liability insurance benefits carrier at the time that cause of action arose;

(b) The Commonwealth or State, County, Court, Term and Number of any lawsuits arising from that cause of action; and

(c) A description of how the accident occurred.

ANSWER

14. State the purpose of the motor vehicle trip you (or your operator) were on at the time of the alleged incident.

ANSWER

15. State whether or not you (or your operator) were familiar with the scene of the alleged incident and how often you traveled through same.

ANSWER

16. Give the names and addresses of all persons or firms who have made repair estimates for your vehicle resulting from this accident and attach copies of such estimates to this answer.

ANSWER

17. Give an itemized statement of the repairs made to your vehicle, showing the cost of:

(a) parts replaced;

(b) work done;

(c) all other charges.

ANSWER

18. If you (or your operator) consumed any alcoholic beverage(s), medications (prescription and/or over-the-counter) or any illicit drugs, during the forty-eight (48) hours immediately preceding the alleged incident, state:

(a) The nature, amount and type of item(s) consumed;

(b) The period of time over which the item(s) was/were consumed; and

(c) The names and addresses of any and all persons who have any knowledge as to the consumption of the aforementioned items (i.e. witnesses, physicians, etc.)

ANSWER

19. If at the time of the alleged incident, you (or your operator) suffered from any deformity, disease, ailment, disability or abnormality, or were under a physician's care for any condition, then describe.

ANSWER

20. Identify your (and/or your operator's) family (or "primary care") physician and their professional address at the time the cause of action arose and currently.

ANSWER

21. Describe the lighting conditions, weather conditions and the condition of the road(s) surface(s) existing at the time and place of the alleged incident.

ANSWER

22. If there were any traffic control devices in the area of the alleged incident at that time, state:

(a) The type of control(s)(i.e. stop sign, traffic light, policeman, etc.);

(b) Your distance from the site of the collision when you first observed the control;

(c) Whether or not the traffic control was functioning properly; and

(d) To which street or byway the signal was controlling or designed to control.

ANSWER

23. Describe the streets or other byways involved in the alleged incident, as follows:

(a) In terms of traffic lanes (i.e. parking, travel, turn-only lanes), the width of the streets or other byways;

(b) Type of road surface (i.e. concrete, black top, dirt, gravel, etc.);

(c) Roadway surface condition(s) (i.e. dry, wet, muddy, etc.); and

(d) Any defects in the roadway which you believe contributed to the happening of the alleged incident.

ANSWER

24. State in detail the manner in which the alleged incident occurred, specifying the speed, position, direction and location of each motor vehicle involved, just before, at the time of, and immediately after the alleged incident.

ANSWER

25. If there was any physical evidence of the alleged incident at the scene, describe what it was and where it was located in relation to the curb lines or other significant landmarks.

ANSWER

26. If after the alleged incident, there were any skid marks or yaw marks remaining on the roadway, describe their dimensions (length and width) and identify the motor vehicle which created the markings.

ANSWER

27. If a police investigation was conducted, state the control number, the incident number and/or the report number, thereof.

ANSWER

28. If you (or your operator) appeared before any Traffic Court, Municipal Court or District Court, state the date and location and whether testimony was offered.

ANSWER

29. Do you admit that you (or your operator) were negligent in the operation and/or control and/or entrustment of a motor vehicle at the time of the alleged incident?

ANSWER

30. If you contend that Plaintiff was guilty of comparative/contributory negligence, then fully and specifically describe upon what conduct, acts or omissions of Plaintiff you base your contention.

ANSWER

31. If you contend that any other person/entity other than the parties to this lawsuit were negligent, then fully and specifically describe what conduct, acts or omissions of that entity or person you base your contention.

ANSWER

32. If you have engaged, or expect to engage, healthcare professionals and/or other expert witnesses (i.e. incident re-constructionists), whom you intend to have testify at trial on your behalf on any matter pertaining to this action, state:

(a) The name of the expert;

(b) The expert's professional address;

(c) The expert's occupation;

(d) The expert's specialty;

(e) The expert's qualifications (i.e. Curriculum Vitae);

(f) The topic or subject matter upon which the expert is expected to testify;

(g) The substance of the facts to which the expert is expected to testify;

(h) The substance of the opinion to which the expert is expected to testify; and

(i) A summary of the grounds or foundation for each opinion the expert is expected to testify.

ANSWER

33. If you have engaged, or expect to engage, healthcare professionals and/or other expert witnesses (i.e. incident re-constructionists) for opinion(s), either oral or written, whom you do not intend to have testify at trial on your behalf, please state:

(a) The name of the expert;

(b) The expert's professional address;

(c) The expert's occupation;

(d) The expert's specialty;

(e) The expert's qualifications (i.e. Curriculum Vitae);

(f) The topic or subject matter of the expert witness' oral or written report; and

(g) The location of and/or whom has the care, custody, possession and/or control of the expert witness' oral or written report, made to anyone other than yourself (i.e. an insurance company) providing an identity and address.

ANSWER

34. If you, your attorney or any representative of yours, conducted any sound, photographic, motion picture film, personal sight or any other type of surveillance of the Plaintiff(s), state:

(a) By whom (name and address of company and individual);

(b) The date(s) of such surveillance;

(c) The time(s) of such surveillance;

(d) The location(s) of such surveillance;

(e) The method by which such surveillance was made; and

(f) A summary of what such surveillance reveals.

ANSWER

35. State the name, home and business addresses of the following:

(a) Those who actually witnessed the alleged incident.

ANSWER

36. Give the names and last known addresses of all persons who were present at the scene of the accident within twenty minutes after it occurred.

ANSWER

37. Give the names and last known addresses of persons from whom statements have been procured in regard to the facts alleged in the pleadings. As to each person named, state:

(a) the name and last known address of the person who took the statement;

(b) the date when the statement was taken;

(c) the names and last known addresses of all persons presently having copies of the statement;

(d) whether the statement was prepared in the general course of business or in anticipation of this litigation or preparation for trial;

(e) whether the statement was prepared under the supervision of or pursuant to the instructions of your attorney, and if so, the name and address of that attorney.

ANSWER

38. Give the name and address of each person who has been interviewed on your behalf. As to each person interviewed, state:

(a) the date of such interview;

(b) the name and last known address of each person who has a resume of such interview.

ANSWER

39. With reference to any report, memorandum or resume prepared by you or anyone acting on your behalf but not necessarily limited to any investigator, insurance adjuster or other person pertaining to any facts alleged of referred to in the pleadings, give the date of each such matter in writing and as to each date given, state:

(a) the name and address of the person or persons who prepared such writing, and the name, address identity of the employer of such person or persons;

(b) whether such writing was prepared by you or on your behalf;

(c) the number of pages of such writing;

(d) a general description of such matter in writing (as, for instance, two-page typed summary of an interview between investigator Jones and witness Smith dated January 1, 1966, or five page report by investigator Smith concerning the results of his investigation of the facts of the accident, etc.);

(e) whether such writing was prepared under the supervision of or pursuant to the instructions of your attorney, and if so, the name and address of that attorney;

(f) the names and addresses of persons who have copies of such matter in writing.

ANSWER

40. With respect to each piece of correspondence or report made by each expert identified in your answer to the preceding interrogatory concerning the facts and opinions as to which he is expected to testify, state the following:

(a) the name and address of the expert making the report or correspondence;

(b) the name, address, and telephone number of each individual to whom such report or piece of correspondence was directed;

(c) the date of the report or piece of correspondence;

(d) the subject matter of the report or piece of correspondence;

(e) the name, address and telephone number of each individual who presently has in his custody, possession, or control a copy of the report or piece of correspondence.

ANSWER

41. Please state whether the defendant entered a guilty plea in any Court to motor vehicle violation arising out of the accident which is the subject matter of this litigation. If yes, state:

(a) the specific statutory violation; and

(b) the specific name and address of the Court in which such plea was entered.

ANSWER

42. State whether the Defendant driver was involved in any motor vehicle violation within the last 5 years preceding this accident and, if so, state for each:

(a) the date;

(b) the specific violation;

(c) the state in which the violation occurred;

(d) the Court rendering the conviction.

ANSWER

43. If you claim that any unexpected mechanical failure caused or contributed to the cause of the collision, state:

(a) the precise portion of the vehicle;

(b) the reasons for this claim;

(c) the names and last known addresses of all persons having such knowledge;

(d) a specific description of everything in writing pertaining to this claim and the names and last known addresses of all persons in possession of such writing.

ANSWER

44. If you claim that this was an unavoidable accident state your reasons in detail and give the names and last known addresses of persons having such knowledge and a description of anything in writing concerning such claim as well as the name and address of the person in custody of such writing.

ANSWER

45. State in detail the facts upon which each affirmative defense, if any, of the answer to the complaint is based and the names and last known addresses of all persons having knowledge and a description of anything in writing concerning such defense as well as the name and address of the person in custody of such writing.

ANSWER

46. If you claim that the Plaintiff violated any state statute not previously listed in the answer, designate the statute and state in what manner it was violated.

ANSWER

47. Please state whether you had a conversation with the Plaintiff or any other party to this lawsuit concerning the accident at any time after the accident and if so, state:

(a) the name of the parties;

(b) the date;

(c) the subject matter;

(d) your best recollection of what everyone said;

(e) the names and last known addresses of anyone else who was present;

(f) where such conversation took place.

ANSWER

48. If the Defendant driver did not have 20/20 unimpaired vision at the time of the accident without the use of corrective lenses, state the following:

(a) whether or not you were wearing corrective lenses at the time of the accident;

(b) the eyesight defect which exists without the use of corrective lenses;

(c) the eyesight defect which exists with the use of corrective lenses;

(d) the name and address of the doctor who prescribed any corrective lenses which you possessed at the time of the accident;

(e) the date of the prescription for any corrective lenses which you possessed at the time of the accident;

(f) the name and address of the doctor who gave you your last eye examination prior to the accident;

(g) the date of your last eye examination prior to the accident.

ANSWER

49. State the specific portion of the vehicle owned or operated by you who first came in contact with the vehicle occupied by the Plaintiff, and state specifically what part of the vehicle occupied by the Plaintiff first came in contact with the vehicle owned or operated by you.

ANSWER

50. If you claim that there was any thing or condition to obstruct your vision or of the driving of the vehicle owned by you just prior to, or at the time of, the said collision, explain and describe in detail

ANSWER

51. If you or anyone on your behalf has received doctors' or hospital reports or records bearing on Plaintiff's injuries state:

(a) the nature of such reports or records;

(b) at whose request they were prepared;

(c) the dates when they were made or prepared;

(d) the name and last known address of the persons making or preparing them;

(e) the name and last known address of the person or persons presently having custody of them.

ANSWER

52. Do you have any information tending to indicate:

(a) that Plaintiff was within five years immediately prior to said occurrence, confined in a hospital, treated by a physician, or x-rayed for any reasons? If so, give the name and address of such hospital, physician, technician or clinic, the approximate date of such confinement or service and state in general the reason for such confinement or service;

(b) the Plaintiff has suffered personal injury prior to the date of said occurrence? If so, state when, where, and in general how he was injured and describe in general the injuries suffered;

(c) the Plaintiff has suffered either (1) any personal injury or (2) ant illness since the date of the occurrence, if so for (1) state when, where, and in general how he was injured, and describe in general the injuries suffered, and for (2) state when he was ill and describe in general

the illness;

(d) that Plaintiff has ever filed any suit for his own personal injuries;

ANSWER

53. If you contend the injuries sustained by the Plaintiff were caused or contributed to, by the conduct or actions of a person or entity other than plaintiff or yourself, state:

(a) the name and address of the person or entity;

(b) a description of such conduct or actions;

(c) what facts are known to you who form the basis of such contention;

(d) state the names and last known addresses of all persons who have knowledge of such facts;

(e) a description of everything in writing regarding (a)-(d) above and the name and last known address of the person in custody of such writing.

ANSWER

54. Do the answers to each and every one of the foregoing interrogatories, include not only the information known to you or your attorney, but also the information within the possession or control of yourself or your attorney?

ANSWER

55. With regard to any payments made to or on behalf of the Plaintiff by the Defendant or the Defendant's insurer for any cause whatsoever, including but not limited to medical expenses, loss of income or the like, or property damage, state:

(a) the amount of each such payment;

(b) the reason for such payment, i.e., hospital bills, doctor's fee, loss of income, property damage, and so forth;

(c) the name and address of the payee;

(d) the date of said payment;

(e) the statutory basis for such payment, i.e., personal injury protection benefits under 21 Del. C §2118, and so forth.

ANSWER

56. With respect to each and every injury, illness, disease, problem or complaint (hereinafter collectively referred to as "injury" or "injuries") that Plaintiff contends were sustained as a result of the accident referred to in the complaint (hereinafter "accident"), state the following:

(a) whether the defendant contends that any of said injuries were not caused by the accident;

(b) a detailed description of each and every injury that defendant contends was caused by some event or condition which is not related to the accident and a description of the event or condition which the defendants contend was the cause of each said injury, including the date on which the condition or event caused said injury;

(c) the names, addresses of the employers of all persons, including but not limited to physicians and other medical personnel, who have knowledge or information of the matter set forth in Defendant's answer to this interrogatory and as to each such person, state the following:

(i) a detailed description of the knowledge or information each person possesses.

(ii) the date on which such knowledge became known to such person and the manner in which it was communicated to him.

(iii) a description of all writings of any kind which refer or relate to the knowledge or information each person possesses, including the date on which the writing was prepared, the name and address of the person who prepared it and the name and address of each person who is in possession of the original or copy of said writing.

ANSWER

57. Has the Defendant or Defendant's attorney(s) ever arranged with any doctor to have the Plaintiff examined or treated in connection with any injuries, illnesses, diseases, problems or complaints (hereinafter collectively referred to as "injuries" or "injury") which plaintiff contends they sustained in the accident referred to in the complaint (hereinafter "accident")? If yes, state:

(a) the name and address of the doctor who performed the examination or rendered the treatment;

(b) whether the doctor examined the plaintiffs and, if so, a detailed description of the type of examination that was conducted, stating specifically each and every part of Plaintiff's body that was examined;

(c) the date and the time of the examination and the name and the address of the place where the examination was performed;

(d) the total length of time in which the examination took place (e.g., fifteen minutes, thirty minutes, etc.);

(e) a detailed description of the findings made by the doctor with respect to each aspect of his examination of Plaintiff;

(f) the name and address of the person who employed the doctor to do the examination;

(g) the amount of money that the doctor was paid to do the examination, the name and address of the person who paid the amount and the date on which the payment was made;

(h) whether any tests of any kind, including but not limited to x-rays, EEG's, or laboratory studies, were administered to Plaintiff in conjunction with the examination and, if so, state the following as to each test that was performed:

(i) a detailed description of the test that was performed.

(ii) the date, time of day and place where the test was administered.

ANSWER

58. Were you taken to the hospital following the collision? If so, please state the name and address of the hospital you were taken to. In addition, please advise if blood work was done at the hospital.

ANSWER

59. Have you ever pleaded guilty to, or have you been convicted of any crime, other than traffic violations, and if so, please state:

a. The nature of the offense;

b. The date;

c. The name and number of the court proceeding such as Justice of the Peace Court, Superior Court, etc.;

d. The sentence given you.

ANSWER

/s/ ATTORNEY SIGNATURE

Dated: May 23, 2023

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAPTION

PLAINTIFFS' REQUEST FOR PRODUCTION DIRECTED TO DEFENDANTS

Definitions

The following definitions, description of files and file types sought, apply to each request herein unless otherwise indicated:

A. As used herein, the word "document" means any writing or record known to you or your attorneys, of any type of description, including, but not limited to, originals and copies of correspondence, letters, contracts, agreements, statements, telegrams, telexes, interoffice communications, memoranda, reports, publications, certificates, notes, notebooks, diaries, minutes, computer tapes, cards and printouts and all other photographs and retrievable data (whether incarded, taped or coded electrostatically, electromagnetically or otherwise), photographs, video, films, motion pictures, microfilm, tape recordings, transcripts of telephone conversations, and all other documents and material, including any non-identical copy (whether different from the original because of alterations, notes, comments, or other material contained therein or attached thereto or enclosures therein or otherwise) and whether it is a draft or final version.

B. As used herein, the word "correspondence" includes written communications and oral communications, whether in person, by telephone, by mechanical or electronic reproduction or otherwise.

C. As used herein, the words "accident," "incident", "collision" or "occurrence" relate to the incident that occurred on May 15, 2018.

D. As used herein, the words "vehicle," "truck", "tractor" or "trailer" relate to the truck and trailer operated by Defendant, on May 15, 2018.

E. All digital or analog electronic files, include "deleted" files and file fragments, stored in machine-readable format on magnetic, optical or other storage media, including the hard drives or floppy disks used by your computers and their backup media (e.g., other hard drives, backup tapes, floppy disks, DVD's, Jaz cartridges, CD-ROMs, etc.) or otherwise, whether such files have been reduced to paper printouts or not. More specifically, all e-mails, both sent and received, whether internally or externally; all word-processed files, including drafts and revisions; all spreadsheets, including drafts and revisions; all databases; all CAD (computer-aided design) files, including drafts and revisions; all presentation data or slide shows produced by presentation software (such as Microsoft PowerPoint); all graphs, charts and other data produced by project management software (such as Microsoft Project); all data generated by

calendaring, task management and personal information management (PIM) software (such as Microsoft Outlook or Lotus Notes); all data created with the use of personal data assistants (PDAs), such as Palm Pilot, HP Jornada, Cassiopeia or other Windows CE-based or Pocket PC devices; all data created with the use of document management software; all data created with the use of paper and electronic mail logging and routing software.

DOCUMENT REQUESTS

1. Copies of the declaration pages for any and all insurance policies covering this loss, including, but not limited to, any and all primary insurance policies, excess insurance policies and/or insurance policies which Defendants are listed as an additional insured under another person's or entity's insurance policy.

RESPONSE

2. The entire claims and investigation file or files including all insurance policies of the Defendants (excluding references to mental impressions, conclusion or opinions representing the value or merit of the claim or defense or respecting strategy or tactics and privileged communication from counsel).

RESPONSE

3. Any and all statements made by any party to this lawsuit, whether written or oral, including any co-Plaintiff or co-Defendant, their agents, representatives or employees.

RESPONSE

4. Any and all statements made by any witnesses to the events described in any of the paragraphs of Plaintiff's Complaint.

RESPONSE

5. Any and all statements made by any of the Defendants, their employees, agents or representatives to any insurance company.

RESPONSE

6. Any and all statements made by any person, other than Defendants or any eyewitnesses, which relate or refer in any way to the incident described in Plaintiffs' Complaint.

RESPONSE

7. Any and all documents containing the name, home and business address of all individuals contacted as potential witnesses.

RESPONSE

8. Any and all written reports rendered by proposed expert witnesses including but not limited to any medical expert witnesses whether intended or not intended to be used at the time of trial.

RESPONSE

9. Copies of any and all written reports or summaries of oral reports, as well as a copy of the Curriculum Vitae, of any and all experts that have supplied reports, whose testimony will be offered at the trial of the above matter.

RESPONSE

10. Any and all books, treatises, scientific studies and/or journals, commentaries, reports, statutes, codes, ordinances, rules, regulations or other published document referred to and utilized by or relied upon by any expert witness intended to be called at trial.

RESPONSE

11. A complete copy of any and all documents contained in all experts' files for all experts who will testify at trial and for all medical expert witnesses whether intended or not intended to testify at trial.

RESPONSE

12. A copy of any and all written reports and/or summaries of any and all oral reports generated as a result of Plaintiff having undergone an independent medical examination/defense medical examination at the request of Defendants or Defendants' insurance company.

RESPONSE

13. Any and all blueprints, charts, diagrams, drawings, graphs, maps, plats, plans, photographs, models or other visual reproductions of any object, place or thing prepared or utilized by, referred to or relied upon by any expert witness intended to be called at the time of trial.

RESPONSE

14. All photographs, video, charts, diagrams, maps and other pictorial or graphic depictions of any matter relevant to the action whether in the possession of or under the control of or available to the party to whom this demand is directed, the attorney(s) for that party or in the possession of any representative of that party's insurance carrier, including but not limited to depictions of the condition of and/or damage to physical property.

RESPONSE

15. Copies of any hospital/medical reports that the party to whom this demand is directed, or his/her/their representatives, employees or attorneys have obtained.

RESPONSE

16. Copies of any and all statements from the Defendants' employees or the employees of Defendants' sub-contractors.

RESPONSE

17. All transcripts of any deposition, court proceeding or testimony with respect to this incident.

RESPONSE

18. Any and all discovery received from any other party to this action.

RESPONSE

19. The original or legible copy of any and all statements, reports, memoranda setting forth the facts disclosed in any and all surveys, inspections, testing or investigation with reference to the above-captioned claim being in your possession or under the control of your agents, servants, workmen and/or employees or counsel except for the personal notes or impressions, conclusions or opinions respecting the value or merit of the claim.

RESPONSE

20. A copy of any written accident or incident report concerning this occurrence signed or prepared by anyone on behalf of Defendants and/or their insurance carrier(s).

RESPONSE

21. All writings, statements, descriptions, notice of loss reports, report of incident, and any and all documents pertaining to any aspect of the incident or accident which gave rise to the instant cause of action; however, you may exercise or delete any references to mental impressions, conclusions or opinions representing value or merit of a claim or defense respecting strategy or tactics and further excluding privileged communications from counsel.

RESPONSE

22. All property damage estimates for any object belonging to the Plaintiffs or the Defendants which was involved in this accident or occurrence.

RESPONSE

23. A copy of any and all documents received from any and all insurance claims or lawsuit indexing services/bureaus for all searches performed with respect to the Plaintiffs.

RESPONSE

24. A copy of any and all documents received from any hospitalization searches performed with respect to Plaintiffs including, but not limited to, any and all hospital check reports.

RESPONSE

25. If applicable, a copy of any and all records or documents of any kind obtained from any source which in any way relate to prior or subsequent accidents, injuries and/or medical care involving the Plaintiffs.

RESPONSE

26. A copy of any and all surveillance video, logs, summaries and/or any other documents of any kind contained in the surveillance file for any surveillance done of the Plaintiffs.

RESPONSE

27. All documents that you supplied to any experts who will be called as witnesses on your behalf at the trial of this action.

RESPONSE

28. Any documents that you receive pursuant to any subpoenas or authorizations in connection with this action.

RESPONSE

29. Any and all documents you intend to rely upon at the time of trial in this matter.

RESPONSE

30. Any and all documents you intend to question any witness with at a deposition, arbitration or trial in this matter.

RESPONSE

31. A copy of any and all reports from the State Police and/or any other governmental department or agency that investigated any aspect of the subject incident.

RESPONSE

32. A copy of any and all contracts and/or written agreements of any kind between any of the Defendants.

RESPONSE

33. A copy of any and all documents of any kind, including but not limited to, photographs, which relate to the property damage and repairs to the subject truck Defendant, _____, was operating on May 15, 2018.

RESPONSE

34. Bills of lading for any shipments transported by the driver, for the day of the accident and the thirty (30) day period preceding the incident.

RESPONSE

35. Any oversized permits or other applicable permits or licenses covering the tractor, trailer or load on the day of the incident.

RESPONSE

36. Defendant, _____, complete driver qualification file, as required by 49 C.F.R. 391.51, including but not limited to:

a. Application for employment;

b. CDL license;

c. Driver's certification of prior traffic violations;

d. Driver's certification of prior collisions;

e. Driver's employment history;

f. Pre-employment MVR;

g. Annual MVR;

h. Annual review of driver history;

i. Certification of road test;

j. Medical examiner's certificate;

k. HAZMAT or other training documents;

l. All drug and alcohol testing records of the driver;

m. All inquiries and responses regarding the driver's employment history;

n. Driver's complete personnel file; and

o. Driver's complete medical file.

RESPONSE

37. All documents normally used to determine whether an accident was preventable or non-preventable, whether or not such determination was actually made in this case, to include, but not be limited to:

a. The driver's post-collision alcohol and drug testing results;

b. Documents used to determine if the driver was on a cell phone or other electronic device at the time of the incident;

c. Documents used to determine whether the driver was texting at the time of the accident;

d. Driver Log Audit and Violation Reports – Whether paper or electronic, whether daily, weekly, monthly, quarterly, cumulatively, and for all other time periods;

e. Reports electronically available through RAIR, JJ Keller, or other services; and

f. The GPS location data for six months prior to the accident for the driver.

RESPONSE

38. The accident register maintained by the motor carrier as required by federal law for the one (1) year period preceding this collision. (FMCSR 390.15)

RESPONSE

39. All OmniTRAC, Qualcomm, MVPC, QTRACS, OmniExpress, TruckMail, TrailerTRACS, SensorTRACS, JTRACS, and other similar systems data for the six (6) months prior to the collision and the day of the collision, for this driver, truck, and trailer.

RESPONSE

40. Cargo pickup or delivery orders prepared by motor carriers, brokers, shippers, receivers, driver, or other persons, or organizations for thirty (30) days prior to the date of the collision as well as the day of the collision pertaining to the cargo transported by the driver, truck and/or trailer involved in this incident.

RESPONSE

41. Accounting records, cargo transportation bills and subsequent payments or other records indicating billings for transportation or subsequent payment for the transportation of cargo, with both the front and back of cancelled checks for cargo transported by the driver and/or truck involved in the collision for thirty (30) days prior to the date of the collision as well as the day of the collision.

RESPONSE

42. The entire personnel discipline, and training files of Defendant, _____,, involved in this collision.

RESPONSE

43. All letters, reports, and written material from a government entity involving safety, and safety ratings for the company and driver to include, but not be limited to, Department of Transportation audits by the state or federal government, the Federal Motor Carrier Safety Administration, or material generated on your company or driver pursuant to SAFERSYS or CSA 2010. The request is limited to one (1) year prior to the accident and any subsequent document, report, letter, or other material (to include electronically transmitted information) that includes the date of the accident or the driver.

RESPONSE

44. The front and back of the driver's daily logs for the day of the collision, and the six month period preceding the collision, together with all material required by 49 C.F.R. 395.8 and 395.15 for the driver involved in the above matter together with the results of any computer program used to check logs as well as all results of any audit of the logs by your company or a third party. This specifically includes any electric on board computers (AOBRD's, EOBR's, etc.) and the audit trail for those entries.

RESPONSE

45. All existing driver vehicle inspection reports required under 49 C.F.R. 396.11 for the vehicle involved in the above collision, to include all existing daily inspection reports for the tractor and trailer involved in this collision.

RESPONSE

46. All existing maintenance, inspection and repair records or work orders on the tractor and trailer involved in the above collision.

RESPONSE

47. All annual inspection reports for the tractor and trailer involved in the above collision, covering the date of the collision.

RESPONSE

48. Photographs, video, computer generated media, or other recordings of the interior and exterior of vehicles involved in this collision, the collision scene, the occurrence, or relating to any equipment or things originally located at or near the site of the occurrence.

RESPONSE

49. Any lease contracts or agreements covering the driver or the tractor or trailer involved in this collision.

RESPONSE

50. Any interchange agreements regarding the tractor or trailer involved in this collision.

RESPONSE

51. Any computer data from the tractor or trailer to include but not be limited to: any data and printout from on-board recording devices, including but not limited to the ECM (electronic control module), any on-board computer, tachograph, trip monitor, trip recorder, trip master, Hours of Service (HOS) or other recording or tracking device for the day of the collision and the six (6) month period preceding the collision for the equipment involved in the collision.

RESPONSE

52. Any post-collision maintenance, inspection, or repair records or invoices in regard to the tractor and trailer involved in the above collision.

RESPONSE

53. Any weight tickets, fuel receipts, hotel bills, tolls, or other records of expenses, to include expense sheets and settlement sheets regardless of type (to specifically include Comdata or similar vendor reports), for the truck driver pertaining to trips taken for the day of the collision and thirty (30) days prior to the collision.

RESPONSE

54. Any trip reports, dispatch records, trip envelopes regarding the driver or the tractor or trailer involved in this collision for the day of the collision and the thirty (30) day period preceding this collision.

RESPONSE

55. Any e-mails, electronic messages, letters, memos, or other documents concerning this collision.

RESPONSE

56. All drivers' manuals, guidelines, rules or regulations, safety messages, safety and training materials for the safe operation of a tractor trailer given to drivers such as the one involved in this collision.

RESPONSE

57. Any reports, memos, notes, logs or other documents evidencing complaints about the driver in the above collision at any time.

RESPONSE

58. Any DOT or PSC reports, memos, notes or correspondence concerning the driver or the tractor or trailer involved in this collision.

RESPONSE

59. Any and all communications via CB radio, mobile or satellite communication systems, email, cellular phone, pager or other in cab communication device to include the bills for the devices for the day before, the day of, and the two days after the collision.

RESPONSE

60. Any and all computer, electronic, or e-mail messages created in the first forty eight hours immediately after the incident, by and between the Defendants and any agents or third parties relating to the facts, circumstances, or actual investigation of the incident as well as any computer messages which relate to this particular incident, whether generated or received.

RESPONSE

61. All correspondence and documents regarding any safety issue for the driver to include, but not be limited to, the initiation, investigation and final conclusion of any:

a. Warning letters;

b. Targeted roadside inspections; and

c. Any document that stated the driver was unfit.

RESPONSE

62. All correspondence and documents regarding any safety issue for the company to include but not be limited to the initiation, investigation and final conclusion of:

a. any off-site investigation;

b. any on-site investigation;

c. any cooperative safety plan;

d. any notice of violation;

e. any notice of claim/settlement agreement;

f. any documents related to DOT recordable accidents pertaining to this incident; and

g. any documents related to "at fault accidents" pertaining to this incident.

RESPONSE

63. Any document that found the driver or the company deficient in any BASIC (Behavior Analysis and Safety Improvement Categories) category.

RESPONSE

64. The BASIC measurements for the trucking company and driver for the three years prior to the collision.

RESPONSE

65. Any correspondence regarding the company or the driver objecting to, or asking for a correction of, any BASIC measurement or FMCSA intervention.

RESPONSE

66. The Pre-Employment Screening Program (PSP) report on the driver for each month for the three years prior to the collision.

RESPONSE

67. Any documents showing inquiry by the trucking company for any PSP reports of the driver for the three years prior to the collision.

RESPONSE

68. Copy of the carrier profile maintained by MCMIS (Motor Carrier Management Information System) for the three years prior to the collision.

RESPONSE

69. All logs of activity (both in paper and electronic formats) on computer systems and networks that have or may have been used to process or store electronic data containing information about or related to safety and safety policies, the collision, the driver(s), the truck,

the trailer, witnesses to the collision, the Plaintiff(s), the load, the facts of the collision, preventability determinations, GPS data, Hours of Service (HOS) data, dispatcher data for this driver(s), this truck, and this trailer.

RESPONSE

70. All e-mails, and information about e-mails (including message contents, header information and logs of e-mail system usage) sent or received by the driver involved in the incident for period of time involving the incident and the seven (7) days before and after the incident.

RESPONSE

71. All other e-mail and information about e-mail (including message contents, header information and logs of e-mail system usage) containing information about or related to company safety and safety policies, the collision, the driver, the truck, the trailer, witnesses to the collision, the Plaintiff(s), the load, the facts of the incident, preventability determinations, GPS data, dispatcher data for this driver(s), this truck, and this trailer.

RESPONSE

72. All databases, files, and/or electronic data (including all records and fields and structural information in such databases), containing any reference to and/or information about or related to company safety and safety policies, the collision, the driver, the truck, the trailer, witnesses to the collision, the Plaintiff(s), the load, the facts of the collision, preventability determinations, GPS data, dispatcher data for this driver, this truck, and this trailer.

RESPONSE

73. Provide all results of the recording or downloading of mechanical or electronic on-board recording Electronic Control Module (ECM) or Event Data Recorder (EDR) commonly known as a "black box" or any other computer or data link of the subject vehicle to include but not be limited to devices such as Cummins Celect™, Cummins Quik-Link®, NEXIQ Pro-Link®, Detroit Diesel Pro Driver®, Detroit Diesel DDEC III® & DDEC IV®, Caterpillar Fleet Information System®, Caterpillar ADEM® or any similar device so equipped in the truck and/or trailer.

RESPONSE

These requests are deemed to be continuing insofar that if any of the above is secured subsequent to the date herein for the production of same, said documents, photographs statements, reports, etc., are to be provided to Plaintiffs' counsel, within thirty (30) days of receipt of same.

/s/ ATTORNEY SIGNATURE

Dated: May 23, 2023

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAPTION

PLAINTIFF'S INTERROGATORIES
DIRECTED TO DEFENDANTS[1]

1. Give the names and last known addresses of all persons who were present at the scene of the accident within twenty minutes after it occurred.

ANSWER

2. Give the names and last known addresses of persons from whom statements have been procured in regard to the facts alleged in the pleadings. As to each person named, state:

(a) the name and last known address of the person who took the statement;

(b) the date when the statement was taken;

(c) the names and last known addresses of all persons presently having copies of the statement;

(d) whether the statement was prepared in the general course of business or in anticipation of this litigation or preparation for trial;

(e) whether the statement was prepared under the supervision of or pursuant to the instructions of your attorney, and if so, the name and address of that attorney.

ANSWER

3. Give the name and address of each person who has been interviewed on your behalf. As to each person interviewed, state:

(a) the date of such interview;

(b) the name and last known address of each person who has a resume of such

[1] These are continuing interrogatories, the answers to which must be kept current.

interview.

ANSWER

4. With reference to any report, memorandum or resume prepared by you or anyone acting on your behalf but not necessarily limited to any investigator, insurance adjuster or other person pertaining to any facts alleged of referred to in the pleadings, give the date of each such matter in writing and as to each date given, state:

(a) the name and address of the person or persons who prepared such writing, and the name, address identity of the employer of such person or persons;

(b) whether such writing was prepared by you or on your behalf;

(c) the number of pages of such writing;

(d) a general description of such matter in writing (as, for instance, two-page typed summary of an interview between investigator Jones and witness Smith dated January 1, 1966, or five-page report by investigator Smith concerning the results of his investigation of the facts of the accident, etc.);

(e) whether such writing was prepared under the supervision of or pursuant to the instructions of your attorney, and if so, the name and address of that attorney;

(f) the names and addresses of persons who have copies of such matter in writing.

ANSWER

5. Give the names and last-known addresses of all persons who have taken photographs with regard to any fact alleged in the pleading. As to each person named, state:

(a) the date when the photograph was taken;

(b) the subject of each photograph by giving a general description thereof;

(c) the name and last known address of each person who has custody of each such

photograph.

ANSWER

6. State the name and address of every expert retained or employed by you in anticipation of this litigation or preparation for trial, whether or not you expect to call him as a witness at trial, and as to each state:

(a) the dates of initial employment;

(b) the date or dates of any reports, letters or other writings prepared by such person, a brief description of such writing (as two-page letter, three-page report, etc.), and the names and addresses of persons having copies of them;

(c) whether such expert rendered any service in connection with any aspect of any subject matter involved in this litigation, other than in anticipation of this litigation or preparation for trial, (as, for instance, giving medical attention required by the accident, designing machinery involved in the accident, etc.).

ANSWER

7. With respect to each expert, including but not limited to medical personnel, whom you expect to call at trial to testify, state the following:

(a) the associations or societies of which such expert is a member;

(b) the names and addresses of all hospitals, if any, on whose staff such expert has served, or with whom such expert has had courtesy privileges or to whom such expert has served as consultant including the applicable dates of same;

(c) the field of specialization of such expert, if any;

(d) the title, publisher, date and form of all documentary material published by such expert within his field of specialization, if any;

(e) the name, address, employer and address of the employer of such expert;

(f) a detailed explanation of the subject matter as to which such expert is expected to testify;

(g) a detailed explanation of the substance of the facts and opinions to which such expert is expected to testify;

(h) a detailed summary of the grounds for each opinion as to which such expert is expected to testify;

(i) a detailed explanation of such expert's educational and professional history;

(j) the title, publisher, date and form of those documentary materials which such expert believes to be the most authoritative with respect to the subject matter and opinions as to which he is expected to testify;

(k) the name, address, present employer, title, and specialty of each individual who instructed such expert in professional or graduate school with regard to any subjects related to such expert's present specialization and/or with regard to the subject matter as to which he is expected to testify.

ANSWER

8. With respect to each piece of correspondence or report made by each expert identified in your answer to the preceding interrogatory concerning the facts and opinions as to which he is expected to testify, state the following:

(a) the name and address of the expert making the report or correspondence;

(b) the name, address, and telephone number of each individual to whom such report or piece of correspondence was directed;

(c) the date of the report or piece of correspondence;

(d) the subject matter of the report or piece of correspondence;

(e) the name, address and telephone number of each individual who presently has in his custody, possession, or control a copy of the report or piece of correspondence.

ANSWER

9. Please state whether you had liability insurance in effect covering the accident in question and, if so, state:

(a) the name of the carrier;

(b) the policy number;

(c) the effective period;

(d) the maximum liability limits for each person and each accident.

ANSWER

10. At the time of the accident referred to in the complaint, if you were covered by any policy of re-insurance or excess liability insurance, state:

(a) the name of the carrier;

(b) the policy number;

(c) the effective period;

(d) the maximum liability limits for each person and each accident.

ANSWER

11. At the time of the accident referred to in the complaint, please state whether punitive damages were covered by your policy. If you are claiming that your policy excluded punitive damages, please provide proof of this exclusion.

ANSWER

12. Please state whether the defendant entered a guilty plea in any Court to motor

vehicle violation arising out of the accident which is the subject matter of this litigation.

ANSWER

13. If the answer to the preceding interrogatory is in the affirmative, please state:

(a) the specific statutory violation; and

(b) the specific name and address of the Court in which such plea was entered.

ANSWER

14. State whether the defendant driver was involved in any motor vehicle violation within the last 5 years preceding this accident and, if so, state for each:

(a) the date;

(b) the specific violation;

(c) the state in which the violation occurred;

(d) the Court rendering the conviction.

ANSWER

15. State whether the defendant driver was involved in any motor vehicle accident in the last 5 years preceding this accident which is the subject matter of this litigation and, if so, state:

(a) the date;

(b) the state in which it occurred;

(c) a description of how the accident occurred.

ANSWER

16. Please state your date of birth, full motor vehicle licensed at the time of the accident in question and indicate whether it is any different now.

ANSWER

17. If the defendant driver had a license for the operation of any vehicle which contained any restrictions, state the nature of such restrictions and the dates when and places where such restrictions applied.

ANSWER

18. If the defendant driver ever had a license to operate any vehicle suspended, canceled, or revoked, state the name of the state suspending, cancelling, or revoking such license, the inclusive dates of the suspending, cancelling, or revoking of the license and the reasons for the suspending, cancelling, or revoking of the license.

ANSWER

19. State the make, model, year, and license number of the vehicle which you were operating at the time of the accident.

ANSWER

20. If you were not the owner of the vehicle which you were operating at the time of the accident, state the following:

(a) the factual circumstances of your use of the vehicle at the time of the accident;

(b) the name, address and telephone number of the individual, if any, who gave you permission to operate the vehicle at the time of the accident.

ANSWER

21. If at the time of the accident the defendant driver was in the course of the business of or for any purpose of any other individual or entity, state the following:

(a) the name and address of each individual or entity for which you were acting;

(b) the name, address, employer, and address of the employer of each individual with knowledge or information with respect to your answer to sub-part (a) above;

(c) a detailed explanation of the nature of the business or purpose which you were pursuing at the time of the accident.

ANSWER

22. Do you claim that the brakes on your vehicle failed at the time of the accident?

ANSWER

23. If you claim that any unexpected mechanical failure caused or contributed to the cause of the collision, state:

(a) the precise portion of the vehicle;

(b) the reasons for this claim;

(c) the names and last known addresses of all persons having such knowledge;

(d) a specific description of everything in writing pertaining to this claim and the names and last known addresses of all persons in possession of such writing.

ANSWER

24. If you claim that this was an unavoidable accident state your reasons in detail and give the names and last known addresses of persons having such knowledge and a description of anything in writing concerning such claim as well as the name and address of the person in custody of such writing.

ANSWER

25. State in detail the facts upon which each affirmative defense, if any, of the answer to the complaint is based and the names and last known addresses of all persons having knowledge and a description of anything in writing concerning such defense as well as the name

and address of the person in custody of such writing.

ANSWER

26. If you claim that the plaintiff violated any state statute not previously listed in the answer, designate the statute and state in what manner it was violated.

ANSWER

27. State in detail your version of the manner in which the accident which is the subject matter of this litigation occurred.

ANSWER

28. Please state whether you had a conversation with the plaintiff or any other party to this lawsuit concerning the accident at any time after the accident and if so, state:

(a) the name of the parties;

(b) the date;

(c) the subject matter;

(d) your best recollection of what everyone said;

(e) the names and last known addresses of anyone else who was present;

(f) where such conversation took place.

ANSWER

29. If the defendant driver took any drug, narcotic, sedative, tranquilizer, or other form of medication within the 24-hour period preceding the occurrence alleged in the complaint, state:

(a) the identity of such a drug or medication;

(b) the date and times of the use of such drug or medication;

(c) the purpose of such drug or medication;

(d) the name and address of the physician or other medical personnel who recommended the use of such drug or medication;

(e) whether you were using such drug or medication at the time of the accident;

(f) whether you are presently using such drug or medication.

ANSWER

30. If the defendant driver did not have 20/20 unimpaired vision at the time of the accident without the use of corrective lenses, state the following:

(a) whether or not you were wearing corrective lenses at the time of the accident;

(b) the eyesight defect which exists without the use of corrective lenses;

(c) the eyesight defect which exists with the use of corrective lenses;

(d) the name and address of the doctor who prescribed any corrective lenses which you possessed at the time of the accident;

(e) the date of the prescription for any corrective lenses which you possessed at the time of the accident;

(f) the name and address of the doctor who gave you your last eye examination prior to the accident;

(g) the date of your last eye examination prior to the accident.

ANSWER

31. State the specific portion of the vehicle owned or operated by you who first came in contact with the vehicle occupied by the plaintiff, and state specifically what part of the vehicle occupied by the plaintiff first came in contact with the vehicle owned or operated by you.

ANSWER

32. Did you see the plaintiff or the vehicle occupied by the plaintiff at any time prior

to the collision?

ANSWER

33. If your answer to the foregoing is in the affirmative, state:

(a) your best judgment of the distance in the number of feet separating the vehicle occupied by the plaintiff from your vehicle at the time you first observed it; and

(b) your best judgment of the speed in miles per hour by the vehicle occupied by the plaintiff at the moment you first observed it on said occasion.

ANSWER

34. If the brakes on the vehicle owned or operated by you were applied prior to the collision, state the speed in miles per hour that said vehicle was traveling at the moment the brakes were first applied and the distance in the number of feet between your vehicle and the vehicle occupied by the plaintiff at the time the brakes were applied.

ANSWER

35. State your best judgment of the speed in miles per hour of the vehicle owned or operated by you on the occasion of the said accident, each of the following points before reaching the point of impact:

(a) 200 feet;

(b) 150 feet;

(c) 100 feet;

(d) 50 feet;

(e) 25 feet;

(f) point of impact.

ANSWER

36. If your vehicle left skid marks or tire marks prior to the collision, state:

(a) the number of feet of such marks;

(b) the location, i.e., beginning in right southbound lane and ending in the left northbound lane;

(c) the tires involved, i.e., front right, rear left, etc.

ANSWER

37. State whether any horn or other signal was given by you or the operator of the vehicle owned by you as a warning to the plaintiff or other persons involved in said accident prior to the time of the collision and if not, why not.

ANSWER

38. If you claim that there was any thing or condition to obstruct your vision or of the driving of the vehicle owned by you just prior to, or at the time of, the said collision, explain and describe in detail.

ANSWER

39. Describe the make, model, and year of your vehicle and give a detailed account of all the damage suffered by your vehicle as a result of the collision described in the complaint.

ANSWER

40. Give the names and addresses of all persons or firms who have made repair estimates for your vehicle resulting from this accident and attach copies of such estimates to this answer.

ANSWER

41. Give an itemized statement of the repairs made to your vehicle, showing the cost

of:

(a) parts replaced;

(b) work done;

(c) all other charges.

ANSWER

42. If your vehicle was not repaired as a result of the present accident, state why and what disposition was made of it.

ANSWER

43. If you or anyone on your behalf has written to or spoken to any doctors, hospitals, or other persons trained in the healing arts, or, written to or spoken with any person or company who maintains any records concerning injuries or illnesses, concerning the physical condition of the plaintiff, state as to each request for information:

(a) the person or institution to which the request was made;

(b) the date of the request;

(c) whether the request was verbal or in writing;

(d) the name and address of the person making the request;

(e) a summary of the information requested.

ANSWER

44. If you or anyone on your behalf has received doctors' or hospital reports or records bearing on plaintiff's injuries state:

(a) the nature of such reports or records;

(b) at whose request they were prepared;

(c) the dates when they were made or prepared;

(d) the name and last known address of the persons making or preparing them;

(e) the name and last known address of the person or persons presently having custody of them.

ANSWER

45. Do you have any information tending to indicate:

(a) that plaintiff was, within five years immediately prior to said occurrence, confined in a hospital, treated by a physician, or x-rayed for any reasons? If so, give the name and address of such hospital, physician, technician or clinic, the approximate date of such confinement or service and state in general the reason for such confinement or service;

(b) the plaintiff suffered personal injury prior to the date of said occurrence? If so, state when, where, and in general how he was injured and describe in general the injuries suffered;

(c) the plaintiff suffered either (1) any personal injury or (2) ant illness since the date of the occurrence, if so for (1) state when, where, and in general how he was injured, and describe in general the injuries suffered, and for (2) state when he was ill and describe in general the illness;

(d) that plaintiff ever filed any suit for his own personal injuries;

ANSWER

46. If you contend the injuries sustained by the plaintiff was caused or contributed to, by the conduct or actions of a person or entity other than plaintiff or yourself, state:

(a) the name and address of the person or entity;

(b) a description of such conduct or actions;

(c) what facts are known to you who form the basis of such contention;

(d) state the names and last known addresses of all persons who have knowledge of such facts;

(e) a description of everything in writing regarding (a)-(d) above and the name and last known address of the person in custody of such writing.

ANSWER

47. If you or your attorney, agent, or insurance company had any surveillance done or made of plaintiff, describe when, where, how, and identity in detail all written reports, photographs and/or movies and the name and the last known address of the person in custody of such items.

ANSWER

48. Do the answers to each and every one of the foregoing interrogatories, include not only the information known to you or your attorney, but also the information within the possession or control of yourself or your attorney?

ANSWER

49. With regard to any payments made to or on behalf of the plaintiff by the defendant or the defendant's insurer for any cause whatsoever, including but not limited to medical expenses, loss of income or the like, or property damage, state:

(a) the amount of each such payment;

(b) the reason for such payment, i.e., hospital bills, doctor's fee, loss of income, property damage, and so forth;

(c) the name and address of the payee;

(d) the date of said payment;

(e) the statutory basis for such payment, i.e., personal injury protection benefits under 21 Del. C §2118, and so forth.

ANSWER

50. With respect to each and every injury, illness, disease, problem or complaint (hereinafter collectively referred to as "injury" or "injuries") that plaintiff contend was sustained as a result of the accident referred to in the complaint (hereinafter "accident"), state the following:

(a) whether the defendant contends that any of said injuries were not caused by the accident;

(b) a detailed description of each and every injury that defendant contends was caused by some event or condition which is not related to the accident and a description of the event or condition which the defendants contend was the cause of each said injury, including the date on which the condition or event caused said injury;

(c) the names, addresses of the employers of all persons, including but not limited to physicians and other medical personnel, who have knowledge or information of the matter set forth in defendant's answer to this interrogatory and as to each such person, state the following:

(i) a detailed description of the knowledge or information each person possesses.

(ii) the date on which such knowledge became known to such person and the manner in which it was communicated to him.

(iii) a description of all writings of any kind which refer or relate to the knowledge or information each person possesses, including the date on which the writing was prepared, the name and address of the person who prepared it and the name and address of each person who is in possession of the original or copy of said writing.

ANSWER

51. Has the defendant or defendant's attorney(s) ever arranged with any doctor to have the plaintiff examined or treated in connection with any injuries, illnesses, diseases, problems or complaints (hereinafter collectively referred to as "injuries" or "injury") which plaintiff contends they sustained in the accident referred to in the complaint (hereinafter "accident")?

ANSWER

52. If the answer to the preceding interrogatory is in the affirmative, state separately, as to each doctor who either examined or treated the plaintiff, the following:

(a) the name and address of the doctor who performed the examination or rendered the treatment;

(b) whether the doctor examined the plaintiff and, if so, a detailed description of the type of examination that was conducted, stating specifically each and every part of plaintiff's body that was examined;

(c) the date and the time of the examination and the name and the address of the place where the examination was performed;

(d) the total length of time in which the examination took place (e.g., fifteen minutes, thirty minutes, etc.);

(e) a detailed description of the findings made by the doctor with respect to each aspect of his examination of plaintiff;

(f) the name and address of the person who employed the doctor to do the examination;

(g) the amount of money that the doctor was paid to do the examination, the name and address of the person who paid the amount and the date on which the payment was made;

(h) whether any tests of any kind, including but not limited to x-rays, EEG's, or laboratory studies, were administered to plaintiffs in conjunction with the examination and, if so, state the following as to each test that was performed:

(i) a detailed description of the test that was performed.

(ii) the date, time of day and place where the test was administered.

ANSWER

53. With respect to each report, document, record, or any other writing of any kind which relates or refers in any way to the matters set forth in defendants' response to interrogatory no. 47, state the following:

(a) the date on which such writing was prepared, including the time of day, if known;

(b) the name address of the preparer of the writing;

(c) a detailed description of the contents of the writing;

(d) the name and address of all persons who are in the possession of the original or copies of said writing.

ANSWER

54. When did Defendant Driver first begin driving for Uber.

ANSWER

55. Describe the employment relationship between Defendant Driver and Uber.

ANSWER

56. Provide any contract or agreement that existed between the parties at the time of the accident at issue.

ANSWER

57. What, if any, were you required to do before you were employed by Uber.

ANSWER

58. How many hours per week, on average, did Defendant Driver log into the Uber application.

ANSWER

59. What time did Defendant Driver log into the Uber application as a driver on the night of the incident?

ANSWER

60. How many Uber rides did Defendant Driver have from the time you logged into the application on the day/night of the incident until the time of the accident?

ANSWER

61. Describe in detail the Uber rides Defendant Driver had in the hour leading up to, until the moment of, the accident at issue.

ANSWER

62. Describe in detail the route Defendant Driver drove in the hour leading up to, until the moment of, the accident at issue. If the Uber application tracks your route, provide proof of

same.

ANSWER

63. At the time of the collision, did you have any passengers?

ANSWER

64. Where were you headed at the time of the collision? Please provide the address and the reason for heading to this destination. Please identify if you were en route to another Uber ride.

ANSWER

65. What time, if any, did Defendant Driver log out of the Uber application.

ANSWER

66. Describe in detail how an Uber driver's rides are cataloged, indexed or otherwise kept track of.

ANSWER

67. Describe all communication between you and any other person (other than your attorney), at any time between the accident and present, relating to any of the allegations in the Complaint.

ANSWER

68. How many hours of sleep did you get the night before the incident?

ANSWER

69. Did you consume any alcoholic beverages in the 48 hours leading up to the _____ incident? If so, please state what type of alcohol and how much of each alcohol you consumed.

ANSWER

/s/ ATTORNEY SIGNATURE

DATED: May 11, 2023

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CAPTION

PLAINTIFF'S REQUEST FOR
PRODUCTION DIRECTED TO DEFENDANTS

The Plaintiff requests the Defendants to produce for examination and copying at the office of the attorneys for the plaintiff within thirty (30) days from the date of this request the following items:

(1) Everything identified in your answers to interrogatories;

(2) A copy of the liability insurance policy and the declarations' page in effect at the time of the accident in question and covering the vehicle operated by the defendant;

(3) Copies of any and all medical records, including, but not limited to medical notes, medical reports, etc. that are not privileged in your possession to date;

(4) All electronic files or records such as e-mails, computer entries or logs, computer files, etc. that have been filed or entered in relation to the events that resulted in this litigation. If you claim that the file or record is privileged, identify the file or record and state the nature of the privilege;

(5) A copy of your partner dashboard or other data evidencing Defendant Driver's rides for the night of the collision;

(6) A copy of any and all contracts and/or agreements between the parties;

(7) A copy of all payments made from Defendant Uber to Defendant Driver pursuant to contract of hire prior, and up through, the date of incident;

(8) Any and all written and/or transcribed communications between defendants; and

(9) Any and all reports and/or documents generated from ISO claims searches that are

not privileged.

/s/ ATTORNEY SIGNATURE

DATED: May 11, 2023

Motion Practice – Discovery and Expert Disputes

Joshua H. Meyeroff, Esquire
Morris James LLP

Colleen D. Shields, Esquire
Eckert Seamans Cherin & Mellott, LLC

Thomas Paul Leff, Esquire
Casarino Christman Shalk Ransom & Doss, P.A.

MOTION PRACTICE – DISCOVERY AND EXPERT DISPUTES

THOMAS LEFF, ESQ.

- **Thomas P. Leff** practiced insurance defense, civil litigation, and appellate advocacy for 23 years with the firm Casarino Christman Shalk Ransom & Doss, P.A. until his retirement in 2020. Before attending the University of Maryland School of Law, Mr. Leff spent 16 years teaching in academe as a professor of English and Drama. During law school, he served as the Executive Notes and Comments Editor for the *Maryland Law Review*. Following law school, Mr. Leff served as a Judicial Law Clerk to the Superior Court of the State of Delaware. He is the author and editor of the "Pattern Jury Instructions for Civil Practice in the Superior Court of the State of Delaware." Mr. Leff is admitted to the Bar in the States of Delaware and Maryland, to the United States District Courts for Delaware and Maryland, and the United States Court of Appeals for the Third Circuit. He is an Associate and Life Fellow with the American Board of Trial Advocates (ABOTA) and is the Delaware Chapter's Representative to the ABOTA National Board.

COLLEEN SHIELDS, ESQ.

- Colleen Shields is the Member-in-Charge of Eckert Seamans Cherin & Mellott, LLC's Wilmington office. She focuses her practice in civil litigation defending complex cases involving professional negligence, products liability, premises liability, sexual abuse, and general commercial liability. She enjoys participating in jury trials and has tried numerous cases to favorable verdicts.
- Colleen has also been active in many trial related organizations, holding leadership roles in Defense Counsel of Delaware, DRI, ABOTA, IADC and the International Society of Barristers. She also enjoys mentoring younger attorneys and students interested in a career in law.

JOSHUA MEYEROFF, ESQ.

- Josh Meyeroff chairs the medical malpractice group at Morris James LLP. He represents injured persons in medical malpractice and negligence suits in Delaware, Maryland and Pennsylvania. Josh is a seasoned litigator, who has tried numerous cases to verdict and has obtained many successful results.
- Prior to representing injured persons, Josh defended healthcare providers and hospitals in medical malpractice claims. In 2021, he changed his practice representing injured persons exclusively in medical malpractice and negligence matters.

"And then it hit me. I've reached that stage in life where most of my friends are lawyers."

GENERAL PROCEDURES FOR CIVIL DISCOVERY DISPUTES

- Many times, discovery disputes can be resolved by conversations with opposing counsel
  - This saves clients (and lawyers) time and money
- When they cannot be resolved through discussions/meet and confers, the next step is a motion

FIRST STEP: MOTION TO COMPEL

- Court rules require that disputes over discovery be submitted to the court via motion (Super. Ct. Civ. Rule 37(a))
- Motion to Compel must contain the following:
  - Generally, you need a certification "by the moving party detailing the dates, time spent, and method of communication in attempting to reach agreement on the subject of the motion with the other party or parties and the results, if any, of such communication" (Super. Ct. Civ. Rule 37(e)(1))
  - Proper notice (Super. Ct. Civ. Rule 37(e))
- Sometimes the Court holds a hearing depending on a reply, if any
- Court then issues an order granting or denying in whole or in part the motion
- Applies to all forms of discovery (written discovery, depositions, requests for admissions, requests for inspection, etc.)

RESULT OF MOTION TO COMPEL

- Court issues an order defining what discovery may be had based on the motion/response
- Court can require production/deposition subject to limits
- Court may require parties to pay for costs and attorneys fees associated with a discovery plan (Super. Ct. Civ. Rule 37(f))
- If the motion is granted in whole or in part, the Court can award costs and attorneys' fees (Super. Ct. Civ. Rule 37(a)(4))
- If a party disobeys a Court order thereafter, sanctions, in the Court's discretion, can be issued to the non-responding party (Super. Ct. Civ. Rule 37(b)(2))
  - For example, the Court can require production of materials, even where privilege may be asserted, during a trial. *See M & G Polymers USA, LLC v. Carestream Health, Inc.*, 2010 WL 1611042, at *51 (Del. Super. Ct. Apr. 21, 2010), *aff'd sub nom. Carestream Health, Inc. v. M&G Polymers USA*, LLC, 9 A.3d 475 (Del. 2010)

PLENTY OF OTHER DISCOVERY MOTIONS, INCLUDING…

- Motion for protective order (Super. Ct. Civ. R. 26(c))
- Motion to quash subpoena (Super. Ct. Civ. R. 45(c)(3)(a))
- Motion for rule to show cause (Super. Ct. Civ. R. 64.1)
- Motion for confidentiality (Super. Ct. Civ. R. 5(g))
  - Higher burden for this (good cause)
- Motion to stay discovery
- Motion to extend discovery
- Motion to supplement expert designations

EXPERT DISCOVERY DISPUTES

- Motions for experts, during the discovery process, typically come in two forms:
  - Motion to compel a deposition/disclosure (Super. Ct. Civ. R. 37) (addressed earlier)
  - Motion to address expert fees for report/deposition (Super. Ct. Civ. R. 26(b)(4))
- But one is limited only by imagination…

"Do you swear to tell the truth based on your beliefs that everything you read on the internet is true?"

EXAMPLES OF ATYPICAL EXPERT DISCOVERY MOTIONS

- Out-of-time filed Motion to Review Affidavit of Merit
  - Governed by 18 *Del. C.* § 6853(d)
  - Based on deposition testimony obtained during expert discovery
- Motion to Limit Number of Expert Witnesses
  - Governed by Super. Ct. Civ. R. 16; D.R.E. 403
  - Can be filed before, during or after expert discovery
- The sky's the limit

"Does this, by any chance, refresh your memory, Mr. Fillgate?"

EXPERT MOTION TO ASSESS COSTS

- Motion to address expert fees is governed by Super. Ct. Civ. R. 26(b)(4)(C)
- Rule requires, absent manifest injustice, that the party requesting discovery pay the expert "a reasonable fee" for responding to discovery and may require the requesting party to pay "a fair portion of the fees and expenses reasonably incurred" to the non-requesting party

WHAT ARE "REASONABLE" AMOUNTS OF TIME?

- Party requesting expert discovery should pay the expert for the reasonable time spent reviewing materials to prepare for the deposition/discovery, as well as the deposition/discovery. *Reid v. Johnston*, 2009 WL 4654598, at *2 (Del. Super. Ct. Dec. 3, 2009)
- That does not include time spent conferring and preparing with counsel. *Id.*
- The amount of time to reimburse the expert for preparation, at the expert's hourly rate, should not exceed the amount of time spent in the deposition. *Id.* at *3.
- Parties may, of course, agree to differing arrangements
  - For example, in medical malpractice cases, it is routine for the requesting party to pay only for the deposition time of the expert.

WHAT IS A "FAIR" RATE FOR EXPERT TIME?

- No set rule – depends on the nature of the expert, his/her expertise, type of case
- For medical experts, the Superior Court has relied upon the Medico–Legal Affairs Committee of the Medical Society of Delaware Study from 1995 and 2006, and it has adjusted those for inflation. See, e.g., *Fellenbaum v. Ciamaricone*, 2002 WL 31357917 (Del. Super. Ct. Oct. 16, 2002); *Enrique v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 2636845 (Del. Super. Ct. June 30, 2010), *aff'd*, 16 A.3d 938 (Del. 2011).
- Medico–Legal Affairs Committee of the Medical Society of Delaware Study issued updated its recommendations in 2016: https://www.medicalsocietyofdelaware.org/DELAWARE/assets/files/Manuals/Resources/Expert%20Fees%20final%202016.pdf
  - By the Hour Medico-Legal Work.....$ 600 – 1000 per hour
  - Deposition & Court Appearance.....$ 2400 – 4000 per ½ day

EXPERT DISPUTES POST-DISCOVERY

- Post-expert discovery, motions *in limine* are often filed as to experts
- Typical motions *in limine* as to experts include:
  - Challenges to qualifications (D.R.E. 702)
  - Challenges to foundation of expert's opinion (D.R.E. 702)
  - Challenges to limit expert testimony
  - Challenges to strike expert testimony
  - Challenges to cumulative/duplicative testimony

EXPERT DISPUTES DURING TRIAL

- Although much more rare, challenges to experts can occur during trial, even after discovery
- Some examples include:
  - Challenges to qualifications (similar to pre-trial challenges) (D.R.E. 702)
  - Challenges to expert opinions going beyond the scope of the Rule 26(b)(4) disclosure
  - Challenges to experts for failing to give opinions to a reasonable degree of probability

EXPERT DISPUTES AFTER TRIAL

- Either party can challenge a ruling as to expert testimony after a verdict
  - Can challenge the same things that were challenged before/during trial
- When costs are available, the prevailing party is entitled to expert costs (Super. Ct. Civ. R. 54(h); 10 Del. C. § 8906)

THE WEEKEND IS ALMOST HERE…

- We appreciate you listening to the last portion of the "Delaware ABOTA presents Discovery Best Practices" CLE
- Questions?

"I used to call people, then I got into e-mailing, then texting, and now I just ignore everyone."

SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOSEPH R. SLIGHTS, III
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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WILMINGTON, DE 19801
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December 3, 2009

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Re: ***Reid v. Johnston***
C.A. No. 08C-01-025-JRS
Upon Plaintiff's Motion to Determine Expert Fees.

Dear Counsel:

As you know, this case arises out of a rear-end automobile collision which allegedly caused personal injury to the plaintiff, Shari Reid. The defendant, Michael Z. Johnston, has engaged Dr. Richard H. Bennett, a neurologist, to examine Ms. Reid and to offer opinions at trial regarding the extent to which the automobile accident proximately caused her injuries. Dr. Bennett examined Ms. Reid on February 6, 2009, and prepared an extensive report in which he detailed the information he reviewed

prior to the examination, his clinical findings on examination, the medical literature upon which he relied, and his opinions regarding Ms. Reid's injuries and prognosis.

Plaintiff's counsel noticed Dr. Bennett's deposition for October 6, 2009. Upon receipt of the notice, Dr. Bennett issued a fee schedule in which he set forth his fee for the deposition and, particularly relevant here, his fee to prepare for the deposition. Plaintiff has filed a motion in which she seeks an order of this Court (1) setting the maximum fee Dr. Bennett may charge to sit for his deposition; and (2) relieving her of any obligation to compensate Dr. Bennett for the time he might spend preparing for his deposition. The Court already has given its ruling regarding Dr. Bennett's deposition fee. To follow is the Court's decision regarding the extent to which Dr. Bennett may pass his deposition preparation fee on to the Plaintiff. Remarkably, as best as the Court can discern, this is an issue of first impression, at least within the written jurisprudence of this Court.[1]

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[1] Among the Courts that have addressed this issue, there is a split of authority that mirrors the divergent positions taken by the parties in this case. *Compare Fisher-Price, Inc. v. Safety 1st, Inc.*, 217 F.R.D. 329, 331 (D. Del. 2003) (preparation time is included in the reasonable fee to be charged the noticing party under Rule 26(b)(4)(C)), *Fleming v. United States*, 205 F.R.D. 188, 190 (W.D. Va. 2000) (ordering party noticing expert deposition to pay for expert's deposition preparation), *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 154 F.R.D. 212, 213 (E.D. Wis. 1994) (same), *and EEOC v. Sears, Roebuck & Co.*, 138 F.R.D. 523, 526 (N.D. Ill. 1991) (same), with *TV58 Ltd. P'ship v. Weigel Broad. Co.*, 1993 WL 125523, at *2 (Del. Ch. 1993) (preparation time is not included in the reasonable fee absent compelling circumstances), *United States v. M&T Mortgage Corp.*, 238 F.R.D. 3, 14 (D.D.C. 2006) (disallowing reimbursement for preparation time), *M.T. McBrian, Inc. v. Liebert Corp.*, 173 F.R.D. 491, 493 (N.D. Ill. 1997) (same), *Benjamin v. Gloz*, 130 F.R.D. 455, 456 (D. Col. 1990) (same), *and Rhee v. Witco Chem. Corp.*, 126 F.R.D. 45, 47 (N.D. Ill. 1989) (same).

Before turning to the specifics of the Plaintiff's motion, it is useful first to identify certain overarching considerations that have guided the Court's analysis of the issue *sub judice*. First, under our rules of civil procedure, a party seeking discovery from an expert witness proffered by another party is responsible for the reasonable costs incurred by the expert in responding to that discovery.[2] In this regard, the Court draws a distinction between the cost of disclosing the expert's testimony under Rule 26(b)(4)(A)(i),[3] which cost must be borne by the party proffering the expert as a predicate to presenting that expert at trial, and the cost of responding to further discovery regarding the expert's opinion after the expert and his opinion have been disclosed, which cost, if reasonable, must be borne by the party seeking that discovery.[4] The distinction, of course, makes perfect sense. A party may not present expert testimony at trial unless and until that party discloses the substance of the expert's testimony to the other parties in the litigation.[5] It is reasonable to expect the proffering party to pay the expert for the time it takes to develop his opinions and then disclose them in a manner that will allow others (including the

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[2] Del. Super. Ct. Civ. R. 26(b)(4)(C)(i) ("the Court *shall* require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery.")(emphasis added)).
[3] *Compare* Del. Super. Ct. Civ. R. 26(b)(4)(A)(i) ("A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.") with Del. Super. Ct. Civ. R. 26(b)(4)(C)(i).
[4] Del. Super. Ct. Civ. R. 26(b)(4)(C)(i).
[5] *See Cloroben Chem. Corp. v. Comegys*, 464 A.2d 887 (Del. 1983).

proffering party) to understand what the expert will say at trial. On the other hand, the proffering party gains little, if anything, from a pretrial discovery deposition of his expert when noticed by another party. It is not surprising, then, that our rules require that the party "seeking [such] discovery pay the expert a reasonable fee for time spent in responding to [such] discovery."[6]

The second consideration that has guided the Court's analysis of this motion is the notion that the Court, whenever possible, should foster efficient discovery processes in order to "secure the just, speedy and inexpensive determination of every proceeding."[7] In this regard, the Court takes the liberty of stating the obvious - - an expert's deposition will be more efficient and productive if the expert is prepared for the deposition. And, to be most efficient and productive, the preparation should occur before the deposition begins. Otherwise, the deposition would be interrupted frequently (and unnecessarily) whilst the expert "prepares" in the midst of the deposition itself.[8]

Next, the Court has considered the practical implications of deposition preparation - - exactly what is the expert being asked to do? In order to prepare for

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[6] Del. Super. Ct. Civ. R. 26(b)(4)(C)(i).
[7] Del. Super. Ct. Civ. R. 1 ("[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding.").
[8] *See Magee v. The Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 647 (E.D.N.Y. 1997)(recognizing the benefits of the expert's pre-deposition preparation); *Hose v. Chicago and N.W. Transp. Co.*, 154 F.R.D. 222, 228 (S.D. Iowa 1994)(same).

a deposition, an expert must refresh his memory of the facts of the case, the documents or other matters he reviewed to reach his opinions, the process he employed to reach his opinions, and the opinions themselves. Assuming the proffering party properly complied with Rule 26(b)(4)(A)(i), the expert may well need only review the written disclosure and summary of his opinion (either by expert report or detailed interrogatory response) to restore his memory. If the case is more complex, the expert may need to review the actual records, research and other data that form the bases of his opinion(s) to prepare for the deposition. In either event, absent extraordinary circumstances, he will *not* be researching new matter or developing his opinions in the case anew. Preparation for deposition connotes reviewing what has already been reviewed, and becoming re-familiar with opinions already given in order to facilitate the deposition process - - a process that has been initiated by the party who noticed the deposition.

Finally, the Court considered the fact that Delaware courts regularly have recognized that experts are entitled to be compensated (albeit reasonably) for their time. They are not "involuntary servants."[9] It is simply not reasonable to expect an expert to perform substantive work in a case without being compensated.[10] When the expert is responding to discovery, our rules direct that the expert's compensation

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[9] *See generally Pinkett v. Brittingham*, 567 A.2d 858 (Del. 1989).
[10] *Fisher-Price*, *Inc.*, 217 F.R.D. at 331(citing *Fleming*, 205 F.R.D. at 190).

should be paid by the party who propounds the discovery.

In light of the considerations just reviewed, and after considering the issue as it relates to this case, the Court is satisfied that the Plaintiff, as the party noticing the expert deposition, should be required to reimburse Dr. Bennett for the reasonable time he spends reviewing materials in preparation for the deposition. In preparing for his discovery deposition (noticed by another party), Dr. Bennett is "responding to discovery" and should be reimbursed "a reasonable fee" for that time by "the party seeking the discovery."[11] The time Dr. Bennett might spend conferring and preparing with retaining counsel regarding deposition testimony, however, is not reimbursable, as this time will be spent not to refresh Dr. Bennett's recollection of the facts and bases for his opinion (for which counsel's involvement is not required), but rather to address tactical and trial preparation issues, for which Dr. Bennett is not entitled to reimbursement from the Plaintiff.[12]

The rule adopted here comports with the underlying purpose of Rule 26(b)(4)(C) and the Court's interest in managing litigation burden and costs by making the time spent in deposing experts more efficient. The Court declines to extend this rule only to "complex cases," as the determination of what is and what is not a complex case would itself provoke litigation and undermine the very purpose of

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[11] Del. Super. Ct. Civ. R. 26(b)(4)(C)(i).
[12] *Rhee*, 126 F.R.D. at 47.

the rule the Court adopts today - efficient, cost effective litigation practices. Moreover, efficiency in litigation is desirable in all civil cases, whether complex or not.

The Court next must decide how best to ascertain a "reasonable fee" for preparation time under Rule 26(b)(4)(C). Because each case is different, the Court's first inclination is to adopt a rule that would encourage the reviewing court to address the reasonableness question on a case-by-case basis. The difficulty with this approach, of course, is that it also would encourage the very sort of litigation that the Court is seeking to discourage by this decision. A "bright line" must be drawn, within reason of course. In this regard, the approach taken by the United States District Court for the District of Connecticut, in *Packer v. SN Servicing Corp.*,[13] is appealing. In *Packer*, the court adopted a rule that an expert's preparation time cannot exceed the length of the deposition itself, and his preparation fee cannot exceed his hourly deposition fee.[14] While any rule, by necessity, would involve some measure of

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[13] 243 F.R.D. 39 (D. Conn. 2007). The Court notes that some courts have declined to place any limits on the amount of reimbursable preparation time. *See, e.g.*, *Underhill Inv. Corp. v. Fixed Income Disc. Advisory Co.*, 540 F. Supp. 2d 528, 539 (D. Del. 2008). Other courts have adopted adjusted ratios of preparation time to deposition time. *See, e.g.*, *Fee v. Great Bear Lodge of Wis. Dells, LLC*, 2005 WL 1323162, at *3 (D. Minn. 2005) (allowing a ratio of two hours of preparation time to one hour of deposition time); *Boos v. Prison Health Servs.*, 212 F.R.D. 578, 580 (D. Kan. 2002) (granting reimbursement for three-and-one-half hours of preparation time for a one-and-one-half-hour deposition). For the reasons stated, the Court has declined to adopt either of these approaches in favor of the approach taken in *Packer*.

[14] *Packer*, 243 F.R.D. at 43-44.

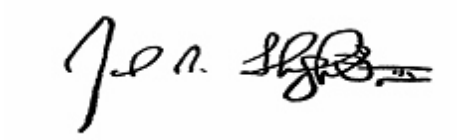
arbitrariness, the rule adopted in *Packer* promotes certainty, predictability, and assurance of compensation for the expert, while at the same time placing reasonable limits on the expert's reimbursable preparation time and hourly fee. Absent extraordinary circumstances, therefore, the Court adopts a rule that the expert shall be reimbursed by the noticing party for time spent actually preparing for a deposition at the expert's hourly rate in an amount up to and including the amount of time spent in the deposition itself.

To summarize, the Court holds that the Plaintiff must reimburse Dr. Bennett for his actual deposition preparation time at his deposition rate up to the time taken to conduct the deposition itself. Accordingly, Plaintiff's Motion to Determine Expert Fees, as it pertains to this issue, is **DENIED.** If called upon to review Dr. Bennett's (or any other expert's) reimbursement request, the Court should (and will in this case) be mindful that preparation for deposition involves refreshing the expert's recollection of facts already reviewed and opinions already expressed. To reiterate, the deposition preparation session is not the time to conduct new research or to review new facts, at least not to the extent that the expert will seek reimbursement for that time from the opposing party. Nor may the expert seek reimbursement for the time spent meeting with the attorney(s) who retained him, even if such meetings ostensibly are meant to help prepare the expert for deposition. As stated, such meetings serve the tactical

interests of the party who engaged the expert and are more accurately characterized as trial preparation expenses. Finally, the Court notes that any request for reimbursement for an expert's deposition preparation time should be in writing and should provide sufficient detail to allow opposing counsel to see what she is paying for.[15]

IT IS SO ORDERED.

Very truly yours,



JRS, III/sb

Original to Prothonotary

[15] Counsel may, of course, stipulate to a different arrangement including, but not limited to, an agreement that each side will pay its own expert preparation costs.