STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: January 30, 2014)

ROSIE K. SWEREDOSKI, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DOUGLAS A. SWEREDOSKI, AND INDIVIDUALLY RECOGNIZED AS SURVIVING SPOUSE	:	
	:	**C.A. No. PC-2011-1544**
v.	:	
ALFA LAVAL, INC., et al.	:	

DECISION

GIBNEY, P.J. In August 2013, Defendant Crane Co. (Crane) filed a Motion for Reconsideration, in which Crane renewed its discovery request for claim forms submitted by Plaintiff Rosie K. Sweredoski (Plaintiff) to asbestos bankruptcy trusts on behalf of her late husband, Douglas A. Sweredoski (Sweredoski). On November 18, 2013, this Court issued an initial ruling, which ordered an in camera review of the claim forms in order to determine whether they were properly discoverable or whether a privilege applied to preclude Crane's discovery request. At the same time, that ruling reaffirmed this Court's original holding that the disputed claim forms are not discoverable for Crane's originally-articulated purpose of showing that Sweredoski's illness was caused by a non-party to this suit. After reconsidering the parties' arguments and conducting an in camera review of the claim forms, the Court finds that, for the reasons below, the documents are discoverable for a limited evidentiary purpose.[1]

[1] More detailed recitations of the facts and travel of this matter are outlined in the Court's July 15, 2013 and November 18, 2013 decisions. See Sweredoski v. Alfa Laval, Inc., No. PC-11-1544, July 15, 2013, Gibney, P.J; Sweredoski v. Alfa Laval, Inc., No. PC-11-1544, Nov. 18, 2013, Gibney, P.J.

I

Discussion

A

Immunity from Discovery

In response to Crane's Motion for Reconsideration, Plaintiff argues that the disputed claim forms are not discoverable because they are protected by the work product doctrine. Plaintiff also submits that the claim forms are privileged from discovery because they are subject to confidentiality agreements between Plaintiff and the bankruptcy trusts. After reviewing the documents in camera, however, this Court finds that the claim forms are neither privileged nor protected by the work product doctrine.

1

Work Product Protection

"There are two distinct categories of work product that are protected by the work-product doctrine," namely opinion work product and factual work product. State v. Lead Indus. Ass'n, 64 A.3d 1183, 1193 (R.I. 2013). Opinion work product, which consists of an attorney's mental impressions, conclusions, opinions, or legal theories, is absolutely immune from discovery. Id.; Crowe Countryside Realty Assocs., Co. v. Novare Engineers, Inc., 891 A.2d 838, 842 (R.I. 2006). Factual work product, on the other hand, "encompasses 'any material gathered in anticipation of litigation,'" and is subject only to qualified protection. Id. (quoting Henderson v. Newport Cnty. Reg'l YMCA, 966 A.2d 1242, 1248 (R.I. 2009)).

The claim forms, therefore, cannot qualify as factual work product because the statements made by Sweredoski in the claim forms were not prepared in anticipation of litigation. Instead, they were prepared for submission to bankruptcy trusts for expedited review in an administrative

claims process, which Plaintiff's counsel has described to this Court as a process meant to avoid more adversarial methods of recovering damages, such as a lawsuit against the trust. Under the expedited review process for which the claim forms were submitted, the bankruptcy trustees "presumed" that Sweredoski qualified for predetermined values in settlement of his claims based on his representations that he worked at particular jobsites. Thus, there was no evidentiary hearing and no litigation under this expedited review process. Therefore, because Plaintiff's counsel prepared the claim forms for an administrative process that was meant to avoid litigation, the claim forms cannot qualify as factual work product. See Henderson, 966 A.2d at 1248 (noting that the purpose of the factual work product protection is to prevent one party from "freeloading" off an opposing party's litigation preparation).

Moreover, Plaintiff argues that the claim forms include the opinions and mental impressions of her attorneys because her attorneys used information they obtained from Sweredoski to determine how to fill out the claim forms. After reviewing the claim forms in camera, however, this Court has determined that they do not, in fact, contain the "mental impressions, conclusions, opinions, or legal theories" of Plaintiff's counsel or other representative. Super. R. Civ. P. 26(b)(3). On the contrary, the claim forms contain only objective facts concerning Sweredoski's exposure to asbestos products, which Plaintiff's counsel transcribed into the forms. Therefore, because the claim forms at issue "merely report[] objective facts or data, untainted by counsel's mental impressions, theories or trial strategy," the opinion work product doctrine does not apply to them. Skonberg v. Owens-Corning Fiberglass Corp., 215 Ill. App. 3d 735, 746 (1991); see also Lead Indus. Ass'n, 64 A.3d at 1194 (holding that the opinion work product doctrine did not apply to a document that merely provided factual information with no "legal advice" or "confidential communications").

2

Confidentiality Provisions

Plaintiff also urges this Court to prohibit Crane from discovering the disputed claim forms on the grounds that the forms are privileged because they are subject to confidentiality agreements between Plaintiff and the bankruptcy trusts. "When a party who is resisting discovery of so-called confidential or protected information asserts a privilege, '[t]he burden of establishing entitlement to nondisclosure rests on the party resisting discovery.'" Gaumond v. Trinity Repertory Co., 909 A.2d 512, 517 (R.I. 2006) (quoting Moretti v. Lowe, 592 A.2d 855, 857 (R.I. 1991)). Plaintiff, however, has failed to meet her burden of establishing that a privilege applies to prevent Crane from discovering the claim forms.

First, the claim forms that Plaintiff submitted to this Court for in camera review did not include the operative confidentiality provisions on which Plaintiff's assertion of privilege relies. Plaintiff, therefore, has not established, as a threshold matter, that these documents are subject to confidentiality agreements.

Even assuming that the claim forms are subject to such agreements, the Court is unconvinced that a private confidentiality agreement would constitute a legal privilege from discovery. The discovery rules clearly exclude "privileged" information from the ambit of discoverability; however, "[i]n this context, the term 'privileged' denotes the recognized exclusions found in the law of evidence." Super. R. Civ. P. 26(b)(1); Fireman's Fund Ins. Co. v. McAlpine, 120 R.I. 744, 747, 391 A.2d 84, 86 (1978). Here, Plaintiff has not indicated any source of Rhode Island law that applies an evidentiary privilege to documents merely because they are subject to a confidentiality agreement. This Court, likewise, was unable to find any such legal authority. See Eric D. Green and Robert G. Flanders, Jr., Rhode Island Evidence

Manual, § 501.02 (2005) (providing a list of the recognized evidentiary privileges under Rhode Island law, which does not include a privilege for documents subject to confidentiality agreements); cf. Porter Hayden Co. v. Bullinger, 350 Md. 452, 464, 469 (1998) (holding that settlement agreements are not protected from discovery simply because they were "deemed confidential by the parties who negotiated them"); Young v. State Farm Mut. Auto. Ins. Co., 169 F.R.D. 72, 79 (S.D. W. Va. 1996) (rejecting the argument that an agreement is necessarily not discoverable on the grounds that it contains a confidentiality provision).

"[P]rivileges, in general, are not favored in the law and therefore should be strictly construed." Moretti, 592 A.2d at 857. Accordingly, this Court finds that because Plaintiff has failed to meet her burden of establishing that a legally cognizable privilege applies to the disputed documents, the claim forms are not protected by the privilege provision of Super. R. Civ. P. 26(b)(1).

B

Discoverability

Rhode Island's discovery rules "are liberal [and] designed to promote broad discovery among parties." Henderson, 966 A.2d at 1246. As such, this Court has broad discretion to grant discovery requests for information "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action," including a "claim or defense" of any party. Super. R. Civ. P. 26(b)(1); see also Corvese v. Medco Containment Servs., Inc., 687 A.2d 880, 881 (R.I. 1997). Even information that is not admissible may be discoverable if it "appears reasonably calculated to lead to the discovery of admissible evidence." Super. R. Civ. P. 26(b)(1).

On the instant Motion for Reconsideration, Crane submits that the claim forms could be

highly relevant to its defense because they may contain information that could be used to impeach Sweredoski's credibility, thereby undercutting the reliability of Sweredoski's allegations against Crane. In support of this argument, Crane has submitted evidence demonstrating that plaintiffs in other unrelated asbestos lawsuits have made different statements regarding their asbestos exposure in their bankruptcy trust claim forms than in their trial and deposition testimony. See, e.g., In re Garlock Sealing Techs., LLC., et al., No. 10-31607 (Bankr. W.D. N.C. Jan. 10, 2014). Crane, therefore, contends that it should be permitted, under the liberal discovery rules of this jurisdiction, to discover the claim forms and determine whether Sweredoski has made inconsistent representations about his asbestos exposure history.

Such inconsistent statements, if any, would be "relevant to the subject matter involved in the pending action" because it would go directly to the credibility of Sweredoski's allegations that exposure to Crane's products caused his injuries. Super. R. Civ. P. 26(b)(1); see also State v. Dennis, 893 A.2d 250, 266 (R.I. 2006) (holding that evidence that a claimant has been untruthful regarding a matter at issue in the case is "directly relevant to [the] defendant's effort to discredit [the] complainant's credibility"); United States v. Catalan-Roman, 585 F.3d 453, 469 (1st Cir. 2009) (noting that "any demonstrated inconsistency in a witness's statement may impeach a witness's credibility"). Consequently, the claim forms are discoverable under the parameters of Super. R. Civ. P. 26(b)(1). Therefore, on reconsideration, this Court grants Crane's Motion to Compel Disclosure of Plaintiff's asbestos bankruptcy trust submissions for the limited purpose of finding admissible impeachment evidence.

C

Limitations on this Decision

It should be noted that the in camera review brought nothing to light that alters this Court's previous rulings on the relevance of the claim forms to Plaintiff's burden of proof. See Sweredoski v. Alfa Laval, Inc., No. PC-11-1544, July 15, 2013, Gibney, P.J. (holding that the claim forms at issue are not relevant to the question of whether Crane is responsible for Plaintiff's damages because they contain information pertaining only to Sweredoski's exposure to nonparties' products); Sweredoski v. Alfa Laval, Inc., No. PC-11-1544, Nov. 18, 2013, Gibney, P.J. (reaffirming this Court's prior ruling on the causation issue). On the contrary, the in camera review made clear that the claim forms do not contain any information about Crane's products nor do they contain any information that would directly disprove that Sweredoski was frequently and regularly in proximity to Crane's products. See Sweredoski v. Alfa Laval, Inc., No. PC-11-1544, June 13, 2013, Gibney, P.J. (adopting the "frequency, regularity, proximity" test as the causation standard under Rhode Island law for asbestos liability suits). Thus, to the extent that information in the claim forms demonstrates non-party liability, nothing in the instant Decision should be taken to alter this Court's prior findings that such information is neither relevant to nor reasonably calculated to lead to the discovery of admissible evidence relating to Plaintiff's burden of proof on the issue of causation.[2] See id.

[2] Crane's repeated citations to contrary holdings of courts in other jurisdictions are unpersuasive on this issue because tort law in Rhode Island is fundamentally distinguishable from that of the jurisdictions on whose rulings Crane relies. Specifically, Rhode Island imposes pure joint and several liability on all tort defendants. See G.L. 1956 § 10-6-2; Graff v. Motta, 695 A.2d 486, 494 (R.I. 1997) (explaining that joint and several liability applies to multiple tortfeasors found liable for the same injury). In contrast, most states whose courts have allowed discovery of asbestos plaintiffs' bankruptcy trust claim forms impose several-only liability on some or all asbestos defendants. For example, California imposes several-only liability on tortfeasors for noneconomic damages. Cal. Civ. Code §§ 1431, 1431.2. Accordingly, that state's intermediate

Rather, this ruling is limited to the discoverability of Plaintiff's claim forms. At this time, the Court makes no ruling regarding the admissibility of the claim forms because Crane's Motion for Reconsideration asks this Court to reconsider only its Motion to Compel Disclosure. Crane has not, thus far, sought to admit the claim forms, or any information contained within them, into evidence. The Court will, therefore, reserve judgment on the admissibility of the claim forms for when, and if, the parties are in such an evidentiary dispute. See Votolato v. Merandi, 747 A.2d 455, 461 (R.I. 2000) (noting that "in cases where a plaintiff already has recovered against a third party and proceeds against a remaining defendant, a motion in limine is ordinarily filed by the plaintiff, seeking to bar admission of any evidence of the third-party settlement agreement").

II

Conclusion

After reconsideration of the underlying facts and applicable law in this case, and after conducting an in camera review of the disputed documents, this Court orders Plaintiff to submit to Crane all claim forms and other supporting documentation submitted by Plaintiff, Sweredoski, or their attorneys on their behalf to asbestos bankruptcy trusts relating to claims of Sweredoski's

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appellate court held that bankruptcy trust claim forms are discoverable by solvent defendants because "each party who shares responsibility for any asbestos-related disease from which a claimant suffers is liable only for its proportionate share of noneconomic damages. Volkswagen of America, Inc. v. Superior Court, 139 Cal. App. 4th 1481, 1495 (2006) (emphasis added). Courts in Pennsylvania, New York, and New Jersey have followed the Volkswagen court's reasoning because those states also impose several-only liability on some or all asbestos defendants. See 42 Pa. Stat. § 7102 (a.1) (2011) (establishing a several-only liability rule); N.Y. Civ. Prac. L. and R. § 1601 (1986) (providing that personal injury defendants who are less than fifty percent liable face several-only liability for the plaintiff's noneconomic damages); N.J. Stat. § 2A:15-5.3 (1995) (applying several-only liability to defendants deemed less than sixty percent at fault). Conversely, because Rhode Island's pure joint and several liability rule imposes responsibility for a plaintiff's entire damages award on each liable party, a bankrupt entity's liability for Plaintiff's damages would be no defense to Plaintiff's claim that Crane is also liable. See § 10-6-2; Graff, 695 A.2d at 494.

injuries from asbestos exposure. In the event the bankruptcy trust documents contain specific instances of offers of compromise, as opposed to factual assertions, Plaintiff may withhold such information and documentation. Additionally, Plaintiff need not produce to Crane any documents provided by the bankruptcy trusts to the Plaintiff or Sweredoski or any documentation revealing any amounts paid to Plaintiff or Sweredoski by any bankruptcy trust. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Sweredoski v. Alfa Laval, Inc., et al.**
CASE NO:	**PC-2011-1544**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**January 30, 2014**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**
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