

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: November 6, 2013)

GLORIA CARY, as Executrix of the :
Estate of LAWSON CARY, JR., and as :
Surviving Spouse :
v. :
3M COMPANY, ET AL. :

C.A. No. PC 10-3263

DECISION

GIBNEY, P.J. Plaintiff Gloria Cary (Plaintiff) has filed multiple motions pursuant to Super. R. Civ. P. 37(a) to compel seventy-nine defendants¹ (collectively, Defendants) to provide more

1 The moving defendants are Reliance Electric Co.; Rockwell Automation, individually and as successor to Allen Bradley; FMC Corporation; Anderson Greenwood LP, f/k/a Crosby Valve and Gage Inc.; Sterling Fluid Systems (USA), LLC; Victaulic Company; Kvaerner US Inc., as successor to John Brown, Inc.; The Foxboro Company; Gardner Denver, Inc.; Zurn Industries, Inc.; The Swagelok Company; Univar USA, Inc.; McKesson Corporation; Vanton Pump & Equipment Corp.; Sloan Valve Company; Grundfos Pumps Corporation; Air & Liquid Systems Corporation, as successor-by-merger to Buffalo Pumps, Inc.; Crane Co.; Spence Engineering Company, Inc.; Van Air, Inc.; Ogontz Corp.; The Young Industries, Inc.; Kewaunee Scientific Corporation; Cooper Industries; Circor International, Inc; Ingersoll-Rand Company; Trane US Inc. f/k/a American Standard, Inc.; Aurora Pump Company; Superior-Lidgerwood-Mundy Corporation; Carboline Company; The William Powell Company; Flowserve US, Inc f/k/a Duriron and Valtek; Georgia Pacific LLC, f/k/a Georgia-Pacific Corporation; Goodyear Tire & Rubber Company; CompuDyne Corporation, individually and as successor to York Shipley; Doyle & Roth Manufacturing Company, Inc.; Alfa Laval, Inc.; Lincoln Industrial Corp.; The Protectoseal Company; Hercules, Incorporated; Champlain Cable Corporation; Coen Co., Inc.; Exxon Mobil Corp.; Baldor Electric Company; Riley Power Inc., f/k/a DB Riley, Inc. and Riley Stoker Corporation; Honeywell International, Inc., f/k/a AlliedSignal, Inc. and The Bendix Corporation; Ametek, Inc.; American Optical Corporation; CBS Corporation; Denali, Incorporated; Fibercast Company; Eaton Hydraulics, Inc.; New England Insulation Co.; Nibco, Inc.; General Electric Company; Fisher Scientific Company, LLC; Sethco, a division of Met-Pro Corporation; ITW Devcon; Moyno, Inc.; Chemineer, Inc.; Control Components, Inc.; Parker-Hannifin Corporation; Jamesbury Corporation f/k/a Jamesbury Valves; General Insulation Company; Goulds Pumps, Inc.; Bonney Forge Corporation; Edward's Industrial Equipment Co., Inc.; Foster Wheeler LLC; Graham Corporation; J.H. France Refractories Company; Lutz Pumps; Northeast Controls Inc.; Pfaudler, Inc.; Jordan Valve, a division of Richard Industries;

responsive answers to her requests for production of documents. Defendants have collectively opposed Plaintiff's motions. For the reasons stated herein, Plaintiff's motions are granted in part and denied in part.

I

Facts and Travel

Plaintiff's late husband, Lawson Cary, Jr. (Cary), worked for over three decades at Hoechst Chemical Corporation (Hoechst), where he performed various tasks that allegedly exposed him to asbestos from numerous products. Cary ultimately died of asbestos-related mesothelioma, which Plaintiff alleges was caused by Cary's exposure to Defendants' products. Consequently, Plaintiff has brought several tort-based claims against Defendants.

In early 2011, Plaintiff's counsel obtained various business records from Hoechst, including invoices, contracts, building and equipment specifications, and maintenance and repair logs (collectively, Hoechst documents) pertaining to the use and presence of asbestos at the facilities where Cary worked. After reviewing the Hoechst documents and making copies of select records, Plaintiff's counsel turned the documents over to Defendants for their review. Defendants then made their own copies of select records contained within the Hoechst documents. Plaintiff now moves to compel Defendants to produce all documentation in their possession, dating from 1950 to the present, pertaining to "serial numbers, model numbers or any other methods of identifying equipment sold, distributed, and/or installed at Hoechst." Defendants interpret this request to refer to the copies they made of select Hoechst documents.

Also in early 2011, Plaintiff's counsel began making arrangements to conduct a walk-through site inspection of the Hoechst property for the purpose of gathering photographic

Serfilco International, Inc.; Carrier Corporation; Graybar Electric Company, Inc; and Spirax Sarco, Inc.

evidence of the asbestos-containing products that Cary likely encountered. Hoechst management informed Plaintiff's counsel that the only date available for a site inspection was June 23, 2011, because the property was in the process of being sold and would be under new ownership as of July 1, 2011. Plaintiff's counsel advised Defendants of the inspection date and invited them to attend. As a result, counsel for both sides visited the Hoechst property together for a joint site inspection. Defendants hired a professional photographer and videographer, while Plaintiff's counsel intended to take his own photos. However, Plaintiff's counsel's camera apparently stopped working sometime before or during the inspection, and he instead took photos of the Hoechst facility using the camera on his cell phone. As a result, the quality and amount of photos that Plaintiff was able to gather at the inspection was limited. Plaintiff, therefore, moves to compel Defendants to produce their photos and video footage of the inspection.

Defendants invoke the work product doctrine in objecting to both of Plaintiff's discovery requests. Plaintiff contends that the information she has requested is not protected by the work product rule or, in the alternative, that she has satisfied the special showing required to overcome work product protection. Lastly, Defendants argue that Plaintiff's request for documents spanning from 1950 to the present is overbroad and unduly burdensome, given that Cary stopped working at Hoechst in 1994.

II

Standard of Review

This Court has broad discretion to grant or deny discovery requests. Corvese v. Medco Containment Servs., 687 A.2d 880, 881 (R.I. 1997). In addition, the Superior Court Rules of Civil Procedure pertaining to discovery "are liberal [and] designed to promote broad discovery among parties." Henderson v. Newport County Reg'l YMCA, 966 A.2d 1242, 1246 (R.I. 2009).

Nonetheless, the work product doctrine protects from discovery certain documents and tangible things that are “prepared in anticipation of litigation.” Super. R. Civ. P. 26(b)(3). The level of protection a trial court is to afford a piece of work product depends on whether it is opinion or factual work product. State v. Lead Industries Ass’n, Inc., 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., LLC 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, 966 A.2d at 1248). Specifically, factual work product is discoverable if “the party seeking discovery . . . demonstrate[s] (1) that it has a substantial need for the materials in preparation of its case and (2) that it is unable to obtain the information by other means without undue hardship.” Id. In addition to our own case law, Rhode Island courts may properly look to federal court decisions for guidance in interpreting Super. R. Civ. P. 26(b)(3)). Smith v. Johns-Manville Corp., 489 A.2d 336, 339 (R.I. 1985).

III

Analysis

A

Photos and Video Footage

1

Opinion Work Product

Defendants argue that the photos and video footage they took at the Hoechst site inspection are opinion work product and, therefore, are subject to absolute immunity from

discovery. Specifically, Defendants argue that sharing the photos and video with Plaintiff would reveal the mental impressions and legal theories that went into their decisions as to which items at the facility to record.

In some cases, photos taken for the purpose of recording potential evidence do have the potential of revealing the attorney's mental impressions or legal theories, and, therefore, they are protected by the work product doctrine. See, e.g., Vardon Golf Co. v. BBMG Golf, 156 F.R.D. 641, 646-47 (N.D. Ill. 1994) (finding that photos of products at the center of a patent infringement case, taken at the behest of an attorney, were absolutely immune from discovery). In this case, however, the Court need not determine whether the photos and video reflect the thoughts, opinions or conclusions of Defendants' counsel because Defendants directed their photographer and videographer to record specific items at the Hoechst site in the presence of Plaintiff's counsel, thereby obviating the need for work product protection.

The primary rationale of the opinion work product protection is to safeguard "the privacy of an attorney's work produced in preparation of trial." Henderson, 966 A.2d at 1246. Therefore, the absolute immunity afforded opinion work product becomes unnecessary when a litigant has already disclosed its work product to the opposing side in a manner "inconsistent with the purpose of maintaining the secrecy of such information from current or potential adversaries." Western Fuels Ass'n. v. Burlington N. R. Co., 102 F.R.D. 201, 203 (D. Wyo. 1984); see also Lead Industries, 64 A.3d at 1196 (noting that "a disclosure . . . that substantially increases the likelihood that protected content would be revealed to an adverse party might waive the work product doctrine"); 8 Wright & Miller, Federal Practice and Procedure, Civil 3d § 2024 (2012) (explaining that where information has been disclosed to an opposing party, "the party who made the disclosure should not subsequently be able to claim [work product] protection").

Neither party suggests that, during the site inspection, Defendants attempted to conceal from Plaintiff's counsel which items they were photographing or recording. Thus, to the extent that Plaintiff's counsel could glean information pertaining to Defendants' counsel's mental impressions and legal theories from viewing the photos and video Defendants recorded at the site inspection, Plaintiff's counsel could have gleaned the same information by listening to the instructions given to the photographer and videographer during the site inspection and looking at which items they recorded. For this reason, the absolute immunity afforded to opinion work product cannot extend to the photos and video collected by Defendants.

2

Factual Work Product

Defendants also argue that the photos and video footage are factual work product and, therefore, are subject to qualified protection. The Court agrees that these records are factual work product because they were "prepared in anticipation of litigation." Super. R. Civ. P. 26(b)(3); see also Lead Industries, 64 A.3d at 1192-93 (explaining that an item is work product if it was prepared in anticipation of litigation). Plaintiff does not dispute that Defendants developed these records in anticipation of litigation, and, indeed, this point seems beyond contention, given that Defendants attended the site inspection at the behest of Plaintiff's counsel after Plaintiff had filed suit against them. Furthermore, Defendants would have had no reason other than impending litigation to photograph the Hoechst property. See Lead Industries, 64 A.3d at 1194 (holding that a document was created in anticipation of litigation when it was created after the suit had been filed and there was no indication that it would have been created for any other purpose); Cabral v. Arruda, 556 A.2d 47, 49 (R.I. 1989) (holding that an item was prepared in anticipation of litigation if it was "prepared or obtained because of the prospect of

litigation”).

However, the photos and video are not immune from discovery if Plaintiff is able to show that she “has substantial need of the materials” and that she “is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Super. R. Civ. P. 26(b)(3); Lead Industries, 64 A.3d at 1193. This “special showing” is required for the discovery of factual work product because “each side should be encouraged to prepare [for trial] independently [and] should not automatically have the benefit of the detailed preparatory work of the other side.” Fed. R. Civ. P. 26(b)(3), Advisory Committee Notes.

In this case, Plaintiff has met her burden of showing a substantial need for Defendants’ photos. “Substantial need for material otherwise protected by the work product doctrine is demonstrated by establishing that the facts contained in the requested documents are essential elements of the requesting party’s prima facie case.” 6 James Wm. Moore et al., Moore’s Federal Practice § 26.70[5][c] (3d ed. 2005). The depiction in Defendants’ photos of the asbestos-containing items at the Hoechst property is key to one of the essential elements of Plaintiff’s prima facie case because, as this Court has ruled, “[i]n the asbestos context, plaintiffs must present . . . product identification . . . evidence to satisfy the causation element.” Sweredoski v. Alfa Laval Inc., No. PC-2011-1544, 2013 WL 3010419, *2 (R.I. Super. June 13, 2013). In order to meet this evidentiary burden, Plaintiff must show which asbestos-containing products were present in the area where Cary worked, and photos of the area are a highly-effective means of doing so. Although Plaintiff might be able to obtain product identification information from witness testimony or Hoechst business records, these would be poor substitutes for photos of the facility because, in the decades between the beginning of Cary’s employment at Hoechst and this lawsuit, memories may have faded and business records may have been lost.

See, e.g., Zoller v. Conoco, Inc., 137 F.R.D. 9, 10 (W.D. La. 1991) (holding that witness testimony or other non-photographic evidence was not the substantial equivalent of the defendant's photos of an accident scene because such other sources "may omit relevant information such as . . . whether certain items were present"). Thus, in order to make out her prima facie case, Plaintiff has a substantial need for the information contained in Defendants' photos.

Additionally, Plaintiff has met her burden of showing that she cannot obtain the substantial equivalent to Defendants' photos without undue hardship. "[T]he most important single factor [in determining whether a party faces undue hardship] is whether the information is otherwise available." Robert B. Kent et al., Rhode Island Civil and Appellate Procedure § 26.14 at 227. Plaintiff cannot now return to the Hoechst property to obtain her own photos of Cary's work environment, nor could she have returned at any time after the original June 23, 2011 site inspection. Management at the Hoechst property informed Plaintiff in 2011 that June 23, 2011 was the only date on which the parties could visit the property because the property was to be sold the following week. Thus, Plaintiff could not have scheduled another site inspection before the transfer of ownership. Now that the property is under new ownership, many of the items the parties photographed are no longer there. Consequently, it would indeed constitute an undue hardship for Plaintiff now to track down where Hoechst sent those items, particularly given that some of them may have been discarded. See Borello v. Barry Hyman Co., 651 A.2d 734, 736 (R.I. 1994) (upholding trial justice's order that the plaintiff produce a report detailing a piece of equipment at the center of a personal injury case when the equipment had been significantly altered before the defendant could examine it); see also Zoller, 137 F.R.D. at 9 (allowing discovery of photos of an accident scene, which were factual work product, when "the

appearance of the accident location [had] changed dramatically” and “it [was] impossible for plaintiff to obtain photographic records of the site by any other means”).

Moreover, the photos that Plaintiff did take at the site inspection are not the substantial equivalent of Defendants’ photos because their quality is so poor that it is impossible to read some of the labels on the items photographed. Other courts have held that pieces of evidence are not substantially equivalent if they differ significantly in caliber or utility. See, e.g., Suggs v. Whitaker, 152 F.R.D. 501, 507 (M.D. N.C. 1993) (holding that, because memories fade, the deposition of a witness taken long after an incident is not the substantial equivalent of the same witness’ statement made immediately after the incident); In re Anthracite Coal Antitrust Litigation, 81 F.R.D. 516, 523 (M.D. Pa. 1979) (same). Thus, Plaintiff does not already have, nor can she practically now obtain, the substantial equivalent of Defendants’ photos.

Lastly, this Court is satisfied that requiring Defendants to turn over copies of their photos and video footage will not violate the purpose behind the factual work product doctrine: the prevention of one side obtaining for free information that the opposing side expended resources to create. See Henderson, 966 A.2d at 1248 (quoting Cabral, 556 A.2d at 49) (noting that “[t]he underlying rationale for [the factual work product] protection is to ‘prevent an attorney from freeloading on his or her adversary’s work’”). Certainly, Plaintiff’s counsel should have engaged in better planning to ensure that he had the necessary equipment to adequately record items at the Hoechst property during the site inspection, particularly given that Plaintiff’s counsel knew the property was available for inspection for only one day. Nonetheless, Plaintiff’s counsel not only attended the inspection and attempted to photograph the site himself, he also carried out most, if not all, of the initial work with Hoechst to set up the site inspection and notify dozens of defendants of the scheduled inspection date. Therefore, it hardly seems that Plaintiff’s counsel is

now attempting to avoid doing his own work and to freeload on Defendants' work instead. But see, e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 190 F.R.D. 532, 538-39 (S.D. Ind. 1999) (classifying the plaintiff's request to discover witness statements taken by the defendant as "freeloading" when the plaintiff could have taken the statements itself but had made no attempt to do so). Rather, it appears that an unlucky series of events converged, leaving information that is essential to Plaintiff's case in the sole possession of Defendants. As a result, Plaintiff has made the requisite special showing to overcome the factual work product protection that would otherwise extend to Defendants' photos and video.

B

Hoechst Documents

Next, Plaintiff asks this Court to compel Defendants to "produce all serial numbers, model numbers or any other methods of identifying equipment sold, distributed, and/or installed at Hoechst." The wording of this request leaves unclear whether Plaintiff requests copies of Defendants' own business records, original business records of Hoechst that are in Defendants' possession, or copies of Hoechst's business records made by Defendants during their document review. Neither Plaintiff's counsel's statements at the hearing on the instant motions nor Plaintiff's arguments in her memorandum of law supporting the instant motions clarified this request. Defendants have interpreted Plaintiff's request to refer to copies they have made of select Hoechst documents. Insofar as Plaintiff is requesting Defendants' copies of the Hoechst documents, such request must be denied because the copies are protected by the factual work product doctrine.

Without doubt, Defendants created photocopies of the Hoechst documents in anticipation of litigation, as the documents are germane to their defenses against Plaintiff's claims, and they

reviewed the documents after Plaintiff had filed suit against them. See Lead Industries, 64 A.3d at 1194; Cabral, 556 A.2d at 49. Therefore, Defendants' copies are factual work product, and Plaintiff may only discover them if she establishes that she "has substantial need of the materials" and that she "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Super. R. Civ. P. 26(b)(3). Here, Plaintiff has not demonstrated that she cannot obtain the exact same copies that Defendants have by conducting her own review of the Hoechst documents. Indeed, it was Plaintiff's counsel who originally secured these documents from Hoechst and shared them with Defendants. There is no indication that Plaintiff now does not have access to the original Hoechst documents from which Defendants' copies were made.

Rather, Plaintiff asserts that it would be "futile" and "foolish" for her to have to issue a new subpoena in order to regain access to the original Hoechst documents so that she may conduct her own document review. The work product doctrine, however, requires that she do just that because, "[a]s a general rule, inconvenience and expense do not constitute [the] undue hardship" required to overcome work product protection. Stampley v. State Farm Fire & Cas. Co., 23 F. App'x. 467, 471 (6th Cir. 2001); see also Colonial Gas Co. v. Aetna Cas. & Sur. Co., 139 F.R.D. 269, 275 (D. Mass. 1989) (stating that "neither inconvenience nor expense constitute sufficient cause to find undue hardship"); 8 Wright & Miller, Federal Practice and Procedure, Civil 3d § 2025 (2012) (explaining that "[t]he fact that [obtaining information is] expensive is not a sufficient showing [to overcome work product protection] unless the expense would amount, in the particular case, to undue hardship"). Consequently, this Court must deny Plaintiff's motions to compel with regard to Defendants' copies of the Hoechst documents. Because this Court finds that these documents are protected by the factual work product doctrine,

it is unnecessary to consider Defendants' assertions that the documents also qualify as opinion work product and that Plaintiff's request is overbroad.

IV

Conclusion

For the foregoing reasons, Plaintiff's Motions to Compel More Responsive Answers to Second Supplemental Requests for Production of Documents is granted with respect to the photos and video footage taken by Defendants during the June 23, 2011 Hoechst site inspection and denied with respect to the photocopies Defendants made after their review of the Hoechst documents. Counsel will submit an appropriate order for entry.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Cary v. 3M Company, et al.

CASE NO: PC 10-3263

COURT: Providence County Superior Court

DATE DECISION FILED: November 6, 2013

JUSTICE/MAGISTRATE: Gibney, P.J.

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