STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: February 7, 2014)

GLORIA CARY, as Executrix of the Estate of LAWSON CARY, JR., and as Surviving Spouse	:	
v.	:	**C.A. No. PC 10-3263**
3M COMPANY, ET AL.	:	

DECISION

GIBNEY, P.J. Several defendants[1] (collectively, Defendants) jointly bring a Motion for Clarification of part of this Court's November 6, 2013 ruling on Plaintiff Gloria Cary's

[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; Honeywell International, Inc., f/k/a AlliedSignal, Inc. and The Bendix Corporation; Ametek, Inc.; 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.; 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; Serfilco International, Inc.; Carrier Corporation; Graybar Electric Company, Inc; and Spirax Sarco, Inc.

(Plaintiff) motions to compel. Defendants also request an evidentiary hearing to determine whether disputed documents are discoverable. Although Defendants have called their motion a "Motion for Clarification," in actuality, they seek to advance new arguments and ask this Court to reconsider its Decision to grant Plaintiff's discovery request for photos and video footage taken by Defendants during a June 23, 2011 site inspection. Because this Court "look[s] to substance, not labels," it will treat the instant motion as one for reconsideration, not clarification. Sarni v. Meloccaro, 113 R.I. 630, 636, 324 A.2d 648, 651 (1974). Plaintiff opposes Defendants' motion and instead asks this Court to leave its prior ruling unaltered. For the reasons stated herein, Defendants' motion is denied, and Defendants' request for an evidentiary hearing is denied.

I

Facts and Travel

This is an asbestos liability suit filed by Plaintiff on behalf of herself and her late husband, Lawson Cary, Jr. (Cary), who was allegedly exposed to asbestos at his workplace, Hoechst Chemical Corporation (Hoechst). This Court's November 6, 2013 Decision provided a detailed explanation of the facts and procedural history of this case. See Cary v. 3M Co., No. PC-10-3263, Nov. 6, 2013, Gibney, P.J. That Decision granted Plaintiff's motions to compel Defendants to provide photos and video footage taken by Defendants during a June 23, 2011 Hoechst site inspection and denied Plaintiff's motions to compel Defendants to turn over photocopies of business records from Hoechst. Defendants now request that this Court reconsider that ruling insofar as it partially granted Plaintiff's motions. As grounds for this request, Defendants assert that the Court relied on findings that "are without evidentiary support" in determining both that the opinion work product protection did not apply to the photos and

video and that Plaintiff met her burden of showing substantial need and undue hardship in order to overcome the factual work product doctrine.

II

Standard of Review

The Superior Court Rules of Civil Procedure do not provide for a motion to reconsider; rather, such motions are treated as motions to vacate judgment under Super. R. Civ. P. 60(b) (Rule 60(b)). Sch. Comm. of City of Cranston v. Bergin-Andrews, 984 A.2d 629, 649 (R.I. 2009). "It is well settled that motions to reopen or vacate a judgment are addressed to the sound discretion of the court of first instance [and that] judgments, once entered, are not to be disturbed without substantial reason." Chase v. Almardon Mills, 102 R.I. 579, 581, 232 A.2d 390, 391-92 (1967) (internal quotations omitted). To that end, Rule 60(b) provides that a judgment may be vacated when, inter alia, it is "no longer equitable" or some "other reason justif[ies] relief from the operation of the judgment."

A motion for reconsideration, however, is not intended to permit a party a second opportunity to present legal arguments that it failed to raise or should have raised at an earlier proceeding. See Bendix Corp. v. Norberg, 122 R.I. 155, 159, 404 A.2d 505, 507 (1979) (applying a federal district court's ruling that a motion to vacate "does not provide an avenue for relief from judgment where the only justification for that relief is the litigant's failure to argue a legal theory or to interpose an arguably applicable defense"); see also Jackson v. Medical Coaches, 734 A.2d 502, 505 (R.I. 1999) (holding that "Rule 60(b) does not constitute a vehicle for the motion justice to reconsider the previous judgments in light of later-discovered legal authority that could have and should have been presented to the court before the original judgments entered"). Indeed, "[t]here would be obvious unfairness in allowing a party to have

two bites at the apple." Flanagan v. Blair, 882 A.2d 569, 574 (R.I. 2005). Accordingly, this Court will reconsider a prior judgment only when necessary "to accomplish justice" in extraordinary circumstances. Bendix, 122 R.I. at 158, 404 A.2d at 506.

III

Analysis

A

The Work Product Doctrine

Defendants assert that both the opinion and factual work product doctrines should preclude Plaintiff from discovering either the photos or the video footage that Defendants took at the June 23, 2011 Hoechst site inspection. See State v. Lead Industries Ass'n, Inc., 64 A.3d 1183, 1193 (R.I. 2013) (explaining that Rhode Island law recognizes both opinion and factual work product protection). In support of this argument, Defendants claim that the Court's original ruling was based on unsubstantiated conjecture. Specifically, with respect to this Court's determination on the issue of opinion work product protection, Defendants claim that "the record does not reflect that Defendants instructed their photographer to take pictures or [video] footage while within the physical proximity of Plaintiff's counsel at all, much less within sufficient proximity for Plaintiff's counsel to either hear or observe said instructions." In addition, Defendants claim that "the record contains but one fleeting reference by Plaintiff's counsel, phrased merely as a rhetorical question during the motion hearing" that Plaintiff's counsel could see the Defendants' photographer taking photos and hear Defendants' instructions. With respect to this Court's ruling that Plaintiff overcame the protections of the factual work product doctrine, Defendants reassert that Plaintiff did not sufficiently prove substantial need and undue hardship. See Lead Industries, 64 A.3d at 1193 (holding that factual work product is discoverable if "the

party seeking discovery . . . demonstrate[s] (1) that it has 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").

The record before the Court, however, demonstrated otherwise. In fact, Plaintiff's counsel mentioned witnessing Defendants' photographer and videographer no fewer than five times during his argument at the hearing on Plaintiff's motions to compel, and Plaintiff's memorandum in support of those motions specifically stated that management at the Hoechst facility required everyone participating in the June 23, 2011 site inspection to move from room to room together with a Hoechst guide. Defendants had ample time and opportunity to offer their own recounting of the site inspection or to request an evidentiary hearing to establish the facts before this Court issued its ruling on Plaintiff's motions to compel. Nonetheless, despite Plaintiff's repeated and consistent representations that her counsel was present when Defendants' photographer and videographer were recording images at the Hoechst facility, Defendants failed entirely to refute Plaintiff's version of events before this Court entered its Decision.

Moreover, in determining whether Plaintiff overcame factual work product protection by sufficiently showing substantial need and undue hardship, this Court credited Plaintiff's uncontested representations that her representatives were unable to access the Hoechst site or the items therein after the June 23, 2011 joint site inspection.[2] This Court will not now consider

[2] This Court and, seemingly, Plaintiff's counsel were unaware, until Defendants filed the instant Motion for Clarification, that the Hoechst facility was also open for a second inspection on June 29, 2011. Plaintiff's counsel stated numerous times, at the hearing on Plaintiff's motions to compel and in her memorandum in support of those motions, that Hoechst management had agreed to open the facility only on June 23, 2011, and that the property would be under new ownership the next week. With their memorandum in opposition to Plaintiff's motions to compel, Defendants submitted a copy of a letter from Plaintiff's counsel, in which he made the same representation about the availability of the facility for the parties' inspection. Because Defendants did not, until the instant motion, call the veracity of that representation into question,

Defendants' arguments to the contrary, which they submit for the first time in the instant motion. See Flanagan, 882 A.2d at 574. Additionally, this Court will not now consider Defendants' argument, also made for the first time in the instant motion, that because Plaintiff's counsel did not intend to take his own video footage of the site inspection, Plaintiff cannot now have a substantial need for Defendants' video footage. Defendants' failure to raise available arguments or pertinent facts known to them before this Court made its ruling should not now serve as grounds for vacating the Decision. See Bendix, 122 R.I. at 159, 404 A.2d at 507.

In order to avoid the "obvious unfairness" that would result to Plaintiff if resolution of her case were further delayed by this Court's reconsideration of a matter that it has already thoroughly considered, this Court will not reconsider the new facts or legal arguments that Defendants now submit in opposition to Plaintiff's motions to compel. Flanagan, 882 A.2d at 574 (refusing to allow a party "two bites at the apple" on a motion for reconsideration where the party attempted to raise an argument that it had not raised "at the various court hearings" before the motion was decided). Because this Court's judgment was "made up after careful deliberation, . . . [it] should not lightly be interfered with." Chase, 102 R.I. at 581, 232 A.2d at 392 (internal quotations omitted). Consequently, this Court declines to exercise its discretion to reconsider its prior ruling with respect to the photos and video taken by Defendants during the June 23, 2011 Hoechst site inspection.[3] See id.

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this Court accepted Plaintiff's claims in making its Decision. Now that this Court has entered its Decision, it would be unfair to Plaintiff to reopen this issue. See Flanagan, 882 A.2d at 574.

[3] Defendants also ask whether this Court's ruling on Plaintiff's motions to compel applies "to each and every photograph taken by Defendants' professional photographer or individual defense attorneys . . . at the joint site inspection [of the Hoechst facility] on June 23, 2011 or June 29, 2011." This Court's ruling stated that "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." Cary v. 3M Co., No. PC-10-3263, Nov. 6, 2013, Gibney, P.J. This ruling makes no

B

Evidentiary Hearing

Defendants have also requested that this Court conduct an evidentiary hearing to determine when and for how long Plaintiff's counsel's camera became inoperable at the June 23, 2011 Hoechst site inspection and to determine which photos and segments of video footage Plaintiff's counsel saw Defendants' photographer and videographer take. Because this Court denies Defendants' request for reconsideration, a post hoc evidentiary hearing on an already-decided motion is unnecessary.

To the extent that Defendants suggest that this Court should vacate its ruling because it previously erred in not holding an evidentiary hearing prior to deciding Plaintiff's motions to compel, Defendants' claim is devoid of legal support. Defendants failed to put Plaintiff's version of events in issue by alleging contrary facts. Defendants do not cite, and this Court has not found, any Rhode Island case law requiring a motion justice to hold an evidentiary hearing before relying on one party's uncontested factual representations in deciding questions of work product. Moreover, the Rhode Island Rules of Civil Procedure do not require an evidentiary hearing before ruling on discovery requests. On the contrary, our Supreme Court, as well as numerous courts in other jurisdictions, has held that evidentiary hearings are not necessary when there are no facts in dispute. See, e.g., Tassone v. State, 42 A.3d 1277, 1285 (R.I. 2012) (quoting Brown v. State, 32 A.3d 901, 909 (R.I. 2011)) (holding that when "'there are no genuine issues of material fact in dispute, then an evidentiary hearing need not be provided'" before a court may rule on a postconviction relief application); McDonald's Corp. v. Robertson, 147 F.3d 1301,

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mention of photos taken on June 29, 2011 and, therefore, does not pertain to them. Moreover, the term "Defendants" in the Decision refers to, not only the corporate entities named in this suit, but to all of their agents present at that site inspection, including, but not limited to, attorneys and photographers.

1312 (11th Cir. 1998) (holding that when a party seeks a preliminary injunction, if "material facts are not in dispute, or [if] facts in dispute are not material . . . district courts generally need not hold an evidentiary hearing"); Republic of Philippines v. New York Land Co., 852 F.2d 33, 37 (2d Cir. 1998); Alexander v. Chicago Park Dist., 927 F.2d 1014, 1025 (7th Cir. 1991) (holding that when assessing attorney's fees and costs, no evidentiary hearing was necessary where relevant facts were not in dispute).

IV

Conclusion

For the foregoing reasons, Defendants' Motion for Clarification is denied. In accordance with this Court's November 6, 2013 ruling, Defendants are to turn over to Plaintiff all photos and video recorded by them or by their agents at the joint June 23, 2011 Hoechst site inspection. 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:	**February 7, 2014**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**
ATTORNEYS:	
For Plaintiff:	**John E. Deaton, Esq.** **Lisa Storti, Esq.**
For Defendant:	**Lawrence G. Cetrulo, Esq.** **Stephen T. Armato, Esq.** **Jonathan P. Michaud, Esq.**