

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EDWARD L. WHITE, P.C.,

Plaintiff,

vs.

No. 12-CV-1340 (JSR)

WEST PUBLISHING CORPORATION d/b/a
"WEST" and REED ELSEVIER INC.,
d/b/a LEXIS NEXIS,

Defendants.

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VIDEOTAPE DEPOSITION OF MARTIN S. HIGH, Ph.D.

Thursday, September 6, 2012

Oklahoma City, Oklahoma

REPORTED BY:

Becky C. Dame

Ref: 8096

1 That's about it.

2 Q That's the only thing that would be
3 updated? Okay.

4 Thank you.

5 A I can't comment on Ed's bio, but my bio,
6 that's --

7 Q Right. Just your bio. Okay.

8 And when did you -- when and how did you
9 first meet Ed White?

10 A Ed was a student at Oklahoma State and
11 graduated before I started at OSU, but knew of Ed,
12 you know, as an alumni at the university. Also, had
13 his brother in some of my classes at OSU, so he and
14 I have had a long relationship since the '80s,
15 almost. So our relationship started before I even
16 knew him, if that makes any sense.

17 Q Okay. And when did you start performing
18 work for Ed White, P.C.?

19 A I served as an expert on some of Ed's
20 cases, roughly, I'd say, 2002, 2003, give or take a
21 couple of years. I'm not exactly sure when I
22 started working as an expert for him.

23 Q And at what point did it evolve from
24 expert?

25 A When I started going to law school, Ed

1 THE WITNESS: I believe so, yes.

2 BY MS. ABRAMSON:

3 Q Is it indicated on either of the two
4 documents that you're a coauthor?

5 MR. BLUE: Objection. The documents speak
6 for themselves.

7 You can answer.

8 THE WITNESS: My name is on the pleading,
9 so, obviously, at the very least, I agree with the
10 information that's in the pleading. If my name is
11 listed as author on the document, no.

12 BY MS. ABRAMSON:

13 Q So if you -- are there instances where
14 your name might be on a pleading where you were not
15 a coauthor?

16 MR. BLUE: Objection.

17 THE WITNESS: If I was listed as a
18 co-counsel in a case and a co-counsel wrote the
19 document and I agreed with the information in the
20 pleading, yes, I think it would not only be
21 appropriate, but I think it would be necessary if my
22 name were on the document as a co-counsel.

23 BY MS. ABRAMSON:

24 Q Okay. And just to go back one second.

25 We were talking about being a coauthor on

1 the pleadings. I just want to clarify that we're
2 talking about the two works at issue in this case.

3 A I was asking your question more in the
4 abstract, but I think that abstract is applicable to
5 these documents as well.

6 Q That you would consider yourself a
7 coauthor of the two works --

8 A Yes.

9 Q Okay. And have you ever coauthored a
10 brief where you were not listed on the cover page or
11 on the signature block?

12 MR. BLUE: I'm sorry. Can you read the
13 question back, please?

14 THE WITNESS: Yes. For me, too.

15 BY MS. ABRAMSON:

16 Q Sure.

17 Have you ever coauthored a brief or a
18 legal document where you were not listed on the
19 cover page for the signature block?

20 MR. BLUE: I have a continuing objection
21 to the use of the phrase "coauthored" in the sense
22 that it's ambiguous whether you're talking about in
23 the legal sense or in his common understanding.

24 My understanding is that Dr. High has been
25 answering this based on his common understanding and

1 more questions. I just want to go back to High
2 Exhibit 6 for a minute.

3 A Okay.

4 Q I didn't get a chance to do this earlier,
5 but I would like for you to look over your affidavit
6 on the back and confirm that it's accurate.

7 A Any particular paragraph?

8 Q All of them. You can take a moment.
9 Thank you.

10 A I believe it's accurate, yes.

11 Q Okay. Thank you. Okay.

12 And this is something that we've gone over
13 already with Mr. White, but I would just like to
14 confirm it with you.

15 The summary judgment motion that we looked
16 at earlier in the Beer litigation, that wasn't
17 created for the purpose of licensing the work, was
18 it?

19 A No.

20 Q Okay. And the same being the Motion in
21 Limine, was it created for the purpose of licensing
22 the work?

23 A It was not.

24 Q We discussed this, but if anyone were to
25 license either of those two works, you would not be

1 MR. BLUE: Objection. Asked and answered.

2 You can answer.

3 THE WITNESS: To the extent that I
4 received a promise of future compensation for the
5 ultimate disposition of the cases, yes, but I didn't
6 receive compensation over and apart from that, no.

7 BY MS. ABRAMSON:

8 Q Okay. Has anyone ever offered to buy or
9 take a license to a legal document that you created?

10 A No.

11 Q Has anyone ever bought or taken license to
12 a legal document that you created?

13 A No.

14 Q Have you ever offered to sell or license a
15 legal document that you created?

16 A No.

17 Q Have you ever sold a license to anyone a
18 legal document that you created?

19 A No.

20 Q Okay. And you mentioned earlier that you
21 believe that there is a market to sell legal
22 documents after they were filed in court; is that
23 correct?

24 A Yes.

25 Q And what is that belief based on?

1 A Because probably for the simple fact that
2 Lexis Nexis and Westlaw sell them.

3 Q And when did you become aware that Lexis
4 and Westlaw sell them?

5 A I -- I -- no later than the ABA Journal
6 article when I learned about the litigation, but I
7 believe I've seen the fact that briefs were
8 available through one of the two providers through,
9 you know, the reams and reams of literature that you
10 get from Westlaw and Lexis.

11 Q And are you aware of a market other than
12 in Lexis or Westlaw for the legal documents?

13 A I, generally, know that attorneys, you
14 know, are interested in seeing what other attorneys
15 have done in a particular case or how they've
16 written a particular filing or a particular
17 pleading, so, yes.

18 Q Are you aware of any attorney ever paying
19 for or licensing a legal document?

20 A I am not.

21 Q Okay.

22 MS. ABRAMSON: That's all the questions
23 that I have.

24 MR. GERBA: Can we just take two minutes
25 and we'll switch places?

1 the facts in the noted places." He also says, "You
2 also need to bolster the legal framework as noted";
3 correct?

4 A Correct.

5 Q I'd like to mark as White Exhibit 8 a
6 document Bates numbered P00442 to P00453.

7 (Exhibit 8 marked for identification)

8 MR. BLUE: I think, John, you might have
9 said "White Exhibit."

10 BY MR. GERBA:

11 Q High Exhibit. I'm sorry if I did.

12 Do you recognize this document, Dr. High?

13 A I do --

14 Q And --

15 A -- in that I recognize that it's a --
16 obviously, a Motion for Summary Judgment in the XTO
17 case.

18 Q And do you believe that this is a draft of
19 Exhibit 3?

20 A Well, I hope it's just a draft that we
21 didn't file this with all the blanks in it, so --
22 yeah, I would assume it's a draft.

23 Q If I could direct you to Page P00446. Do
24 you see Paragraph 5?

25 A Yes.

1 Q It says "The named plaintiffs' wells are
2 both subject to the 80 percent contract." And after
3 that, in brackets, it says "Add proof." Do you see
4 that?

5 A Yes.

6 Q Do you have any understanding of what the
7 "Add proof" indication was there for?

8 A I suppose that what that is is Ed's
9 comment to me to get into the exhibits and contracts
10 involved in the case to add citations supporting
11 that representation.

12 Q And if I could have you turn to Page
13 P00447.

14 A Okay.

15 Q And there, under the Legal Framework,
16 again, there's a bracketed section that says "Add
17 discussion to show: One, can't base royalties on
18 sale between a controlled company; and, two,
19 defendant has burden to plead and prove any
20 deductions to be taken. Need separate analysis for
21 Kansas and Oklahoma."

22 Do you see that?

23 A Yes, I do.

24 Q Do you have an understanding as to what
25 that indication is?

1 A Again, I believe that's a notation from Ed
2 to me asking to include case citations, argument,
3 that support those propositions.

4 Q And that's what the Legal Framework
5 section refers to?

6 A Exactly.

7 Q You would agree with me that the Legal
8 Framework is a fairly important section of the legal
9 brief?

10 A It certainly is.

11 Q And if you could look at Page P00448.
12 There's -- at the bottom of the page, there's a
13 heading. It says "Class definitions," and, again,
14 in brackets, it says, "Amend to incorporate class
15 definition adopted by the Court in its order."

16 Do you see that?

17 A I do.

18 Q Do you have an understanding about what
19 the language in the brackets there refers to?

20 A A similar contention. It's probably a
21 notation from Ed to me to add that information to
22 the pleading, to the brief.

23 Q So what I'd like to do now is mark as High
24 Exhibit 9, the document Bates No. P00392 through
25 P00409.

1 A Correct.

2 Q And in its place, if we look at P00398,
3 P00399, P00400, P00401, P00402, you have now added
4 the -- what is now called the Arguments and
5 Authority section of this brief; is that correct?

6 A Correct. Assuming, again, that I'm -- I
7 believe it's correct, your premise that I'm the one
8 that edited, deleted, and then added, and I believe
9 that's correct.

10 Q That's all I'm asking for is what your
11 belief is about that.

12 A That's my belief as well.

13 Q I'd like to mark as High Exhibit 10 a
14 document that's Bates numbered P00425 to P00441.

15 (Exhibit 10 marked for identification)

16 BY MR. GERBA:

17 Q Do you recognize this document?

18 A It looks like it's another version of the
19 MSJ.

20 Q And that's Exhibit 3, right, another
21 version of Exhibit 3?

22 A Exactly.

23 Q And, again, do you have any understanding
24 with me about this document about whose edits are
25 reflected?

1 A Just flipping through here, I don't have
2 any indication whether this is my edits or Ed's.

3 Q Can you take a look at Page P00430, the
4 bottom third of the page, there's a comment
5 indicated on the right and in brackets it says
6 "MSH1." Do you see that?

7 A Yes, I do.

8 Q Does "MSH" refer to Martin S. High?

9 A That would be me, correct.

10 Q So do you believe at least some of the
11 comments and editing here would be from you?

12 A At least -- at least some. At least that
13 one, for sure. Again, it's hard -- I am familiar
14 with Word. I know how Word works, but looking at
15 these comments, I can't -- I can't say conclusively
16 whether all of the deletes and additions were from
17 me or just some of them, but, obviously, you know,
18 some of them were, at least that comment is.

19 Q Let's turn to Page P00434, and towards the
20 middle of the page, it says "Proposition 3.
21 Underpayment of royalties is readily determined."

22 Do you see that?

23 A Yes, I do.

24 Q And after that, it has what appears to be
25 three paragraphs that continues onto Page 435,

1 information that was added.

2 A Yes. I see that.

3 Q And back on 434, on the right, towards the
4 bottom, there is an indication that says Deleted.
5 Add specific discussion tied back to your UMF No.
6 7." Do you see that?

7 A Yes.

8 Q Do you have any recollection of whether
9 this insertion was yours, whether you put in this
10 text here?

11 A Whether I put in the text, "Add specific
12 discussion tied back to UMF No. 7"?

13 Q I'm sorry. I'll reask. Let's be clear
14 about that.

15 Let's start with this first: Do you
16 remember if Mr. White ever asked you to add specific
17 discussion tied back to UMF No. 7 in this section?

18 A I don't remember that specific request.

19 Q Thinking back on it, sitting here today,
20 do you think this would have been something that
21 Mr. White was asking you to do?

22 A I would -- based on the way we have worked
23 on this document, I would say that that was a
24 request by Mr. White to me, yes.

25 Q And then, starting on Page P00434 and

1 continuing on 435, the underlined text there for the
2 next three paragraphs, would you believe that that
3 was, then, text that you added?

4 A I believe so, yes.

5 Q And if we could look down at the bottom of
6 Page P435, there's's another indication on the right
7 that says "Deleted prop IV, add damages discussion."
8 Do you see that?

9 A Correct.

10 Q Do you believe that that was Mr. -- that
11 text previously in there, which was now being
12 deleted, was Mr. White asking you to add a damages
13 discussion?

14 A I would assume that that's the case, yes.

15 Q And then there is two paragraphs that were
16 added under that heading on 435 and continuing on
17 436.

18 Do you believe that that would have been
19 text that you added to the brief?

20 A Correct.

21 Q And then it continues -- the bottom there,
22 you can see on page -- I'm sorry -- 436, in the
23 middle, it says "Deleted Prop V. Add preview of
24 class damages." Do you see that?

25 A Now I'm not with you. Tell me again which

1 page number?

2 Q 436, P00436.

3 A Okay.

4 Q About midway down the page.

5 A Yes.

6 Q It says "Deleted prop V. Add preview of
7 class damages."

8 A Okay.

9 Q Do you see that?

10 A Again, if this particular document
11 proceeded in the way that we're assuming, that --
12 that would be Ed's request of me to add this
13 particular material.

14 Q And then it goes on for the next page,
15 P436 to 437. Again, it looks like there's two
16 paragraphs of added material.

17 Do you see that?

18 A Yes.

19 Q And do you believe that that -- you know,
20 judging by the normal way you and Ed would work,
21 that this was text you added?

22 A Correct.

23 Q And then if we can look on Page P437.

24 A Yes.

25 Q About midway through the page again, it

1 says on the right, "Deleted," and in brackets "Add
2 specific discussion tied back to UMF No. 7"?

3 A Yes.

4 Q And, again, do you believe that that's Ed
5 asking you to add that part of the brief?

6 A I believe so, yes.

7 Q And, again, there's underlying text that
8 goes on from P437 to P438, and do you believe that
9 that text is what you added in response to Ed asking
10 you to add specific discussion tied back to UMF No.
11 7?

12 A Given, again, how this document would have
13 been initiated and Ed making suggestions on what we
14 needed to add, yes.

15 Q There's a significant amount of text that
16 we've discussed that's underlined and added in this
17 draft that you said, based upon how you and Ed
18 normally work, you would have added to the draft;
19 right?

20 A That's correct.

21 MR. BLUE: Objection.

22 THE WITNESS: That's correct.

23 MR. GERBA: I'd like to mark as High
24 Exhibit 11 the document Bates numbered P00464 to
25 P00494.

JURAT

WHITE VS WEST PUBLISHING ET AL

I, MARTIN S. HIGH, Ph.D., do hereby state under oath that I have read the above and foregoing deposition in its entirety and that the same is a full, true and correct transcription of my testimony so given at said time and place.

Signature of Witness

Subscribed and sworn to before me, the undersigned Notary Public in and for the State of Oklahoma by said witness, MARTIN S. HIGH, Ph.D., on this _____ day of _____, 2012.

NOTARY PUBLIC

MY COMMISSION EXPIRES: _____

JOB #8096