MCFADYEN et al v. DUKE UNIVERSITY et al Doc. 31

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CIVIL ACTION NUMBER 1:07-CV-00953

RYAN McFADYEN, et al., Plaintiffs, v. DUKE UNIVERSITY, et al., Defendants.	**DUKE'S BRIEF IN SUPPORT OF ITS MOTION TO RE-OPEN THE DEPOSITION OF PLAINTIFF ARCHER AND COMPEL ANSWERS TO QUESTIONS PROPOUNDED BY COUNSEL**

Defendant Duke University, ("Duke"), through counsel, submits this brief in support of its Motion to Re-Open the Deposition of Plaintiff Archer. In support thereof, Duke shows the Court the following:

NATURE OF THE CASE

McFadyen arises out of the investigation of false rape allegations made against members of the 2005-2006 Duke men's lacrosse team by a stripper hired by one team member to perform at a party. Pursuant to this Court's Order of 9 June 2011, discovery proceeded with respect to Counts 21 and 24. [DE 192 at 9] The fraud alleged in Count 24 is based on Plaintiffs' claim that after their DukeCard information:

> had already been provided to Durham Police, [Defendant] Drummond sent a letter to Plaintiffs notifying them that their Duke Card

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> transactions had been subpoenaed by Nifong. The letters advised Plaintiffs that they would need to move to quash the subpoena if they wished to preserve the privacy of their records, but did not advise Plaintiffs that the records had already been provided . . . . Plaintiffs allege that Drummond's letter contained false representations that Drummond knew were false, and that Drummond acted with intent to decive Plaintiffs and intent to cover up the prior disclosure.

[DE 186 at 170] This Court noted "[i]t will ultimately be Plaintiffs' burden to prove all of the elements of this claim, including that Drummond was aware that the Duke Card reports had previously been provided to the Durham police. . . ." [DE 186 at 174]

STATEMENT OF THE FACTS

On 19 April 2012, Duke took the deposition of Plaintiff Archer. (19 April 2012 Deposition of Breck Archer, attached as Exhibit A) During the deposition, Duke sought to probe Mr. Archer's claim in Count 24 that Defendant Drummond was aware that the DukeCard reports had previously been provided to the Durham police:

> Q. As of June 2nd, 2006, do you have any reason to believe that Matthew Drummond knew that Sergeant Smith had delivered that DukeCard information to Durham?
>
> A. Uhm, I'm not sure. I mean, I believe it was -- I believe information was already released, but I'm not -- I really...

(Ex. A at 318) At the conclusion of Duke's questions, counsel for Mr. Archer requested a break to "see if we have anything." (*Id.* at 330) Counsel for Mr.

Archer returned to the room nine minutes later, and asked virtually identical questions regarding Defendant Drummond, but this time Mr. Archer provided substantive responses:

> Q. At the time of the motion to quash the subpoena, did you have knowledge that Matthew Drummond knew that the DukeCards had already been given to the Durham police?
>
> A. No.
>
> Q. What do you know about that since ---
>
> A. I know that --- I know that at the time that he wrote this letter, he'd already known that his assistant had given that information to the police.
>
> Q. And what's your source of that information?
>
> A. Just basic – uh, just rumors, talking, I mean, just heard it.
>
> Q. Are you aware that Mr. Getttlief (sic) has been deposed?
>
> A. Yes. It's -- I'm sorry -- well, I mean, rum -- obviously, rumors from the deposition. The deposition was the source, but...

(Ex. A at 331) During Duke's final examination, Duke's counsel probed this new information from Mr. Archer, but Mr. Archer's counsel ultimately instructed Mr. Archer not to answer:

> Q. Other than what you know from the testimony of Mr. Gettlief [sic], do you know of any other facts that support your contention that as of June 2nd, 2006, Mr. Drummond knew that Sergeant Smith had turned over DukeCard information to Durham?
>
> MS. SMITH: Objection, to the extent that it would reveal legal theories of counsel, I'd instruct you not to answer.
>
> A. It's the -- I mean, there's theories within counsel, but ...

Q. Okay, and I'd like to know what they are.

MS. SMITH: Objection. You can't ask about theories of counsel.

MR. SEGARS: You've opened the door by asking the question, without qualification, on cross-examination, and it's my contention that that has waived any privilege --

MS. SMITH: And it's my contention that the privilege has not been waived.

(Ex. A at 335-36)

The parties conferred about this discovery dispute at length. On 11 May 2012, the parties participated in a telephone conference. The parties continued their dialog through subsequent written communications. Mr. Archer's counsel denied Duke's request to re-open Mr. Archer's deposition; however, the parties were able to agree on a resolution of the dispute that involved Mr. Archer providing an affidavit about the extent of his knowledge on the areas in dispute. The parties agreed on the text of an affidavit. (*See* 11 June 2012 E-mail from Stefanie Smith to Tom Segars, attached as Exhibit B; *see also* Draft Affidavit of Breck Archer, attached as Exhibit F)

On 11 June 2012, Mr. Archer's counsel agreed to coordinate with Mr. Archer and provide the affidavit. Duke's counsel repeatedly inquired into the status of the affidavit and requested extensions of the discovery period from the Court to allow Mr. Archer to provide the affidavit. (*See* Ex. B; DE 296, 298, 299, 301) As of the date of this brief, Mr. Archer has not provided the affidavit.

QUESTIONS PRESENTED

I. Whether the attorney-client and work product privileges protect facts?

II. Whether broad inquiry into a client's knowledge of facts and source of knowledge of those facts waives any attorney-client privilege or work product doctrine protection that might prevent discovery of those facts?

III. Whether an Order re-opening Mr. Archer's deposition to permit examination on disputed areas of testimony – or, in the alternative, compelling production of an affidavit promised in resolution of a discovery dispute – is appropriate?

IV. Whether costs may be awarded for a motion seeking to have a deponent compelled to answer questions that are not protected by any privilege or other protection?

ARGUMENT

During a deposition, counsel cannot direct a witness not to answer unless based on privilege (or a limitation on evidence by the Court). L.R. 30.1(1). No privilege applied to the testimony responsive to Duke's question. Duke is attempting to probe Mr. Archer's substantive claims by asking about facts. Facts provided through counsel are not privileged.

Further, the conduct of Mr. Archer and his counsel at the deposition constitutes a broader, subject matter waiver of any privilege that might otherwise apply. During questioning by his own counsel, Mr. Archer testified regarding Defendant Drummond's knowledge of the prior DukeCard disclosure and the source of Mr. Archer's knowledge. To the extent any protection would have

otherwise applied, Mr. Archer and his counsel waived the protection through this exchange.

Accordingly, Duke requests that Mr. Archer's deposition be re-opened and that Mr. Archer be directed to respond to Duke's questions. In the alternative, Duke requests that Mr. Archer be compelled to deliver the signed affidavit that his counsel agreed he would provide.

I. The Attorney-Client Privilege Does Not Protect Facts.

Facts are not protected by the attorney-client privilege or the work product doctrine. *See Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) (the protection of the privilege extends only to communications and not to facts); *Thomas v. City of Durham*, No. 1:98CV00706, 1999 WL 203453, at *3 (M.D.N.C. Apr. 6, 1999) ("Even with respect to the attorney-client privilege, the underlying facts communicated between the client and the counsel are not privileged.") (internal citations omitted)); *Suggs v. Whitaker*, 152 F.R.D. 501, 507 (M.D.N.C. 1993) (facts are not protected by the work product doctrine).

An attorney cannot shield facts she communicated to her client from discovery: "when an attorney conveys to his client facts acquired from other persons or sources, those facts are not privileged." *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) (quoting *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980)); *accord B.C.F. Oil Ref., Inc. v. Consol. Edison Co.*, 168 F.R.D. 161,

165 (S.D.N.Y. 1996); *Allen v. West Point-Pepperell Inc.*, 848 F. Supp. 423, 428 (S.D.N.Y. 1994); *Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc.*, 111 F.R.D. 76, 80 (S.D.N.Y. 1986).

Courts have disagreed on whether the *source* of such information is privileged. *Compare Thurmond v. Compaq Computer Corp.*, 198 F.R.D. 475, 483 (E.D. Tex. 2000) (allowing questions "aimed at determining the level of [the client's] knowledge, not the source of the knowledge") *with Johnson Matthey, Inc. v. Res. Corp.*, No. 01 CIV. 8115 (MBM) (FM), 2002 WL 1728566, at *4 (S.D.N.Y. July 24, 2002) (allowing discovery of "when [plaintiff's] officers first learned the relevant facts and *from whom*"). However, Mr. Archer and his counsel cannot be attempting to protect the *source* of his knowledge, as his counsel specifically asked Mr. Archer "what's your source of that information?" (Archer Dep. Tr. 331:13; *see supra* Section II)

Duke's question to Mr. Archer sought facts: "[D]o you know of any other *facts* that support your contention . . . ?" (Archer Dep. Tr. 335:12-13 (emphasis added)) As facts are not protected by any applicable privilege or work product doctrine, Mr. Archer should have answered the question.

II. Any Attorney-Client Privilege or Work Product Doctrine Protection Has Been Waived by Mr. Archer and His Counsel.

Mr. Archer and his counsel waived any protections that might otherwise have prevented discovery on the issue of Defendant Drummond's alleged knowledge of the prior release of DukeCard information. Mr. Archer's own attorney asked him broad, open-ended questions seeking any information and the source of his information:

> Q. At the time of the motion to quash the subpoena, did you have knowledge that Matthew Drummond knew that the DukeCards had already been given to the Durham police?
>
> A. No.
>
> Q. What do you know about that since ---
>
> A. I know that --- I know that at the time that he wrote this letter, he'd already known that his assistant had given that information to the police.
>
> Q. And what's your source of that information?
>
> A. Just basic – uh, just rumors, talking, I mean, just heard it.

(Archer Dep. Tr. 331:4-20) In answering the questions, Mr. Archer necessarily waived any attorney-client privilege or protection pursuant to the work product doctrine.

The proponent of the work product or attorney-client protection "has the burden of establishing he has not waived them." *Wells v. Liddy*, No. 01-1266, 2002 WL 331123, at *9 (4th Cir. Mar. 1, 2002). "As a general rule, implied

waiver occurs when the party claiming the privilege has made any disclosure of a confidential communication to any individual who is not embraced by the privilege." *Hawkins v. Stables*, 148 F.3d 379, 384 n.4 (4th Cir. 1998) (citations omitted). Once a party has waived its privileges and "decided to reveal these confidential communications," then "[f]airness, . . . requires complete disclosure of the confidential communications and the details underlying those communications." *Wells*, 2002 WL 331123, at *9 (applying Virginia law and finding waiver where proponent of privilege submitted confidential communications in his motion for summary judgment).

For instance, in *Hawkins v. Stables*, 148 F.3d 379, 384 (4th Cir. 1998), a litigant responded to a deposition question regarding advice from her attorney regarding wire-tapping. She later claimed privilege for conversations with her attorney regarding wire-tapping. *Id.* The Fourth Circuit rejected this argument and found a broader, subject matter waiver as to the wire-tapping generally: "a disclosure not only waives the privilege as to the specific information revealed, but also waives the privilege as to the subject matter of the disclosure." *Id.* n.4. The situation is even more egregious here, as Mr. Archer waived the privilege through questioning by his own attorney. *See Couture v. Anderson*, No. 10-5026, 2012 WL 369451, at *9 (D.S.D. Feb. 3, 2012) (noting that by utilizing and disclosing work product materials during deposition, counsel had "effectively waived the work

product privilege” as to those materials).

Mr. Archer and his counsel waived any protections that apply to the subject of Defendant Drummond’s alleged knowledge of the prior DukeCard disclosure.

III. Duke Is Entitled to Reopen Mr. Archer’s Deposition Based on Counsel’s Improper Assertions.

Mr. Archer’s counsel improperly instructed him not to answer questions seeking facts or information subject to a waived privilege. Duke’s question goes to the heart of Plaintiffs’ claims, as described by the Court in its 31 March 2011 Order. [DE 186 at 174]

When an attorney obstructs a deposition by improperly telling her witness not to answer questions, it is appropriate to request a re-opening of the deposition to allow examination on the obstructed topics. *See, e.g.*, *Dairyland Power Coop. v. United States*, 79 Fed. Cl. 709, 720-21 (2007) (reopening deposition and imposing costs against party who improperly invoked deliberative process privilege); *Univ. Sports Publ’ns Co. v. Playmakers Media Co.*, No. 09 Civ. 8206, 2011 WL 1143005, at *7 (S.D.N.Y. Mar. 21, 2011) (“Defendants may also reopen the depositions of any witnesses . . . who, at their depositions, were instructed by Plaintiff not to answer questions on privilege or work-product grounds, when the questions would not have called for protected information . . . .”). Under the circumstances, Duke requests a re-opening of Mr. Archer’s deposition to answer

the questions posed.

If this Court decides that re-opening Mr. Archer's deposition is imprudent, Duke respectfully requests that the Court compel Mr. Archer's counsel to secure the affidavit they agreed to provide. Federal courts have inherent powers that are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (citations omitted). A federal court may enforce a private, bargained-for exchange between lawyers, based on "its inherent authority to regulate members of the bar who practice before it." *Hornady Truck Line, Inc. v. Volvo Trucks N. Am.*, No. CV-98-0037-BH-M, 2000 WL 1137203, at *1 (S.D. Ala. July 18, 2000).

The parties reached an agreement under which Mr. Archer would provide an affidavit. (*See* Ex. B) Mr. Archer's counsel has assured Duke since June that the signed affidavit was forthcoming. (*See* Exhibit 25 July 2012 E-mail from Tom Segars to Stefanie Smith, attached as Exhibit C; 1 August 2012 E-mail from Stefanie Smith to Tom Segars, attached as Exhibit D) Accordingly, Duke has sought and received multipled extensions of the discovery period to allow for the affidavit. [*See* DE 296, 298, 299, 30.]

On 3 October 2012, Mr. Archer's counsel indicated that they would be in touch with Mr. Archer during the month of October. (3 October 2012 E-mail from

Stefanie Smith to Jeremy Falcone, attached as Exhibit E) On 9 November 2012, Duke's counsel again inquired as to the status and indicated that a motion to compel would be forthcoming if the affidavit was not provided. (9 November 2012 E-mail from Jeremy Falcone to Stefanie Smith, attached to the brief as Exhibit H) Mr. Archer's counsel responded that she was making efforts to communicate with Mr. Archer. (9 November 2012 E-mail from Stefanie Smith to Jeremy falcone, attached to the brief as Exhibit I)

Should the Court decline to re-open the deposition, Duke respectfully requests that the Court order Mr. Archer to provide the agreed-upon affidavit.

IV. Duke is Entitled to Its Costs in Bringing the Motion.

Plaintiffs' counsel's conduct in this case warrants an award of costs to Duke.

A party forced to file a motion to compel may receive its reasonable costs and fees if the moving party first conferred in good faith with the non-moving party, and the non-moving party had no substantially justifiable reason for objecting. *See* Fed. R. Civ. P. 37(a)(4)(A); *see also EEOC v. Sheffield Financial LLC*, No. 1:06CV00889, 2007 WL 1726560, at *7-8 (M.D.N.C. June 13, 2007); *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, No. 6:92CV00592, 1996 WL 575946, at *3 (M.D.N.C. Sept. 6, 1996) (permitting moving party to file affidavit of costs where instructions not to answer were not substantially justified).

Based on conduct in depositions prior to Mr. Archer's deposition, Duke notified Mr. Archer's counsel that instructions not to answer questions calling for facts were improper. (*See* 13 March 2012 Letter from Jeremy Falcone to Robert Ekstrand, attached as Exhibit G) Plaintiffs' counsel's continued instructions on questions calling for facts were not substantially justified. (*See supra* Sections I, II) Additionally, Duke attempted to resolve this dispute with Plaintiffs; however, after six months of promises by Plaintiffs' counsel to provide Mr. Archer's affidavit, no affidavit has been provided. (*See* supra Section III) Accordingly, Duke not only conferred on the underlying issue regarding improper instructions, but also spent six months working with Plaintiffs in an attempt to resolve this dispute without Court intervention. Under the circumstances, Duke requests an award of its costs in bringing this Motion.

CONCLUSION

For the reasons set forth above, Duke respectfully requests that the Court enter an Order compelling the re-opening of Breck Archer's deposition. In the alternative, Duke requests an order compelling Mr. Archer to complete and return the affidavit he agreed to provide. In either case, Duke requests that the Court award its costs to be submitted as directed by the Court.

This the 12th day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record and to Mr. Linwood Wilson, who is also registered to use the CM/ECF system.

This the 12th day of November, 2012.

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