STATE OF MICHIGAN

COURT OF APPEALS

JOANNE BRANHAM, Individually and as Personal Representative of the Estate of FRANKLIN DELANO BRANHAM,

Plaintiff-Appellant,

v

ROHM AND HASS COMPANY,

Defendant,

and

DOW CHEMICAL COMPANY,

Appellee.

UNPUBLISHED
March 16, 2010

No. 288476
Midland Circuit Court
LC No. 08-003476-PZ

Before: K. F. Kelly, P.J., Hoekstra and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting in part Dow Chemical Company's motion to quash a subpoena. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. BASIC FACTS AND PROCEDURAL BACKGROUND

This case has its genesis in litigation pending in Pennsylvania, the location of defendant's corporate headquarters, although the cause of action arises in Illinois. According to plaintiff, defendant and its subsidiary, Morton Chemical, have long operated a chemical manufacturing plant in Ringwood, Illinois, which is near McCullom Lake Village. Plaintiff, a resident of McCullom Lake Village, filed suit in the Philadelphia County Court of Common Pleas, asserting that defendant contaminated the village's air and water by dumping large quantities of certain contaminates, including vinyl chloride, in locations upstream and upwind of her home. Plaintiff further asserted that her decedent husband was one of several persons in the area who suffered an unusual form of brain cancer that she contends was caused by the chemical pollution.

Dow has long supplied vinylidene chloride to defendant. Plaintiff asserts that once in the ground, vinylidene chloride degrades into vinyl chloride, which is the subject carcinogen in the Pennsylvania litigation. To the contrary, Dow insists that these are distinct chemicals, and that it has never supplied vinyl chloride to defendant.

During discovery, plaintiff requested and was granted a commission to this state's judiciary for purposes of a subpoena to compel the records custodian of Dow to submit to deposition. Plaintiff specifically sought the following information:

> 1. All records . . . relating to sales of vinylidene chloride to Morton chemical from 1955 to 1990.
>
> 2. All communication . . . between Dow and Rohm and Haas relating to any personal injury or class action litigation involving Rohm and Haas's Ringwood, Illinois facility.
>
> 3. All documents . . . describing or referring to or regarding any communications between Down [sic] and Rohm and Haas relating to any personal injury or class action litigation involving Rohm and Haas' Ringwood, Illinois facility.
>
> 4. All documents . . . describing or referring to or regarding any communications between Dow and Rohm and Haas relating to environmental remediation activities at Rohm and Haas' Ringwood, Illinois facility.
>
> 5. All documents . . . describing or referring to or regarding any communications between Dow and Rohm and Haas relating to environmental remediation activities at Rohm and Haas' Ringwood, Illinois facility.
>
> 6. All communication . . . between Dow and the Manufacturing Chemists' Association or any of its successor organizations . . . relating to the carcinogenicity or potential carcinogenicity of vinyl chloride from 1950 to the present.
>
> 7. All documents . . . describing, referring to or regarding any communication between Dow and the Manufacturing Chemists' Association or any of its successor organizations . . . relating to the carcinogenicity or potential carcinogenicity of vinyl chloride from 1950 to the present.
>
> 8. All communications . . . between Dow and any researcher or scientist who has participated in any epidemiological study or animal study relating to the carcinogenicity or potential carcinogenicity of vinyl chloride.
>
> 9. All documents . . . describing, referring to or regarding any communications between Dow and any researcher or scientist who has participated in any epidemiological study or animal study relating to the carcinogenicity or potential carcinogenicity of vinyl chloride.

> 10. All documents relating to any in-house research, study or investigation Dow has engaged in relating to the carcinogenicity or potential carcinogenicity or [sic] vinyl chloride.

Dow moved to quash the subpoena, on the grounds that the information sought was confidential and duplicative of information already sought from defendant, and that plaintiff was seeking to press Dow into service as an involuntary, unpaid expert. Of particular concern to Dow was that it was in the process of acquiring defendant. The merger negotiations entailed significant due-diligence inquiry and sharing of sensitive information, in light of which Dow and defendant executed a confidentiality agreement.[1]

At the hearing on the motion, Dow agreed to supply the information relating to the sales of vinylidene chloride to Morton Chemical as specified by paragraph 1 of the subpoena. In deciding to quash the subpoena in connection with the remaining nine items, the circuit court explained as follows:

> With respect to items two through five, . . . I am concerned . . . that parties enter into agreements to purchase each other all the time. Sometimes deals close. Sometimes they don't. And for reasons that I think are legitimate, they place certain limitations on each other's ability to use the information that is obtained during the due diligence process, especially in the event that the deal were not to close.
>
> . . . I'm concerned about the contractual confidentiality rights of the parties. And to the extent that . . . requests two through five deal with communications between Dow and Rohm and Haas, the information is obtainable through . . . discovery in the Pennsylvania action . . . .
>
> Absent some showing that there . . . is information that is not being provided . . . I do not think that it's appropriate that Dow be compelled to provide items responsive to numbers two through five.
>
> With respect to six through ten, . . . I interpret the subpoena consistent with what [plaintiff's attorney] tells me, that he's not seeking to make Dow the expert.
>
> But when I asked what purpose is sought to be achieved by obtaining items six through ten, it sounds to me that what he's trying to do . . . is he's seeking to enhance his expert's understanding of the data upon which they base their opinion, which I think in some respect makes Dow, for lack of a better term, a consulting expert.

---

[1] Dow advises that, as of April 1, 2009, defendant Rohm and Haas became a wholly-owned subsidiary of Dow, but asserts that despite that relationship the two companies remain legally separate and distinct.

> . . . And I think it imposes upon the party requesting the information the obligation to prove that . . . have a need that cannot be met through less burdensome means.
>
> So that is not to say that I would not order production of this information. It is to say the Plaintiff should pursue other means first, then come back if, for example, a discovery request to . . . another organization for the studies that are referred to in eight through ten cannot be obtained from those sources, then . . . at some point in the future Dow may be compelled to produce them.

The trial court entered an order quashing the subpoena in part, pending plaintiff's efforts to obtain the information needed through less burdensome means. The trial court did not rule out compelling disclosure of the information in the future.

II. STANDARDS OF REVIEW

A trial court's decision on a motion to quash a subpoena is reviewed for an abuse of discretion. See *Castillion v Roy*, 412 Mich 873; 312 NW2d 655 (1981) (order); *Chastain v General Motors Corp (On Remand)*, 254 Mich App 576, 593; 657 NW2d 804 (2002); *Park Forest of Blackman v Smith*, 112 Mich App 421, 429; 316 NW2d 442 (1982). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

III. ANALYSIS

Plaintiff first argues that the circuit court erred in finding that the existence of a confidentiality agreement transformed the covered material into privileged information and thus lying beyond the reach of discovery. We find this argument to be misplaced.

The circuit court did not hold that the existence of a confidentiality agreement between Dow and defendant converted its subject matter to one protected from discovery under absolute privilege. Instead the court merely gave some deference to Dow's legitimate confidentiality concerns and noted that such information was presumably discoverable through the normal course of the Philadelphia County proceedings. It determined that, for those reasons, compelling Dow to disclose such information was not proper unless and until there was a showing that such information was not otherwise available. Significantly, on appeal plaintiff does not argue that any of the information relating to environmental and remediation issues at the Ringwood, Illinois plant has not been discoverable through ordinary procedures in the Pennsylvania litigation.

Next, plaintiff argues that a subpoenaed third party withholding requested documents on a claim of privilege must produce a privilege log.[2] However, although Dow did speak of the attorney-client privilege in connection with its due-diligence information, Dow mainly asserted general confidentiality concerns, and the circuit court decided in Dow's favor on that basis.

---

[2] We note that at the hearing, Dow did offer to prepare a privilege log.

Because the subpoena was quashed with regard to the environmental and remediation issues at the Ringwood, Illinois plant for reasons other than attorney-client, or work-product, privilege, there was no need for a privilege log in this instance. The circuit court did not err by declining to order Dow to produce one.

Finally, plaintiff argues that the circuit court erred in its conclusion that the subject subpoena was, in connection with the request for information concerning the carcinogenicity of vinyl chloride, seeking to compel Dow to share its information in order to bolster its expert's expertise or to turn Dow into an unpaid expert. Instead, plaintiff contends she is not seeking to conscript Dow as her expert, but instead merely seeks studies Dow may have conducted about the toxicity of vinyl chloride. We find that to be a distinction without a difference.

A defendant sued over pollution-related issues may not resist disclosure of studies and related such documentation relating to the pollution on the policy ground that such a duty would discourage efforts to investigate and remediate pollution. *Daniels v Allen Industries, Inc*, 391 Mich 398, 408-411; 216 NW2d 762 (1974). However, "an expert is one who gives opinion testimony, and not testimony concerning 'relevant facts,'" and thus an expert "has a property right in his opinion and cannot be made to divulge it in answer to a subpoena." *Klabunde v Stanley*, 384 Mich 276, 282; 181 NW2d 918 (1970). In this case, Dow is a nonparty to the underlying litigation who is being asked for information relating to cancer risks in general, rather than to the individual circumstances causing the death of plaintiff's decedent. The circuit court's decision to quash the subpoena in relation to such information pending plaintiff's attempts to obtain it through less burdensome means did not lie outside the range of principled outcomes, and thus was not an abuse of discretion. See *Radeljak, supra*.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck