STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: January 22, 2016)

In Re: Asbestos Litigation

RALPH DELMONICO and DONNA DELMONICO	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. PC-14-2901**
	:	
A.O. SMITH CORPORATION, et al.,	:	
Defendants.	:	

DECISION

GIBNEY, P.J. Before this Court is Defendant CertainTeed Corporation's (CertainTeed or Defendant) motion to compel Plaintiffs to produce all exposure affidavits executed by Ralph Delmonico (Mr. Delmonico, or, with Donna Delmonico, Plaintiffs). This motion is made pursuant to Super. R. Civ. P. 34(b) and 37(a)(1). At issue is whether the exposure affidavits in question are protected by the work product privilege. After carefully considering the parties' arguments and conducting an in camera review of the exposure affidavits, the Court finds that, for the reasons set forth below, the exposure affidavits are not discoverable in this particular case.

I

Facts

Mr. Delmonico is a seventy-eight year old man who has been diagnosed with Stage IV lung cancer. Mr. Delmonico worked as a plumber for thirty-two years and allegedly worked with and/or around asbestos-containing products.

In May of 2014, Mr. Delmonico retained counsel to pursue claims related to his alleged exposure to asbestos. Mr. Delmonico met with counsel and discussed the basic facts of his

claims including his employment history and the various products he worked with throughout his career. As a matter of course, Plaintiffs' counsel memorialized these discussions in the form of affidavits (exposure affidavits) that were finalized on June 2, 2014. These affidavits contain a basic recitation of Mr. Delmonico's work history including a list of work sites and products used or encountered at those work sites.

Just four days later, on June 6, 2014, the Complaint was filed. Both parties engaged in discovery. On June 16, 2014, Plaintiffs provided to Defendant answers to Rhode Island's standard asbestos interrogatories. Question six of these interrogatories asks about a plaintiff's employment history, work sites, and asbestos products use—essentially the same information already contained in the exposure affidavits. Plaintiffs contend that the information provided to Defendant on June 16 in answer to interrogatory number six included all of the information contained in the exposure affidavits.

Mr. Delmonico's discovery deposition started on July 17, 2014 and continued over the course of six nonconsecutive days, ending in October 2014. It is undisputed that Defendant had a full and fair opportunity to cross-examine Mr. Delmonico over the course of those six days of deposition. A videotaped trial deposition took place on May 15, 2015. Defendant again cross-examined Mr. Delmonico during this seventh day of deposition testimony. Over the course of these seven days of deposition, Defendant did not have access to the exposure affidavits but Defendant did have access to Plaintiffs' answers to interrogatories.

Upon learning of the exposure affidavits' existence, Defendant requested them from Plaintiffs. Plaintiffs declined to release the exposure affidavits, claiming privilege.

II

Standard of Review

The trial court is afforded broad discretion in its handling of discovery requests. Pastore v. Samson, 900 A.2d 1067, 1073–74 (R.I. 2006) (citing Cullen v. Town Council of Lincoln, 850 A.2d 900, 903 (R.I. 2004)). In making its ruling, the Court is mindful that our Superior Court Rules of Civil Procedure "are liberal [and] designed to promote broad discovery among parties . . . ." Henderson v. Newport Cnty. Reg'l YMCA, 966 A.2d 1242, 1246 (R.I. 2009). Our discovery rules are motivated by a philosophy that "prior to trial, all data relevant to the pending controversy should be disclosed unless the data is privileged." Cabral v. Arruda, 556 A.2d 47, 48 (R.I. 1989) (citing 8 Wright & Miller, Federal Practice and Procedure: Civil § 2001 at 15 (1970)).

The work product privilege is one such privilege that may preclude discovery. See Super. R. Civ. P. 26(b)(3). The work product privilege protects documents and other tangible things that were "prepared in anticipation of litigation." Id. Two strands of work product exist: opinion work product, which contains the "mental impressions of an attorney or his or her legal theories," and is absolutely immune from discovery, and factual work product, which more broadly contains "any material gathered in anticipation of litigation," and is subject to only qualified immunity. Henderson, 966 A.2d at 1247–48. The underlying rationale for factual work product protection is "to 'prevent an attorney from 'freeloading' on his or her adversary's work.'" Id. at 1248 (quoting Cabral, 556 A.2d at 48). As factual work product does not contain any of the thoughts of the attorney, the qualified protection is not extended when the party seeking discovery: "(1) [ ] has substantial need for the materials in preparation of its case and (2) [ ] is unable to obtain the information by other means without undue hardship." State v. Lead

Indus. Ass'n., 64 A.3d 1183, 1193 (R.I. 2013) (citing Crowe Countryside Realty Assocs., Co. v. Novare Eng'rs, Inc., 891 A.2d 838, 842 (R.I. 2006)).

III

Discussion

A

Parties' Arguments

In support of its motion to compel, Defendant argues that the exposure affidavits do not contain the mental impressions or legal theories of any attorney and thus do not constitute opinion work product. Defendant also contends that the exposure affidavits do not constitute factual work product because they are affidavits, something courts in other jurisdictions have not recognized as protected by work product privilege. Defendant also notes that the anti-freeloading philosophy underlying factual work product is not offended by discovery of the exposure affidavits. In the alternative, Defendant argues that even if the exposure affidavits do constitute factual work product, Defendant can show the requisite substantial need and undue hardship to overcome the qualified immunity. Defendant contends that the exposure affidavits contain material necessary for establishing impeachment, determining Plaintiffs' affirmative case against Defendant, other defendants' pro rata share, and causation, therefore establishing a substantial need for the documents. Defendant further contends that because the exposure affidavits were created before the prolonged months of depositions and because Mr. Delmonico faces a deteriorating illness, the exposure affidavits created a snapshot of Mr. Delmonico's memory at one point in time, and therefore, Defendant faces an undue hardship in attempting to obtain substantially equivalent information.

Plaintiffs respond by asserting that the exposure affidavits were explicitly prepared in anticipation of litigation and thus qualify as factual work product. Plaintiffs further contend that

Defendant is unable to show the requisite substantial need or undue hardship necessary to vitiate the qualified immunity provided to factual work product. Plaintiffs point to the information given to Defendant in the answer to interrogatory number six and note that it is nearly identical to the information contained in the exposure affidavits. Plaintiffs argue that given that the information is the same and that Defendant had this information prior to the seven days of deposition, Defendant cannot show any substantial need for the identical information contained in the exposure affidavits. Plaintiffs further argue that the very close timeline of the exposure affidavits, the answer to interrogatory number six, and the beginning of the deposition testimony negate a finding of undue hardship. Plaintiffs maintain that this close timeline counters the snapshot theory proposed by Defendant and that the mental state of Mr. Delmonico during the exposure affidavits was nearly identical to his mental state during the soon-thereafter depositions. Plaintiffs also contend that the exposure affidavits are covered by the attorney-client privilege.

B

Work Product Privilege

1

Factual Work Product

The Court is satisfied that the exposure affidavits fall under the protections of factual work product. The Rhode Island Supreme Court has made clear that factual work product "encompasses 'any material gathered in anticipation of litigation.'" Lead Indus. Ass'n, 64 A.3d at 1193 (quoting Henderson, 966 A.2d at 1248). This broad and inclusive language compels the conclusion that the exposure affidavits are factual work product. Plaintiffs' counsel prepared the exposure affidavits just four days before filing the Complaint, and the exposure affidavits contain the basic facts underlying Mr. Delmonico's claims. The timing of their creation and their

content clearly fall within the ambit of material "'gathered in anticipation of litigation.'" Id. Indeed, the exposure affidavits were made with the express purpose of litigating the case. These facts yield only one outcome: the exposure affidavits are factual work product. See Henderson, 966 A.2d at 1248 (finding a report qualified as factual work product because "the report was produced at the behest of defendant's attorney . . . .").

2

Substantial Need

As the exposure affidavits are factual work product, Defendant must show a substantial need for the documents to overcome the qualified immunity. See id. Substantial need "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. 2013).

The Court is satisfied that Defendant does not have a substantial need for the exposure affidavits. After an objective in camera review of the exposure affidavits, the Court finds no meaningful or significant difference between the information in the exposure affidavits and the answer to interrogatory number six, with respect to CertainTeed or any other defendant in this case. Indeed, the information provided to Defendant in the answer to interrogatory number six is virtually identical in all but format to the information contained in the exposure affidavits. Given that Defendant had this nearly identical information prior to the seven days of deposition testimony, the Court cannot find any substantial need for Defendant to have this information now. See Moore, et. al., supra ("[A] party's desire to find corroborating evidence is insufficient to establish substantial need."); see also Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP, 124 F.3d 1304, 1308 (D.C. Cir. 1997) ("It is the rare case where corroborative evidence can

be thought 'necessary.'"). Although Defendant claims substantial need based on the potential for impeachment evidence, the Court can reassure Defendant that the exposure affidavits and the answer to interrogatory number six are nearly identical, and thus there is no impeachment evidence to be found. See Henderson, 966 A.2d at 1249 (finding no substantial need where the requested document was unlikely to produce the information sought). Accordingly, based on the nearly identical information already being provided to Defendant, the Court does not find a substantial need.

3

Undue Hardship

The Court is also satisfied that nondisclosure of the exposure affidavits will not impose undue hardship on Defendant. See Lead Indus. Ass'n., 64 A.3d at 1193. Of import is the ability of the requesting party to obtain "material equivalent" to the undisclosed document. Id. at 1194. As previously noted, the Court is satisfied that its in camera review of the exposure affidavits revealed the information to be nearly identical to the answer to interrogatory number six. Additionally, because the answer to interrogatory number six was provided to Defendant prior to the seven days of deposition, Defendant had ample opportunity to cross-examine Mr. Delmonico with this information.

Moreover, the Court finds significant the particularly short timeline among the exposure affidavits, the answer to interrogatory number six, and Mr. Delmonico's deposition. The exposure affidavits were completed on June 2, 2014, the answer to interrogatory number six was given on June 16, 2014, and the beginning of the deposition testimony was on July 17, 2014. The six days of deposition testimony ended by October 2014, leaving a timespan of less than five months between the creation of the exposure affidavits and the end of the deposition testimony

(not including the later videotaped trial deposition). This close timeline, as well as a lack of evidence about the impairment of Mr. Delmonico's mental faculties during this timeline, allays concerns about the exposure affidavits capturing a "snapshot" of Mr. Delmonico's memory. Cf. Burgess v. R.I. Pub. Transit Auth., 664 A.2d 1119 (R.I. 1995) (finding that an approximately five year time gap coupled with a documented deterioration of memory constituted an undue hardship to obtain equivalent material). Therefore, the nondisclosure of the exposure affidavits does not create any undue hardship for Defendant.

Exposure affidavits occupy a unique station in the discovery context: exposure affidavits are prepared by plaintiff's counsel in anticipation of litigation, but done, at least in part, as a potential source of affirmative evidence for the plaintiff's case in chief. This state of affairs places defendants in the unenviable position of claiming that they need the information contained in the exposure affidavits to present a competent defense without any precise knowledge of what exactly is contained therein. The Court's hearing on December 8, 2015 puts this posture in relief: Defendant's counsel contended that the exposure affidavits were needed as a potential source of impeachment, and Plaintiffs' counsel replied that upon his review of the exposure affidavits, there was no information that would help Defendant with impeachment. Hr'g Tr. 14. The Court remains very concerned about the potential unfairness these exposure affidavits impose on defendants. The exposure affidavits are therefore done at plaintiff's peril; the Court finds the exposure affidavits undiscoverable in the present instance only because of the particular facts of this case. In addition, at the risk of creating a cottage industry, the Court finds that an in camera review in these instances would properly and fairly adjudicate the discovery dispute.

Finally, having ruled on the work product privilege, the Court will not address the attorney-client privilege. See Henderson, 966 A.2d at 1249 ("Because we conclude that the

[requested document] is shielded from discovery based on the work-product privilege, we need not reach the defendant's alternative argument that the report is protected by the attorney-client privilege.").

IV

Conclusion

For the aforementioned reasons, this Court denies Defendant's motion to compel.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Delmonico v. A.O. Smith Corporation, at al.**
CASE NO:	**PC-14-2901**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**January 22, 2016**
JUSTICE/MAGISTRATE:	**Gibney, P.J.**
ATTORNEYS:	
For Plaintiff:	**Vincent L. Greene, IV, Esq.**
For Defendant:	**R. Bart Totten, Esq.; Mark O. Denehy, Esq.; Peter F. Mathieu, Esq.; Lawrence G. Cetrulo, Esq.; Jeffrey S. Brenner, Esq.; Anthony J. Sbarra, Esq.; Andrew J. Murray, Esq.; David A. Goldman, Esq.; James J. McKenna, Esq.; Mary C. Dunn, Esq.; Jonathan F. Tabasky, Esq.; Cassandra L. Feeney, Esq.**