

No. SC85970

IN THE  
MISSOURI SUPREME COURT

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STATE EX REL. FORD MOTOR COMPANY

Relator,

-vs-

THE HONORABLE HENRY WESTBROOKE, CIRCUIT JUDGE, DIVISION 3  
CIRCUIT COURT OF GREENE COUNTY, MISSOURI

Respondent.

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RELATOR'S REPLY BRIEF

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## **I. Introduction**

Respondent's Brief spans 74 pages and contains six (6) Points Relied On. Not until the fifth Point Relied On, however, do Plaintiffs address the only issue before the Court – whether the work-product doctrine is perpetual in nature. Plaintiffs go to great lengths to obfuscate the sole legal issue. For example, Plaintiffs' statement of facts regarding the "Background on the Bronco II" is wholly irrelevant to the instant issue and, like much of Respondent's Brief, is meant only to: cast Relator in bad light and draw attention away from the real legal issue. Respondent's Brief is further peppered with irrelevant argument and misleading facts. To the extent possible, Relator will refrain from addressing Plaintiffs' collateral issues. Instead, Relator's Reply will focus on the legal issue before the Court.

## **II. The Sole Legal Issue is Whether the Work-Product Doctrine is Perpetual in Nature.**

Plaintiffs cannot deny the fact that, by their admission, the sole legal issue before the Court is whether the work-product doctrine is perpetual in nature. On or about October 20, 2003, Plaintiffs filed a Motion to Compel Discovery relating to discovery that sought documents and information generated by Ford's

consultants in prior Bronco II cases. (See Ex. C, p. 5; Index A024.)<sup>1</sup> It is Plaintiffs' Motion to Compel that set the stage for this Writ and the instant issue.

Below is a verbatim rendition of Plaintiffs' take on the previous arguments set forth in Plaintiffs' Motion to Compel.

Two clearly articulated grounds were (1) that Ford had failed to meet its burden because it simply made blanket objections and refused to produce any evidentiary support for the necessary elements of the claimed privileges, and (2) that Ford had waived privilege by its failure to file a privilege log identifying and disclosing what discovery was being withheld. Plaintiffs also sought production on the grounds that Ford's objections showed even if these items had been work product, they no longer retained any protection as they were for unrelated terminated litigation.

(Respondent's Brief at p. 20.)

Contrast Respondent's Brief with Plaintiffs' contentions set forth in their Motion to Compel:

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<sup>1</sup> All exhibits referenced herein are attached to Relator's previously filed Appendix.

- The battle is therefore over the information and documents which arose prior to this accident and which were generated for or on behalf of Ford in anticipation/preparation of a prior Bronco II case and which has not been previously disclosed. (Ex. C p. 3; Index A022.)
- Plaintiffs do not dispute that Ford may have generated and/or collected the documents to prepare for litigation. However, Ford did so for **prior** litigation – not this case. (emphasis in original) (Ex. C p. 5; Index A024.)
- In other words, work-product protects documents in the particular litigation for which the document was generated or gathered, but not subsequent litigation. (Ex. C p. 5; Index A024.)

Plaintiffs' Motion clearly illustrates that the "battle" is exclusively whether work-product protection, which Plaintiffs admitted applied to Ford documents, survives the end of prior litigation for which it was generated. Equally clear is that Respondent's Brief downplays the importance of this clear legal issue by burying the following statement on page 62 of their Brief: "Plaintiff also sought production on the grounds that Ford's objections showed even if these

items had been work product, they no longer retained any protection as they were for unrelated terminated litigation.”

Moreover, the Motion to Compel **never** set forth facts and authority supporting Plaintiffs’ contention that Ford waived its work-product protection by not providing a privilege log. Plaintiffs only made conclusionary statements to that effect, and then Plaintiffs asked the trial court, **in the alternative**, to order Ford to provide a privilege log. (Ex. C p 7; Index A026.) Plaintiffs, despite attempts to show otherwise, cannot escape their own admission contained in their Motion to Compel – that the only issue presented to the trial court was whether the work-product doctrine is perpetual in nature.

Once Plaintiffs finally address this legal issue, their position is contrary to established Missouri law. Plaintiffs admit Missouri appellate courts have adopted the majority view that has held the work-product doctrine is perpetual in nature for related cases. See State ex rel. Day v. Patterson, 773 S.W.2d 224, 228 (Mo. Ct. App. 1989) (finding the “sounder view” to be that such work product documents prepared for and protected from disclosure in one case have the same protection in a second case, at least if the two cases are related.); see also State ex rel. Classic III, Inc. v. Ely, 954 S.W.2d 650, 659 (Mo. Ct. App. 1997) (following Patterson). The courts in Patterson and Ely followed the “weight of modern authority – both federal and state”. See e.g. Shook v. City of Davenport,

497 N.W.2d 2d 883, 887 (Iowa 1993). See also In re Murphy, 560 F.2d 326, 334 (8<sup>th</sup> Cir. 1977) (“What is needed, if we are to remain faithful to the articulated policy of Hickman, is a perpetual protection for work product, one that extends beyond the termination of the litigation for which the documents were gathered.”)

Plaintiffs, however, would have this Court rule against both modern authority and Missouri appellate court precedent on the issue. Plaintiffs cite several decisions that encompass the minority view rather than respond to Owens-Corning Fiberglas Corp. v. Caldwell, 818 S.W. 2d 749 (Tex. 1991); a decision that not only encompasses the majority view, but also is directly on point in the instant case.

Owens-Corning Fiberglas Corp. v. Caldwell, 818 S.W.2d 749 (Tex. 1991) stands for the proposition that repeat litigants are entitled to the protection of a perpetual work-product doctrine. The court, relying on In re Murphy, reasoned the underlying purpose of the work-product doctrine, which is to provide a privileged area within which the lawyer can analyze or prepare a case, would be defeated if the doctrine were limited to documents that were prepared in the particular case for which discovery was sought. Id. at 750. The court further reasoned that “any party which is a repeat litigant clearly must be allowed to develop an overall legal strategy for all the cases in which it is involved. This is true [where] the litigant is a corporation sued repeatedly in products liability . . .”

Id. at 751 (emphasis added). As noted by Justice Brennan in his concurring opinion in FTC v. Grolier, “[d]isclosure of work product connected to prior litigation can cause real harm to the interests of the attorney and his client even after the controversy in the prior litigation is resolved.” 426 U.S. 19, 26 (1983). Specifically, consumer product manufacturers, like Relator, who face litigation of a commonly recurring type “have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes.” Id.

The documents at issue here – consultant and design analysis materials – were generated by Ford to develop an overall legal strategy for cases in which it has been repeatedly sued in products liability. Ford is entitled to develop this type of overall legal strategy recognized by Caldwell and Justice Brennan in FTC v. Grolier.

### **III. This Court should not consider Plaintiffs’ collateral issues.**

Due to the extent in which Plaintiffs try to divert the Court’s attention away from the real issue, Relator would be remiss if it did not address a few of Plaintiffs’ “contentions.” As shown below, Plaintiffs’ collateral issues are irrelevant to the sole legal issue before this Court.

#### **A. A record of the March 15<sup>th</sup> hearing is not necessary.**

Plaintiffs spend an inordinate amount of time pointing out the obvious fact that no record was made at the March 15<sup>th</sup> hearing. A record of the March 15<sup>th</sup>

hearing (or lack thereof) is not critical to this Court's determination of the sole legal issue. Plaintiffs contend Relator had a duty to request that the March 15<sup>th</sup> hearing be held on the record, and failure to do so leaves nothing for review in this case. Plaintiffs are overreaching. Relator only has the duty to present a record that contains "all the evidence necessary for [the Court's] making determinations in the issues raised." State ex rel. Callahan v. Collins, 978 S.W.2d 471, 474 (Mo. Ct. App. 1998) (cited by Plaintiffs). The pleadings in this case, particularly Plaintiffs' Motion to Compel, are the only records necessary for this Court's determination.<sup>2</sup>

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<sup>2</sup> Plaintiffs also cite cases involving appeals from trial issues in which the record is void of any transcript. See Providian Nat'l Bank v. Houge, 39 S.W.3d 552, 555 (Mo. Ct. App. 2001)(no record made during trial regarding what evidence was offered and admitted); Missouri Farmers Assoc. v. Kemper, 726 S.W.2d 723, 727 (Mo. banc 1987)(Missouri Approved Instruction issue arose during trial, but no record was made of a "off the record conference in chambers".) These cases are distinguishable from the instant facts because they involve trial issues in which the appellate court had absolutely no record for review. To the contrary, the prior motions and briefing in this case provides this Court with an adequate record to decide the lone, legal issue.

From the beginning, there was little doubt that the documents and information Plaintiffs sought were work-product materials. Again, referring to the original Motion to Compel, Plaintiffs essentially conceded the documents they sought were consulting expert materials. See Ex. C at p. 5; Index A024 (“Plaintiffs do not dispute that Ford may have generated and/or collected the documents to prepare for litigation. However, Ford did so for **prior** litigation – not this case.”) (emphasis in original.) Accordingly, before the March 15<sup>th</sup> hearing it was well known that: 1) the documents sought were classically protected by the work-product doctrine, the disclosure of which, could only be had if Plaintiffs established they had a substantial need for the materials in the preparation of the case and that they were unable without undue hardship to obtain the substantial equivalent of the materials by other means; and 2) the remaining issue for the trial court to decide was whether this classic work-product retained its protected status after the case for which it was generated ended.

Respondent initially ordered a privilege log, and Relator complied. When Plaintiffs challenged the adequacy of the privilege logs, Relator prepared to defend them. These were the facts and issues presented to the Respondent at the March 15<sup>th</sup> hearing and, by summarily ordering the production of every document listed in Relator’s privilege logs, the Respondent held that the work-product protection, once attached to the consulting/design analysis materials, was lost after

the termination of the cases for which it was generated. The trial court's ruling is supported by the following: 1. not considering other evidence, testimony, additional briefing, or an in-camera review at the March 15<sup>th</sup> hearing and not requiring Plaintiffs to show a substantial need. The substantive issue of Ford's burden of proof and Plaintiffs' challenge of Ford's privilege (and adequacy of Plaintiff's challenge) was not before the court. Accordingly, a record of the March 15<sup>th</sup> hearing is not necessary for this Court to rule on the same legal issue that was once before (and ruled upon) by the trial court.

**B. Relator's privilege logs were adequate.**

Plaintiffs contend the documents identified in the privilege logs were not adequately detailed. Although this is yet another attempt to blur the sole issue, Relator will briefly address this irrelevant contention. As shown in Relator's Response to Plaintiffs' Motion to Compel Discovery and For Sanctions (Ex. J; Index A0107-A0117), the privilege logs produced on January 15, January 22, and again on February 23 contained adequate information for the purposes of this Respondent's Order of November 17<sup>th</sup>. (A copy of the Privilege Logs are attached as Ex. H.)

The items identified by the privilege logs provided Plaintiffs with adequate descriptions of the documents and the privilege and/or protection claimed. In Atchison, Topeka and Santa Fe R.R. Co. v. O'Malley, 898 S.W.2d 550 (Mo. banc 1995), the Missouri Supreme Court relied on Federal Rule of Civil

Procedure 26 when describing the parameters of a privilege log. The O'Malley Court noted that “[d]etails concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected . . . .” O'Malley, 898 S.W.2d at 554 (citing Committee Notes on Use to Rule 26(b)(5)).

Relator’s privilege logs contained voluminous documents, but nonetheless, Relator provided the matter name, the document type, the date, a description/purpose, the author, the recipient for each document, and the privilege and/or protection claimed. (Ex. J; Index A0113-A0114.) On February 23, 2004, Relator supplemented the original privilege logs, and the updated privilege logs contained even greater detail.<sup>3</sup> (Id.) This detailed information adequately

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<sup>3</sup> Plaintiffs have argued Relator’s privilege logs should have included “whether the accident involved likely litigation, the position of the individuals preparing the reports, whether it had resolved, whether the person who inspected the vehicle had ever appeared as an expert for Ford in Bronco II cases, whether the communication was for the purpose of seeking legal advice, whether the information was shared with anyone else outside of litigation, or that the investigation was outside of Ford’s general duty of post sale monitoring of its products for safety.” See Ex. I at pp. 8-9; Index

identified the documents in question. Revealing any more information would divulge the very information Relator seeks to protect. See Rule 26(b)(5) (when claims of privilege or work product are made, the party shall describe the nature of the documents, “without revealing information itself privileged or protected . . .”).

**C. Relator did not waive its work product protection.**

Plaintiffs contend that Respondent’s Order of March 18, 2004 was based on Relator’s failure to timely comply with Respondent’s Order of November 17, 2003. At the March 15<sup>th</sup> hearing, Respondent was presented with Relator’s Response to Plaintiffs’ Motion to Compel Discovery and for Sanctions (Ex. J.), which illustrated, in detail, the great lengths taken by Relator to produce complete logs.

Relator will not rehash the monumental effort undertaken by Relator in order to provide the subject privilege logs but rather refers this Court to its Response to Plaintiffs’ Motion to Compel Discovery and For Sanctions. (Ex. J.) By way of example, however, Relator’s task required: the manual page-by-page review of 783 lawsuit files and 300 claims files (Ex. J at p. 3; Index A0108); the

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A099-A0100.) Plaintiffs fail to cite any decision requiring such a detailed privilege log – a privilege log which would most certainly reveal the very information one would seek to protect – and the preeminent Missouri case on privilege logs, O’Malley, supra, does not require such detail.

inquiry of numerous outside law firms and engineering consultants (Ex. J at p. 3; Index A0108); the retention of an outside law firm to review files, which had twelve people working ten (10) hour days (Ex. J at p. 4; Index A0108-A0109); and a second review to capture information inadvertently missed in the original review. (Ex. J at p. 7; Index A0110.)

Plaintiffs characterize Relator's privilege logs as being over two and half months late. Put in context, however, Plaintiffs' contention is overreaching. Respondent's order of November 17, 2003 (Ex. F) gave Relator approximately 18 days over the Thanksgiving holiday in which to complete the daunting task described above. Due to the complexity of the task, Relator asked Plaintiffs for two separate extensions, which set the deadline for January 15, 2004. Plaintiffs agreed. By January 15, 2004, Relator's counsel requested an extension up to January 30, 2004. (Attached at A0117 is a January 15, 2004 letter memorializing the conversation in which Ford's counsel indicated the privilege logs for Interrogatory No. 38 and Request for Production No. 34 could be provided by January 30, 2004.) On or about January 20, 2004, Plaintiffs' counsel refused to grant Ford additional time. In doing so, Plaintiffs put Ford in the position of producing privilege logs before Ford was able to complete its inquiry of outside counsel and engineering firms on the issues. Nevertheless, Ford produced privilege logs for Interrogatory No. 38 and Request for Production No. 34 on

January 22, 2004. Accordingly, Plaintiffs' "contention" that the privilege logs were over two and a half months late is misleading given the above circumstances.

Although irrelevant to the instant issue, Exhibit J illustrates Relator provided adequate privilege logs in a timely fashion under the circumstances and did not act with disrespect or contempt toward Plaintiffs or Respondent.

**D. Relator did not misstate the law on the work-product doctrine.**

Plaintiffs incorrectly state Relator's position regarding work-product protection. According to Plaintiffs, "Ford throughout its briefing has continually confused whose burden it is to initially show protection. (Respondent's Brief at 42.) This statement is inaccurate. Ford has maintained that the privilege logs provided adequate information to show the subject documents were protected by the work-product doctrine. In fact, as discussed above, Plaintiffs essentially conceded in their first Motion to Compel that the subject documents were prepared in anticipation of litigation. Since Relator established this fact, the burden shifts to the Plaintiffs to show a substantial need for the protected documents and an inability to obtain the substantial equivalent without undue hardship. See Rule 56.01(b)(3); State ex re. Safeco Nat. Ins. Co. of America v. Rauch, 849 S.W.2d 632, 635-36 (Mo. Ct. App. 1993). Relator's position has never swayed from this basic and established rule of law.

#### **IV. Conclusion**

Plaintiffs' initial Motion to Compel is the key to understanding the procedural and substantive background of this Writ. Therein, Plaintiffs essentially conceded the documents and information they sought were prepared in anticipation of litigation. Plaintiffs were aware they sought consulting expert materials that are classically protected work-product materials. Accordingly, Plaintiffs were left with one argument – any work-product protection given to the documents and information was removed after the termination of the case for which it was generated.

Despite the collateral issues raised by Plaintiffs, Respondent summarily overruled Relator's work-product objections based on the sole legal issue before this Court. Respondent's ruling on Relator's work-product privilege objections was inconsistent with Missouri law and the majority view. Accordingly, Relator's Writ should be made permanent.

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Signature of this filing certifies a copy of the foregoing was sent via facsimile and mailed, by U.S. Mail, postage prepaid, this 10<sup>th</sup> day of September, 2004, to:

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