

IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

FILED  
OCT 15 2009  
MOLLY LIVINGSTON  
Clerk of Clinton Co. Circuit Court

WILLIAM KEMPER, et al. )  
 )  
Plaintiffs )  
 )  
v. )  
 )  
PRIME TANNING CORP., et al. )  
 )  
Defendants. )

Case No. 09CN-CV00333

**PLAINTIFFS' SUGGESTIONS IN OPPOSITION TO  
DEFENDANT PRIME TANNING CORP.'S  
MOTION TO COMPEL DISCOVERY RESPECTING VENUE ISSUES**

On October 9, 2009, Defendant Prime Tanning filed its motion to compel discovery and noticed the motion for hearing on October 16, 2009 – the same day that Prime’s venue motion is to be heard. Prime then filed and served suggestions in support of its motion to compel on October 13, 2009 – three days before the noticed hearing. Prime Tanning’s motion to compel is premature and plaintiff should be granted additional time to respond to the motion. The motion to compel should not be heard on October 16, 2009.

If Prime’s motion to compel is heard on October 16, 2009, it should be denied. Prime seeks written correspondence between plaintiffs’ counsel and consulting experts Bob Bowcock and Erin Brockovich, including any retainer agreements. Missouri law is clear that such items are privileged and not discoverable unless and until these consulting experts are designated as testifying experts:

Rule 56.01(b)(3) provides that information prepared by an expert with whom a party’s attorney has consulted is shielded by work product privilege. Brown v. Hamid, 856 S.W.2d 51, 54 (Mo. banc 1993). However, Rule 56.01(b)(4) provides that when a party designates an expert as a witness at trial, that party must disclose the facts and opinions

to which the expert is expected to testify. Thus, designation of an expert as a trial witness begins a process of waiving privilege.

State ex rel. American Economy Ins. Co., v. Crawford, 75 S.W.3d 244, 245-46 (Mo. banc 2002).

Plaintiffs have done nothing to waive the privilege with regard to communications with these consulting experts. None of the communications from plaintiffs' counsel to these consulting experts have been divulged to third parties – and these consulting experts have not been designated as testifying experts. The communications between plaintiffs' counsel and consulting experts are classic work product material because they contain thoughts, impressions and strategy regarding these cases. Therefore, Prime is not entitled to discover written communication or agreements between plaintiffs' counsel and consulting experts.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that on this 15<sup>th</sup> day of October, 2009, copies of the foregoing were transmitted via first class U.S. mail, with proper postage affixed, to:

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A handwritten signature in cursive script, appearing to read "Brian M. ...", is written over a horizontal line.