IN THE SUPREME COURT OF MISSOURI

SC95606

STATE EX REL. JASON H. MALASHOCK,

Relator,

vs.

THE HONORABLE MICHAEL T. JAMISON,

Respondent.

On Petition for Writ of Prohibition
From St. Louis County
Circuit Court No. 14SL-CC01034

Honorable Michael T. Jamison, Judge Presiding

RESPONDENT'S BRIEF

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The Honorable Michael T. Jamison

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SUPPLEMENTAL STATEMENT OF FACTS

Relator Jason Malashock fails to state facts material to the issues set forth in the Writ of Prohibition. Therefore, pursuant to Rule 84.049(f), counsel submits a supplemental statement of facts.

A. BACKGROUND

On March 20, 2013, Jason Malashock was injured when he rolled his 2013 Polaris Ranger XP 900 while driving it for the first time on a farm owned by his friend Jon Serkes. On December 23, 2013, Malashock filed suit against three Defendants: (1) Polaris Industries, Inc. ("Polaris"); (2) Chesterfield Valley Power Sports, Inc. ("CVPS"); and (3) FTDCABS.com ("FTD"). (Appendix, A1-30). Malashock settled his claims against Polaris in July of 2015 and, to date, FTD has not appeared and has not filed any pleading in response to Malashock's lawsuit. Therefore, the sole Defendant participating in discovery is CVPS.

On February 25, 2014, CVPS served Relator with its First Set of Interrogatories which included the Interrogatory No. 5 regarding disclosure of experts. (Appendix, A31) In response to Interrogatory No. 5, Relator stated that he would endorse his experts in accordance with the scheduling order set by the court. (Appendix, A31-46).

In accordance with a scheduling order agreed to by the parties and entered by the trial court, Malashock was required to disclose his retained and non-retained expert witnesses on or before September 1, 2015. On September 1, 2015, in compliance with the Court's Order, counsel for Malashock sent an e-mail to counsel for CVPS. (Appendix, A47-80)

The "Subject" of the e-mail was "Malashock Expert Disclosures". Attached to the e-mail were Malashock's expert trial witness designations pursuant to Rule 56.01(b)(4). (Appendix, A47) In the body of his e-mail, counsel for Malashock also provided available dates for the depositions of several of the witnesses and stated that he would be sending the remaining experts' availability by the end of the week, if not the next day. Counsel also suggested a conference call be held on Thursday or Friday of that week in order to lock in deposition dates for all of the experts. (Appendix, A47)

In his e-mail, counsel for Malashock designated four retained expert trial witnesses, five non-retained expert witnesses, and reserved the right to elicit lay and expert testimony from any witness endorsed by CVPS. The four retained expert trial witnesses designated by Malashock were Herb Newbold (Engineering Expert and Accident Reconstructionist), Gerald Rosenbluth (Engineering Expert), Michelle Hoffman (Biomechanical Expert), and Robert J. Cunitz (Human Factors Expert). (Appendix, A47-80)

With regard to all four witnesses, counsel for Malashock provided each designated expert's name, address, occupation, place of employment, curriculum vitae, along with a one to two page typewritten summary of the general nature of the subject matter and opinions on which each of the four retained designated trial witnesses was expected to testify along with their hourly rate. (Appendix, A47-80).

B. **Expert Herbert Newbold**

The facts reveal that on July 17, 2014, Relator's retained expert, Mr. Herbert Newbold and his assistant Tim Eakins visited the scene of the accident (Serkes farm) and drove the subject vehicle at the location where Malashock's injury occurred, conducted their own investigation, and obtained certain facts in connection with their inspection. (Appendix, A49, A83-84, A86-89). After completing their inspection and investigation of the accident scene on July 17, 2014, Mr. Newbold and/or his assistant transported the subject vehicle to Mr. Newbold's place of business located in Louisville, Colorado. (Appendix, A83-84). Jon Serkes, the owner of the farm where the accident occurred, testified in his deposition regarding observations he made of Mr. Newbold and Mr. Eakins during their inspection on July 17, 2014. (Appendix, A86-89)

Mr. Serkes testified that he observed them operate the subject vehicle on the tract where the accident happened, that he saw them operate the vehicle quite a few times and that they were present on his farm for probably half a day. Mr. Serkes testified that Malashock's lawyers were also present that day. Mr. Serkes testified that Newbold and Eakins had helmets, cameras, everything and said that they looked like they were going to NASCAR. Mr. Serkes further testified that he saw Newbold and Eakins lose traction while operating the subject vehicle. Mr. Serkes described that they were going faster and faster to see what speed it would take to lose traction. Mr. Serkes testified that Newbold and Eakins drove the vehicle back and forth with all different permeations. Mr. Serkes testified to his belief that Newbold and Eakins had cameras mounted on the vehicle itself. He testified to his belief that they had computers hooked up to the vehicle and described it as a very technical approach to try to recreate the accident. (Appendix, A86-89).

On September 8, 2015, counsel for Malashock and counsel for CVPS participated in a conference call in an effort to lock down deposition dates for Plaintiff's four designated retained expert trial witnesses. Counsel for Malashock made no mention of his intention to "de-endorse" Newbold.

After Relator designated his expert trial witnesses, Relator also permitted conferences to occur between Newbold and two of Relator's other retained experts, Gerald Rosenbluth and Michelle Hoffman. (Appendix, A96-105). The conferences continued even after Newbold was supposedly "de-endorsed". In fact, on September 30, 2015, 15 days after the so-called attempt to "de-endorse", there was a conference between Newbold, Rosenbluth and counsel. (Appendix, A96).

On September 15, 2015, counsel for Malashock sent an e-mail to counsel for CVPS. (Appendix, A81-82). Attached to that e-mail was a "Revised Designation" for witness Rosenbluth. According to the e-mail, the only change in Rosenbluth's designation was in the first paragraph. Malashock's "Revised Designation" for Rosenbluth inserted the following language **"which included a quasi-static quantification of the minimum force applied by the roof structure on Jason's arm."** (Appendix, A82) Interestingly, Relator's designation of Herb Newbold contained the following language under the second bullet point **"The forces created when the 2013 Polaris Ranger XP 900 with the FTD roof struck Jason's arm."** (Appendix, A49).

In his September 15, 2015 e-mail to counsel for CVPS, counsel for Malashock also stated that he had "de-endorsed" Herb Newbold leaving them with three retained and five non-retained experts. (Appendix, A81). In other words, it appears that Malashock

decided to "de-endorse" Newbold, but have Rosenbluth testify to one of the opinions for which Newbold was originally designated.

Malashock's other three retained experts were deposed on October 29, 2015, November 3, 2015, and November 4, 2015. On November 4, 2015, during the deposition of Mr. Rosenbluth, counsel for CVPS requested a copy of Mr. Newbold's file materials, which included the video that Mr. Newbold took during one of the inspections. (Appendix, A90-95). In response, counsel for Malashock stated that he would produce the video that was taken by Newbold, but had to think about producing anything else because Mr. Newbold was only a "consultant" because they decided not to do an accident reconstruction. (Appendix, A92). It is noteworthy that Newbold had been designated as an accident reconstructionist one month earlier.

Mr. Rosenbluth was also questioned during his deposition about Mr. Newbold visiting the scene of the accident. Mr. Rosenbluth concurred that Mr. Newbold visited the scene and probably took photographs. Mr. Rosenbluth also admitted that he had spoken to Mr. Newbold about the case and had looked at some of Newbold's photos. (Appendix, A91-95) Despite counsel for Malashock's assertions that they "de-endorsed" Mr. Newbold because they decided not to do an accident reconstruction, it is clear from Mr. Newbold's September 1, 2015 designation that he had driven and inspected the vehicle at the location where Malashock's injury occurred and not only intended to provide factual testimony with regard to his inspection, but also as to the opinions he had reached regarding accident reconstruction. (Appendix, A49, A90-95)

Since Malashock had revised Mr. Rosenbluth's original designation to include testimony which was set forth in Newbold's designation, counsel for CVPS expected Rosenbluth to produce Newbold's photos, videos, data, and inspection findings during Rosenbluth's deposition. As previously stated, during Rosenbluth's deposition, counsel for CVPS made a verbal request for Newbold's file materials. Said request was made on November 4, 2015. (Appendix, A90-95)

On November 20, 2015, counsel for CVPS sent Malashock a Fifth Request for Production requesting a complete copy of Newbold's file regarding this matter, as well as all videos taken by Newbold during the inspection at the Serkes farm, and all photographs, measurements, and evidence gathered by Mr. Newbold, or his assistant during the inspection. (Appendix, A106-109)

On December 1, 2015, counsel for CVPS sent an e-mail to counsel for Malashock inquiring as to whether they would produce Mr. Newbold's file materials since they indicated that they were unsure when the request was originally made during Mr. Rosenbluth's deposition. (Appendix, A110-A111) On December 1, 2015, counsel for Malashock advised that they would not produce Mr. Newbold's entire file because he was their consultant and the material was "privileged". (Appendix, A110-111).

The very next day, December 2, 2015, counsel for CVPS then filed a Motion to Amend Scheduling Order. (Appendix, A112-115). The primary basis for the Motion to Amend was to address the need for Mr. Newbold's file materials and deposition before CVPS disclosed its experts. (Appendix, A112-115). Counsel for CVPS also filed a Notice to Take Video Deposition of Mr. Newbold on December 10, 2015 setting his

deposition on December 17, 2015 and requesting that he produce his entire file materials, among other things identified in the Notice. (Appendix, A116-117) On December 11, 2015, counsel for CVPS filed its Memorandum in Support of its Motion to Amend Scheduling Order. (Appendix, A118-A122)

C. Trial Court Hearings and Orders

On Friday, December 11, 2015, Respondent conducted a hearing regarding CVPS's Motion to Amend Scheduling Order as well as other discovery matters. At the hearing, Respondent indicated that he thought that Relator had waived the privilege with regard to Mr. Newbold's file materials, but allowed the parties until Monday, December 14, 2015 to submit any additional authority along with proposed Orders. (Appendix, A123). In compliance with the Court's December 11, 2015 Order, both parties submitted additional Memorandums and proposed orders on December 14, 2015. (Appendix A124-A135)

On Tuesday, December 15, 2015, Respondent correctly entered the Order submitted by CVPS granting CVPS's Motion. As stated in the Court's Order, Relator waived the work product privilege with regard to Mr. Newbold's file materials and Relator was ordered to produce Mr. Newbold for deposition. (Appendix, A136-137).

On December 21, 2015, counsel for Malashock served objections to CVPS's Fifth Request for Production and objected to producing any records related to Mr. Newbold on the basis that they were protected by the attorney client privilege, work product doctrine, and consulting expert privilege. (Appendix, A138-140) It is noteworthy that Relator's objections were filed after the Court already entered the discovery Order on December

15, 2015 in which Respondent already determined that Relator waived the work product privilege.

On December 23, 2015, Malashock filed a "Motion to Reconsider" Respondent's December 15, 2015 Order. (Appendix, A141-146) Counsel for CVPS also filed a Response in Opposition to Malashock's Motion to Reconsider. (Appendix, A147-151). On March 2, 2016, Respondent entertained oral argument for a second time regarding the same issue. An Order was entered on March 2, 2016 stating that Malashock's Motion to Reconsider the Court's December 15, 2015 Order was called, heard, and submitted. (Appendix, A152) The Court also ordered the parties provide proposed Orders by close of business on Friday, March 4, 2016. (Appendix, A152)

On March 14, 2016, Respondent entered an Order finding for a second time that Malashock waived his work product privilege as to Newbold's file materials and denied Malashock's "Motion to Reconsider". Respondent also ordered Malashock to produce Mr. Newbold for deposition within 30 days. (Appendix, A153-156)

Despite Relator's accusations, Respondent has not acted in excess or an abuse of his jurisdiction. Respondent's Orders were in compliance with Missouri Supreme Court precedent as well as the Missouri Rules of Civil Procedure. As such, Respondent's Orders must stand and the Court should dissolve the Preliminary Writ and dismiss Relator's Petition outright.

POINT RELIED ON

I. Relator is not entitled to an order prohibiting Respondent from enforcing his orders of December 15, 2015 and March 14, 2016 because Respondent correctly followed the Missouri Supreme Court Rules and precedent and ruled that Relator waived his work product privilege because he clearly designated his expert witness pursuant to Rule 56.01(b)(4), and also disclosed the general nature of his expert's opinions. (Response to Point Relied On I).

State ex rel. Tracy v. Dandurand, 30 S.W.3d 831 (Mo. *banc* 2000)

American Economy Ins. Co. v. Crawford, 75 S.W.3d 244 (Mo. *banc* 2002)

State ex rel. Crown Power & Equip. Co., L.L.C. v. Ravens, 309 S.W.3d 798 (Mo. 2009).

Supreme Court Rule 56.01(b)(4)

Supreme Court Rule 56.01(b)(3)

ARGUMENT

Standard of Review

A writ of prohibition does not issue as a matter of right. *State ex rel. K-Mart Corp v. Holliger,* 986 S.W.2d 165, 169 (Mo. banc 1999). Rather, it is discretionary and will lie only to prevent "an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." *State ex. Rel. Linthicum v. Calvin,* 57 S.W.3d 855, 857 (Mo. banc 2001). A writ of prohibition is an extraordinary remedy that is to be used "with great caution and forbearance and only in cases of extreme necessity." *State ex rel. Miss. Lime Co v. Mo. Air Conservation Comm'n,* 159 S.W.3d 376, 383 (Mo. App. 2004) (quoting *State ex rel. Douglas Toyota III, Inc. v. Keeter,* 804 S.W.2d 750, 752 (Mo. banc 1991). The writ relator bears the burden of establishing that the respondent exceeded its jurisdiction and that no adequate remedy is available to him by way of appeal. *Miss. Lime Co.,* 159 S.W.3d at 383.

A trial court is allowed broad discretion in the control and management of discovery. *State ex. Rel. Lichtor v. Clark,* 845 S.W.2d 55, 59 (Mo. App. 1992). It is only for an abuse of discretion amounting to an injustice that the appellate courts will interfere. *Id.*

In this matter, the Honorable Court should dissolve the preliminary writ and dismiss Relator's Petition because Respondent The Honorable Michael S. Jamison did not abuse his discretion in entering the discovery orders of December 15, 2015 and March 14, 2016. Respondent's Orders were entered in accordance with the applicable Missouri Rules of Civil Procedure and legal precedent.

I. Relator is not entitled to an order prohibiting Respondent from enforcing his orders of December 15, 2015 and March 14, 2016 because Respondent correctly followed the Missouri Supreme Court Rules and precedent and correctly ruled that Relator waived his work product privilege because he clearly designated his expert witness pursuant to Rule 56.01(b)(4), and also disclosed the general nature of his expert's opinions. As a result, Relator's designated expert is subject to the rules of discovery. (Response to Point Relied On I).

Relator's Orders requiring Respondent to produce for deposition his designated expert witness (Herbert Newbold) for deposition is not inconsistent with this Court's decisions in *State ex rel. Tracy v. Dandurand,* 30 S.W.3d 831 (Mo. *banc* 2000); *American Economy Ins. Co. v. Crawford,* 75 S.W.3d 244 (Mo. banc 2000), and *State ex rel. Crown Power Equip Co., L.L.C. v. Ravens,* 309 S.W.3d 798 (Mo. 2009), and with the provisions of Supreme Court Rule 56.01(b)(4). The exhibits and evidence submitted herewith establish that Respondent Honorable Michael S. Jamison correctly determined and ordered not once, but twice, that Relator waived the work product privilege as to witness, Herbert Newbold. As a result, Respondent's Orders must stand and this Honorable Court should dissolve the preliminary writ and dismiss Relator's Petition outright.

The Respondent's Orders must stand for two reasons: (1) Relator waived the work product privilege with regard to expert witness, Herbert Newbold, when he was designated as a retained expert pursuant to Rule 56.01(b)(4) because the Missouri Rules of Civil Procedure and Missouri law do not require both a designation and disclosure of all opinions to waive the privilege; and (2) Relator waived the work product privilege with respect to

witness, Herbert Newbold, because his designation made on September 1, 2015 pursuant to Rule 56.01(b)(4) did include the general nature of his opinions and is substantially similar to the designations made of Relator's other retained expert witnesses. This is also evidenced by the fact that when Relator attempted to "de-endorse" Expert Newbold, Relator concurrently supplemented his expert designation of Gerald Rosenbluth to include one of the opinions that Newbold had been designated to address. (Appendix, A81-82)

At issue in this writ proceeding is whether Relator can admittedly designate an expert witness for trial pursuant to Rule 56.01(b)(4)(a), have that designated expert continue working on the case, share facts and information with Relator's counsel and other designated experts, but then "de-endorse" the expert and claim discovery cannot be had because that expert is now a consultant. The answer to this question is, no.

The Missouri Rules of Civil Procedure do not require a party to identify non-testifying experts (i.e., consulting experts) during discovery; it requires identification of retained and non-retained testifying experts only. *See,* Rule 56.01(b)(4)-(5); *see also State ex rel. Richardson v. Randall,* 660 S.W.2d 699, 701 (Mo. banc 1983) ("[I]n a civil case[,] a litigant is not required to reveal the name of experts it does not intend to call."). "[F]acts known and opinions held by an expert are, until the expert is designated for trial, the work product of the attorney retaining the expert." *State ex rel. Tracy v. Dandurand,* 30 S.W.3d 831, 834 (Mo. banc 2000).

In the instant matter, there is no dispute that Relator designated Mr. Newbold in compliance with Rule 56.01(b)(4)(A). This designation occurred on September 1, 2015. (Appendix A47-50). Mr. Newbold is not Relator's consultant.

There was nothing in Mr. Newbold's expert witness designation indicating that Relator was contemplating or possibly de-endorsing Mr. Newbold. There was no mention of Mr. Newbold being a "consulting" witness. There was no reservation made in Newbold's designation. To the contrary, the only reservation made by Relator in his September 1, 2015 designation was his reservation of the right to elicit lay and expert testimony from any witness endorsed by CVPS. (Appendix, A80)

In his September 1, 2015 e-mail, Relator's counsel indicated that he would be sending the remaining experts' availability to counsel for CVPS by the end of the week, if not the next day. He further suggested his interest in a conference call on Thursday or Friday of that week in order to lock in dates. (Appendix, A47). Again, Relator's counsel did nothing on September 1, 2015 to treat Mr. Newbold any differently than the other three retained expert trial witnesses and made no mention in his e-mail of any uncertainty as to Mr. Newbold.

As stated in Respondent's March 14, 2016 Order, during the hearing on March 2, 2016, Relator conceded: (1) that he "designated" four retained witnesses on September 1, 2015 (Newbold, Hoffman, Cunitz and Rosenbluth); (2) that his September 1, 2015 "designations" of Hoffman, Cunitz and Rosenbluth waived the work product privilege as to those witnesses; and (3) that, under Missouri law, his September 1, 2015 "designations" of Hoffman, Cunitz and Rosenbluth precluded him from later de-designating those three witnesses without waiving the work product privilege. (Appendix, A153-156)

The record is clear that Relator's designation of Mr. Newbold occurred on September 1, 2015 pursuant to Rule 56.01(b)(4)(A). As a result, "the bell has been rung

and cannot be unrung". *See, State ex rel. American Economy Ins. Co. v. Crawford,* 75 S.W.3d 244 (Mo. banc 2002).

Before addressing the arguments raised by Relator, it is important to note and address the discovery rules at issue and set forth in Rule 56.01(b)(4). (Appendix A157-160)

Rule 56.01(b)(4)(a) states in relevant part as follows:

> Trial preparations: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of Rule 56.01(b)(1) and acquired or developed in anticipation of litigation or for trial may be obtained only as follows:
>
> (A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial by providing such experts name, address, occupation, place of employment and qualifications to give an opinion, or if such information is available on the expert's curriculum vitae, such curriculum vitae may be attached to the interrogatory answers as a full response to such interrogatory, and to state the general nature of the subject matter on which the expert is expected to testify, and the expert's hourly deposition fee.

Missouri law provides that discovery of facts known and opinions held by an expert are, **until the expert is designated for trial**, the work product of the attorney retaining the expert. (emphasis added). *State ex rel Tracy v. Dandurand,* 30 S.W.3d 831, 834 (Mo. *banc*

2000) *citing* Mo. R. Civ. Pro 56.01(b)(3). Once the retaining attorney decides to use the expert at trial and discloses him or her as a witness, ***the expert is subject to discovery.*** *Id.* (emphasis added); *citing* Mo. R. Civ. P. 56.01(b)(4). In *Tracy,* this Court specifically stated and held "all material given to a testifying expert **must**, if requested, be disclosed. This indeed is a 'bright line' rule, as our Rule 56.01(b)(4) requires. It is clear, understandable, and does not require the application of a multi-prong test." *Tracy,* 30 S.W.3d at 836. (emphasis added).

Relator argues, however, that since Mr. Newbold's so-called "opinions" were not provided with the designation, he was properly "de-endorsed" before his deposition, and therefore, the privilege has not been waived. Relator's argument is fatally flawed. Rule 56.01(b)(4)(A) and the relevant case law provide that an expert is subject to discovery after he or she is designated. Contrary to Relator's argument, Missouri law does not require both a designation and disclosure of opinions to be subject to the rules of discovery.

Relator relies on *State ex rel. Tracy* v. *Dandurand,* 30 S.W.3d 831 (Mo. *banc* 2000) for his argument that there must be both the designation of an expert and a disclosure of a retained expert's opinions for there to be a waiver of the work product privilege. This is a misreading of the opinion, and inconsistent with this Court's opinion in *State ex rel. American Economy Ins. Co. v. Crawford,* 75 S.W.3d 244 (Mo. *banc* 2002).

Further, Relator relies on dicta in *Tracy* in support of his argument. Specifically, Relator argues on page 9 of his Brief that according to *Tracy,* a party may withdraw an expert's designation, and the expert will not be subject to discovery, so long as the expert's opinions have not already been disclosed. Relator then cites to the following excerpt:

> The expert witness is wholly in control of the party who retained him or her. If the party's attorney, in preparing the expert for deposition, finds that privileged documents have been mistakenly provided to the expert, *the attorney presumably has the option of withdrawing the expert's protection as to that retained expert, since the expert will not be called for trial.*

Tracy, 30 S.W.3d at 835-36 (emphasis added).

This paragraph and excerpt of the *Tracy* opinion was discussed in *American Economy.* In *American Economy,* this Court dismissed the notion that there can be no waiver until the expert's deposition is taken. This Court stated as follows: "Under Jackson's interpretation of this part of the opinion, no waiver can occur until the expert's deposition is taken. This is a misreading of the opinion." *American Economy,* 75 S.W.3d. at 246.

In *American Economy,* this Court held that the plaintiff waived the work product privilege and the waiver was effective despite the plaintiff's re-designation of the expert as a non-testifying consultant. The same is true here.

In *American Economy,* the court clearly stated that 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. *Id.* at 246; *citing Brown v. Hamid,* 856 S.W.2d 51, 54 (Mo. *banc* 1993). Thus, ***designation of an expert as a trial witness begins a process of waiving privilege.*** *Id.* (emphasis added). The court went on to state the following:

> Here, as in in *Hamid* and *Tracy,* the disclosure occurred pursuant to the rules of discovery while the expert witness was designated as a testifying expert. As a result, Jackson has waived work product privilege for Mr. Loumiet's report, and re-designation of Mr. Loumiet as a consulting rather than testifying expert at this point is ineffective to invoke the protection of Rule 56.01(b)(3). As this Court concluded in *Tracy,* "The bell has been rung and cannot be unrung." *id.,* and American Economy must be permitted to explore the expert's opinion during deposition.

American Economy, 75 S.W. 3d at 246.

Relator argues that *American Economy* is distinguishable from the instant case because there has been no "disclosing event" either before or after the designation. It is Relator's position that in *American Economy* this Court determined that the work product privilege will only be waived when a "disclosing event" has occurred in which an expert's opinions have been disclosed, not just the information provided by Rule 56.01(b)(4). Although this Court stated in in *American Economy* that "designation of an expert as a trial witness begins a process of waiving privilege", Relator questions how the designation of the expert witness can be both the beginning and sole event that waives the privilege. *See, American Economy,* 75 S.W.2d at 246.

However, Relator cannot quarrel with the cited language in *American Economy.* There is no dispute that this Court has already determined that the designation of an expert as a trial witness begins the waiver of privilege. This is consistent with the unambiguous language set forth in Rule 56.01(b)(4). Rule 56.01(b)(4) does not require both a

designation and a "disclosing event" in order for the designated expert to be subject to the rules of discovery. Had the Missouri legislature intended such a rule, it would be so stated. Rule 56.01(b)(4) is clear and ambiguous with regard to permissible discovery for a designated expert. Here, Expert Newbold was clearly designated pursuant to Rule 56.01(b)(4), and is now subject to the permissible scope of discovery as stated in the Rule.

Relator also relies upon *State ex rel. Crown Power and Equipment Co., LLC v. Ravens,* 309 S.W.3d 798 (2009) in support of his argument that there must be both a designation of an expert and disclosure of all of his/her opinions to waive the designating party's work product privilege. Respondent respectfully disagrees. In fact, the holding in *Crown* supports Respondent's position and decision that Relator has waived the work product privilege as to Mr. Newbold and his file materials.

In *Crown,* the issue in the writ proceeding was whether an expert witness who was informally produced for his deposition because he was going to testify at a pretrial hearing on venue but **was not designated to testify as an expert witness at trial** may be compelled to disclose material provided to him unrelated to the venue issue. *Id.* at 799. (emphasis added). The writ was filed to prevent the trial court from compelling relator's expert witness' testimony and production of his entire file. *Id.*

In *Crown,* the court discussed that since the expert was not designated as a testifying witness for trial, he could not be compelled to disclose all materials provided to him. *Id.* at 800-01. The court also reiterated the applicable discovery rules set forth in *State ex rel. Tracy v. Dandurand,* which states: "The discovery of facts known and opinions held by an expert are, ***until the expert is designated for trial***, the work product

of the attorney retaining the expert." 30 S.W.3d 831, 834 (Mo. banc 2000) (emphasis added).

The Court in *Crown* noted that the expert was not designated as a testifying witness for trial; therefore, he could not be compelled to disclose all materials provided to him. The court went on to reference *Tracy,* in which the court stated the "bright-line rule that '[a]ll materials given to a testifying expert must, if requested, be disclosed.'" In *Crown,* the expert was not a "testifying expert" as defined by Rule 56.01(b)(4) because he was never designated as an expert to testify at trial. *Id.* at 801. Instead, the expert had a limited role to offer opinions at a hearing regarding a motion for change of venue. As a result, the court held that the decision in *Tracy* that experts designated to testify at trial must produce all materials given to him if requested, was not modified. *Id.*

In the instant matter, Relator concedes that Mr. Newbold was designated to testify at trial pursuant to Rule 56.01(b)(4). (Appendix, A153-A156) Further, counsel for CVPS requested Mr. Newbold's expert file materials via the rules of discovery, and sent a Notice to Take Video Deposition requesting that Mr. Newbold produce all pertinent materials at his deposition. (Appendix, A106-109, A116-117) As a result, the "bright-line rule" set forth in *Tracy* applies. Respondent's rulings in this case are consistent with Rule 56.01(b)(4) and legal precedent. As such, all materials counsel provided to Mr. Newbold must be produced, and Mr. Newbold is subject to discovery and deposition.

Relator also argues that Respondent mistakenly determined that Mr. Newbold's opinions had, in fact, been disclosed as part of Relator's designation. Essentially, Relator argues that the designation of Mr. Newbold is different from the other designated experts

because Mr. Newbold's includes the general nature of the subject matter on which he is expected to testify whereas the designations of Relator's other three (3) experts also include their expert opinions.

It is undisputed and Relator must concede that he designated four retained experts on September 1, 2015 (Newbold, Hoffman, Cunitz and Rosenbluth). Relator also conceded that his September 1, 2015 designations of Hoffman, Cunitz and Rosenbluth waived the work product privilege as to those witnesses. (Appendix, A153-156) Relator also conceded that, under Missouri law, his September 1, 2015 designations of Hoffman, Cunitz and Rosenbluth precluded him from later de-designating those three witnesses without waiving the work product privilege. (Appendix, A153-156)

Pursuant to Rule 56.01(b)(4)(A), each of the Relator's designations included the expert's name, address, occupation, place of employment, qualifications and/or curriculum vitae, and the general nature of their opinions or subject matter on which the expert was expected to testify. (Appendix, A47-80)

Further, Relator's designation of Mr. Newbold included the general nature of his expert opinions. Relator disclosed that Mr. Newbold would provide fact testimony about his July 2014 inspection as well as expert opinions on ***subject matters including, but not necessarily limited to***:

* The range of speeds the 2013 Polaris Ranger XP 900 with the FTD roof was traveling when Jason was injured and its performance at such speeds.

* The forces created when the 2013 Polaris Ranger XP 900 with the FTD roof structure struck Jason's arm.

* The performance and factors impacting the performance of the 2013 Polaris Ranger XP900 with the FTD roof on which Jason was injured.

(Appendix, A49-50)

Similarly, Relator disclosed that Ms. Hoffman would provide expert testimony and opinions ***on subject matters including, but not necessarily limited to:***

* The subject FTD aluminum roof structure, which includes a 1/8th inch thick angulated drip rail edge, caused or contributed to cause the injuries Jason sustained when his arm was captured or entrapped between the roof rail structure and the ground when the subject Ranger tipped over.

* Ms. Hoffman will opine on and describe the mechanisms by which the FTD roof caused Jason's injuries and how Jason's injuries are consistent with contact with the FTD aluminum roof and its 1/8th inch thick angulated drip rail.

(Appendix, A54)

Relator also disclosed that Mr. Cunitz would provide expert testimony and opinions ***on subject matters including, but not necessarily limited to,*** the inadequacy of warnings, directions, disclosures and instructions provided by CVPS relating to the 2013 Polaris Ranger XP 900 with the FTD roof on which Jason Malashock was injured, and Jason Malashock's behavior in the 90 degree rollover. (Appendix, A65)

Further, Relator disclosed that Mr. Rosenbluth was expected to testify on "subject matters including the defective roof structure and would provide expert testimony and opinions about the roof structure including, but not necessarily limited to . . ." (Appendix, A51)

Clearly, Relator designated all four (4) retained experts on September 1, 2015 pursuant to Missouri Supreme Court Rule 56.01(b)(4), and provided them to counsel for CVPS. Relator's designations of all four (4) experts were substantially similar and included the general nature and subject matters of their anticipated expert opinions. As a result, Mr. Newbold's file materials and opinions are not privileged and subject to discovery. *See, State ex rel. American Economy Insurance Co. v. Crawford,* 75 S.W.3d 244 (Mo. *banc* 2002).

It is undisputed that the designation of Herbert Newbold occurred pursuant to Rule 56.01(b)(4) while he was designated as a testifying expert. As a result, Mr. Newbold is subject to discovery by both deposition and production of his file materials. Relator has waived the work product privilege for Mr. Newbold's file materials, and the re-designation of Mr. Newbold as a consulting rather than a testifying expert is ineffective. *See, American Economy Ins. Co.,* 75 S.W.2d at 246.

Assuming arguendo that this Court determines that Mr. Newbold is now a consultant, as Relator is claiming, CVPS is still entitled to obtain and discover the facts and evidence that Mr. Newbold possesses because Expert Newbold clearly has information and evidence from the scene of the accident that CVPS has no other means of obtaining. CVPS has a substantial need of the investigating materials Newbold gathered from the scene of the accident, and should be entitled to obtain that information pursuant to Rule 56.01(b)(3).

For all the reasons discussed above, Respondent respectfully asks this Court to dissolve the preliminary writ and dismiss Relator's Petition outright. Respondent's

Orders must stand, and Relator must produce Mr. Newbold for deposition and produce his file materials within thirty (30) days[1].

CONCLUSION

It is undisputed that the designation of Herbert Newbold occurred pursuant to Rule 56.01(b)(4) while he was designated as a testifying expert. As a result, Mr. Newbold is subject to discovery by both deposition and production of his file materials. Relator has

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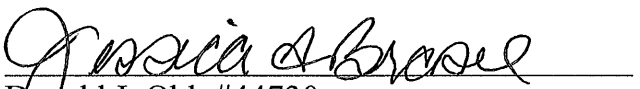
[1] In a footnote on page 15 of Relator's brief, Relator argues that some of the arguments raised in the court of appeals by counsel for Respondent should not be considered by this Court because the reviewing court is limited to the record made in the court below. In support Relator cites to *State ex rel. Terry v. Holtkamp,* 330 Mo. 608, 51 S.W.2d 13, 16 (Mo. *banc* 1932). The facts in this case are not akin to *Terry.* In *Terry,* this Court sustained a motion to strike an affidavit that was not filed in the lower court. As a result, this Court held and ruled that the affidavit was improper because it is limited to the record made in the "courts below". Here, Respondent submitted exhibits and arguments with the court of appeals. Respondent is not filing any new exhibits that have not already been filed and included in the record made in the courts below. As a result, all exhibits and arguments included in Respondent's supplemental statement of facts and argument are proper for this Court's consideration.

waived the work product privilege for Mr. Newbold's file materials, and the re-designation of Mr. Newbold as a consulting rather than a testifying expert is ineffective. *See, American Economy Ins. Co.,* 75 S.W.2d at 246.

For all the reasons discussed above, Respondent respectfully asks this Court to dissolve the preliminary writ and dismiss Relator's Petition outright. As a result, Respondent's Orders must stand, and Relator must produce Mr. Newbold for deposition and produce his file materials within thirty (30) days.

KNAPP, OHL & GREEN



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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the **Respondent's Brief and Appendix** were served on the following parties via first-class mail and e-filing on this 16 day of June, 2016:

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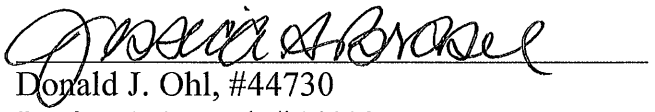
CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Respondent's Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). This Brief contains 6,341 words, excluding the parts of the Brief exempted from that calculation by Rule 84.06(b). The Brief is set proportionally spaced typeface, no small than 13-point Times New Roman, using Microsoft Word 2013.



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