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

RELATOR'S BRIEF IN SUPPORT OF WRIT OF PROHIBITION

Bradley A. Winters, #29867
Vicki L. Little, #36012
Douglas J. Winters, #65284
SHER CORWIN WINTERS LLC
190 Carondelet Plaza, Suite 1100
St. Louis, MO 63105
Telephone: (314) 721-5200
Facsimile: (314) 721-5201
Email: bwinters@scwstl.com

Attorneys for Relator,
Jason H. Malashock

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Court Rules

JURISDICTIONAL STATEMENT

This brief is submitted in response to the Court's order issued April 3, 2016, which granted a preliminary writ of prohibition prohibiting any further action by Respondent, the Honorable Michael T. Jamison, in connection with St. Louis County Case No. 14SL-CC01034.

On April 1, 2016, pursuant to Mo. Sup. Ct. Rule 97, Relator filed and served a Petition for Writ of Prohibition in this Court. On April 3, 2016, this Court issued its Preliminary Writ of Prohibition. Respondent filed his Answer on April 28, 2016. This proceeding follows.

The Supreme Court of Missouri has jurisdiction over this proceeding pursuant to its supervisory powers set out in Article V, Section 4 of the Missouri Constitution, which grants the Court authority to issue and determine original remedial writs. Hence, the jurisdiction of this Court is invoked.

STATEMENT OF FACTS

On December 17, 2013, Relator, Jason Malashock ("Jason" or "Relator"), filed in the Circuit Court of Pike County his petition for damages alleging that Defendant Chesterfield Valley Power Sports, Inc. ("CVPS") sold a defective utility terrain vehicle ("UTV") and roof that caused profound injuries to Jason's left arm when the UTV tipped over. The case was transferred to St. Louis County on March 14, 2014.

On September 1, 2015, Relator provided CVPS with designations for four experts as potential trial witnesses pursuant to Missouri Supreme Court Rule 56.01(b)(4)(a), including a designation for his consulting expert, Herbert Newbold. Consistent with the rule, Mr. Newbold's designation contained only "the general nature of the subject matter on which the expert is expected to testify," and did not include any statement as to the substance of his opinions. (Appendix, A13-14)

On September 14, 2015, two weeks after designating his experts, and prior to any expert depositions, Relator withdrew Mr. Newbold's designation by phone, and by email the following day. (Appendix, A16) Relator has made it clear that he will not elicit any testimony from Mr. Newbold at trial.

Without objecting to the withdrawal of the Newbold designation or requesting Mr. Newbold's deposition, counsel for CVPS took Relator's three other retained experts' depositions prior to the November 5, 2015, deadline for doing so.

On December 10, 2015, four weeks after the expert witness deposition deadline, CVPS served a notice to take Mr. Newbold's deposition. When Relator objected to that

notice, CVPS filed a Motion to Amend Scheduling Order to allow Mr. Newbold's deposition. (Relator's Exhibit 4)[1]

On December 15, 2015, Respondent granted CVPS's motion and ordered Relator to produce Mr. Newbold for deposition and to produce his file, including all privileged communications (the "First Order"). (Appendix, A1-2) On December 23, 2015, Relator filed a motion to reconsider, which Respondent denied on March 14, 2016 (the "Second Order") (collectively, "Respondent's Orders"). (Appendix, A3-6)

On March 14, 2016, Relator filed his Petition for a Writ of Mandamus and/or a Writ of Prohibition in the Missouri Court of Appeals. (Relator's Exhibit 7) On March 15, 2016, the court of appeals issued its Preliminary Order in Prohibition. (Relator's Exhibit 8) However, on March 24, the court quashed its preliminary order, without opinion, and denied Relator's petition. (Relator's Exhibit 9)

Relator then moved for transfer to this Court pursuant to Rule 83.02. On March 31, 2016, the court of appeals entered its order under Rule 84.24(m) striking Relator's motion to transfer and directing as follows: "If Relator seeks further review, Relator should file a new petition for writ of prohibition with the Missouri Supreme Court." (Relator's Exhibit 10) As noted above, Relator filed his petition with this Court on April 1.

[1] Citations to exhibits refer to those exhibits accompanying the Suggestions in Support of Relator's Petition for Writ of Prohibition, which form the record in this case.

POINT RELIED ON

I. Relator is entitled to an order prohibiting Respondent from enforcing his Orders of December 15, 2015, and March 14, 2016 (or entering substantially similar orders), to the effect that Relator waived his work product privilege with respect to his consulting expert merely by identifying that expert as a potential trial witness, without disclosing any of that expert's opinions, because Respondent's Orders ignore Missouri Supreme Court Rules and precedent, in that this Court has three times held or otherwise stated that there is no waiver of the work product privilege as to an expert witness who is identified pursuant to Rule 56.01(b)(4), but later withdrawn as a potential trial witness before the expert's opinions have been disclosed.

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)(a)

ARGUMENT

Standard of Review

A writ of prohibition is appropriate whenever a trial court has exceeded its jurisdiction or abused its discretion to such an extent that it lacked the power to act as it did, or whenever there is no adequate remedy by appeal for the party seeking the writ, and the "aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision [of the lower court]." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. *banc* 1994). A writ of prohibition is particularly appropriate where a trial court has abused or exceeded its jurisdiction and discretion by improperly ordering the disclosure of protected work product or other privileged material, a disclosure that cannot be undone. *State ex rel. Crown Power & Equip. Co., L.L.C. v. Ravens*, 309 S.W.3d 798, 800 (Mo. 2009); *St. Louis Little Rock Hospital, Inc. v. Gaertner*, 682 S.W.2d 146, 148 (Mo. App. E.D. 1984). Indeed, in such cases, writ relief is not only appropriate, it's necessary: "[T]he damage to the party against whom discovery is sought is irreparable, because if the privileged material is produced, the damage cannot be repaired on appeal." *Crown Power*, 309 S.W.3d at 800.

So it is here: If CVPS is permitted to depose Mr. Newbold and review his file, as Respondent has ordered, Relator will be harmed beyond repair on appeal, because Mr. Newbold's opinions, and the privileged communications on which they are based, will already have been disclosed. Relator asks that this Court make its writ permanent to prevent that irreparable harm.

I. Relator is entitled to an order prohibiting Respondent from enforcing his Orders of December 15, 2015, and March 14, 2016 (or entering substantially similar orders), to the effect that Relator waived his work product privilege with respect to his consulting expert merely by identifying that expert as a potential trial witness, without disclosing any of that expert's opinions, because Respondent's Orders ignore Missouri Supreme Court Rules and precedent, in that this Court has three times held or otherwise stated that there is no waiver of the work product privilege as to an expert witness who is identified pursuant to Rule 56.01(b)(4), but later withdrawn as a potential trial witness before the expert's opinions have been disclosed.

Respondent's Orders requiring Relator to produce for deposition a consulting expert whose opinions have never been disclosed and who will not testify at trial is 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* 2002), 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). Under these authorities, Relator enjoys a work product privilege with respect to his consulting experts until (1) they are designated as trial witnesses, *and* (2) their opinions are disclosed. Relator did not waive that privilege with respect to Mr. Newbold's materials, communications, or opinions by designating him as a testifying witness in the manner called for by Rule 56.01(b)(4)(a), because he withdrew that designation without disclosing Mr. Newbold's opinions.

This Court has stated, repeatedly, that it is not the mere designation of an expert that waives the work product privilege as to that expert, but the designation of that expert *and* the disclosure of that expert's opinions.

First, in *Tracy*, cited above, this Court unambiguously stated that 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:

> 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 designation prior to deposition. The attorney can claim work product 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).

In *Tracy*, the Court found a waiver only because the expert's deposition had already been taken and the documents had already been produced. *Id.* at 836. It was not the mere designation of the expert that effected a waiver of the privilege; rather, as the Court explicitly recognized, counsel can avoid a waiver by exercising the "option of withdrawing the expert's designation prior to deposition." *Id.*

That is precisely what Relator did here – he avoided waiver by withdrawing Mr. Newbold's designation prior to the disclosure of his opinions at deposition or otherwise, just as this Court instructed.

In ruling against Relator here – and holding that a trial designation by itself was sufficient to waive the privilege – Respondent ignored the express language of *Tracy*, relying instead on a misreading of this Court's opinion in *American Economy*. That reliance was misplaced. *American Economy* involved a situation distinguishable from this one, and was, in fact, consistent with the *Tracy* recognition that the mere endorsement of an expert witness will not effect a waiver of the work product privilege as to that expert. In order for a waiver to occur, there must also be a "disclosing event," either before or after the designation.

In *American Economy*, the Court found a waiver only because the expert had already testified and produced his entire file in a prior case: The plaintiff had "waived the work product privilege … by disclosing the expert's opinion in the earlier Kansas case, and the waiver [was] effective despite plaintiff's re-designation of the expert as a non-testifying consultant." *American Economy*, 75 S.W.3d at 245-47. But the Court made clear that the work product privilege will be waived only when a "disclosing event" has occurred in which an expert's opinions have been disclosed, not, as Respondent ruled here, when the expert's identity and only the "general nature" of his expected testimony have been disclosed, pursuant to court rules, in an interrogatory answer.

The Court explained that an expert designation is merely the first of two steps in the process of waiving privilege:

> [D]esignation of an expert as a trial witness **begins** a process of waiving privilege. The circumstances of *Brown* illustrate the point: Defendant's attorney was permitted to engage in *ex parte* contact with the plaintiff's testifying expert

because the plaintiff waived the work product privilege for the expert's opinion by designating the expert as a witness **and disclosing the expert's opinion in interrogatory responses**.

Id. at 246 (internal citations omitted; emphasis added).

This language begs the question that lies at the heart of Relator's petition: If the disclosure of the expert merely "begins a process of waiving privilege," how can it also be the sole event that waives the privilege?

In *Crown Power*, this Court again held that designating an expert without disclosing his/her opinions did not waive the designating party's work product privilege. In that case, one party had designated its expert witness to testify at a pre-trial hearing on a limited issue (venue), but had not designated him as a testifying witness at trial. The other party claimed that merely by designating the witness on this limited issue, the designating party had waived the work product privilege as to all communications between counsel and that expert. After the trial court agreed with the non-designating party, this Court issued a writ of prohibition, holding that there had been no waiver. The Court held that, although the expert had been designated to testify at a pre-trial hearing, he had not been designated for trial and, importantly, had never provided any materials to the other side except those on the narrow question (venue) upon which he had been designated to testify. *Crown Power*, 309 S.W.3d at 801. The Court cited *Tracy* with approval and affirmed the guidance provided earlier in both *Tracy* and *American Economy* to counsel wishing to withdraw an expert:

> [The witness] was informally disclosed to opposing counsel as a witness to be called at the venue hearing. **In *Tracy*, this Court made clear that when an expert is mistakenly given privileged documents, the attorney may withdraw the expert's designation as a testifying expert prior to the deposition; then, "[t]he attorney can claim work product protection as to that retained expert, since the expert will not be called for trial."** *Tracy at 835-36*. Here, Crown Power never intended [the witness] be called at trial and has conceded that [the witness] will never be called at trial. Accordingly, Crown Power may claim work product protection of [the witness's] non-venue related materials.

Id. at 801 (footnote omitted; emphasis added).

Likewise, in this case, because Relator withdrew his designation of Mr. Newbold as a testifying witness *before Mr. Newbold's opinions were disclosed*, he did so before the second step to waiver had been taken and, therefore, did not waive the work product privilege. Respondent's rulings in this case are thus in contravention of this line of Missouri Supreme Court cases.

Respondent also mistakenly found that Mr. Newbold's opinions had, in fact, been disclosed as part of Relator's designation, stating that the Newbold designation was "substantially similar to the designations of Mr. Rosenbluth, Ms. Hoffman, and Mr. Cunitz." (Appendix, A6) But even a cursory review of the referenced designations reveals the flaw in this finding.

For example, the designation for expert Michelle Hoffman stated: "Ms. Hoffman **will opine on** and describe the mechanisms by which the FTD roof caused Jason's

injuries and **how Jason's injuries <u>are consistent with</u> contact with the FTD aluminum roof and its 1/8th inch thick angulated drip rail**" and that **"[t]he subject FTD aluminum roof structure . . . <u>caused or contributed to cause</u>" Jason's injuries**. (Appendix, A12, emphasis added)

The designation for expert Gerald Rosenbluth similarly stated his opinions that "**Chesterfield Valley Power Sports <u>was negligent</u>** in selecting, installing and selling the FTD aluminum roof with its 1/8th inch thick angulated drip rail edge on the 2013 Polaris Ranger XP 900 on which Jason was injured" and that **"[t]he subject FTD aluminum roof structure . . . <u>is defective in design and unreasonably dangerous</u>[.]"** (Appendix, A15, emphasis added)

And, finally, the designation for expert Robert Cunitz also disclosed his opinions that **Jason "<u>was acting naturally, reflexively and foreseeably</u>**, when he extended his left arm . . ." and that the "**warnings, directions, disclosures and instructions (including manuals) . . . <u>were inadequate</u>[.]**" (Appendix, A11, emphasis added)

In sharp contrast, and as permitted by Rule 56.01(b)(4)(a), Mr. Newbold's designation stated only "the general nature of the subject matter on which [he was] expected to testify":

> Mr. Newbold is expected to provide fact testimony about his inspection as well as fact and expert opinions **on subject matters including but not 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 XP 900 with the FTD roof on which Jason was injured.

(Appendix, A13, emphasis added)

Mr. Newbold's opinions on these general subjects were not disclosed.

Because there has been no disclosure of Mr. Newbold's opinions, Relator should have been permitted to rely with confidence on the Supreme Court-approved process identified in *Tracy*, which allows a party to withdraw an expert (and thus maintain the work product privilege) prior to that expert's deposition. Relator followed that Missouri Supreme Court-approved procedure and precedent to avoid a waiver here. That precedent should not be ignored, and Relator's reliance on it should not be punished.

Respondent, however, ignored this precedent in holding that Mr. Newbold's designation by itself constituted a waiver. In each of his Orders, Respondent stated law directly contrary to the law articulated in this Court's opinions on the very question presented here. But litigants should be able to rely with confidence on thrice-stated Supreme Court guidance and should not be punished with orders opening their privileged communications to inspection by opposing counsel when they so rely. The consequences

of Respondent's Orders are extreme and irreversible, and, for that reason, Relator respectfully asks that this Court grant the relief sought in Relator's petition – that Respondent not be permitted to enforce his Orders (or any like orders) that would violate Relator's work product privilege or undermine litigants' confidence in announced Supreme Court precedent. [2]

---

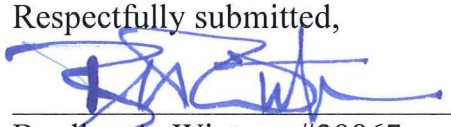
[2] Respondent (through CVPS's counsel) suggested as an aside in his opposition to Relator's writ petition before the court of appeals, with neither supporting argument nor case law, that because Mr. Newbold communicated with Relator's other experts, Relator therefore waived work product protection. But this come-lately comment has no bearing on this case, as the reviewing court is limited to the record made in the court below. *State ex rel. Terry v. Holtkamp*, 330 Mo. 608, 51 S.W.2d 13, 16 (Mo. banc 1932). The only question that was presented to Respondent below, which formed the sole basis for his rulings, was whether Relator had waived the work product privilege with respect to Mr. Newbold's opinions and his privileged file materials solely by virtue of having first designated Mr. Newbold as a testifying witness and then almost immediately withdrawing that designation. Respondent's Orders relate exclusively to his (mistaken) answer to that question. And, indeed, the inconsequential nature of these communications – about which each of those other experts testified – is evidenced by the fact that CVPS never brought them to Respondent's attention, and they found no place in the "Argument" section of Respondent's opposition brief.

CONCLUSION

For the foregoing reasons, the Preliminary Writ of Prohibition issued by the Court should be made absolute.

Date: May 27, 2016

Respectfully submitted,



Bradley A. Winters, #29867
Vicki L. Little, #36012
Douglas J. Winters, #65284
SHER CORWIN WINTERS LLC
190 Carondelet Plaza, Suite 1100
St. Louis, MO 63105
Telephone: (314) 721-5200
Facsimile: (314) 721-5201
Email: bwinters@scwstl.com

Attorneys for Relator,
Jason H. Malashock

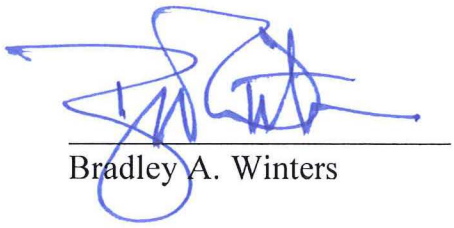
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Relator's Brief in Support of Writ of Prohibition** and a disc containing an electronic copy of same were served on the following parties via first-class mail on this 27th day of May, 2016:

Honorable Michael T. Jamison
St. Louis County Courthouse, 4th Floor
105 South Central Avenue
Clayton, MO 63105
Telephone: (314) 615-1510
Respondent
Presiding, Underlying Cause No. 14SL-CC01034

and

Donald J. Ohl
Knapp, Ohl and Green
6100 Center Grove Road
P. O. Box 446
Edwardsville, IL 62025
Telephone: (618) 656-5088
Facsimile: (618) 656-5466
Attorney for Defendant Chesterfield Valley Power Sports, Inc.



Bradley A. Winters

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Relator's Brief includes the information required by Rule 55.03 and complies with the limitations contained in rule 84.06(b). This brief contains 3,547 words, excluding the parts of the brief exempted from that calculation by Rule 84.06(b). The brief is set in proportionally spaced typeface, no smaller than 13-point Times New Roman, using Microsoft Word 2010. The undersigned further certifies that the electronic copy provided on disk is virus-free.

Bradley A. Winters, #29867
Vicki L. Little, #36012
Douglas J. Winters, #65284
SHER CORWIN WINTERS LLC
190 Carondelet Plaza, Suite 1100
St. Louis, MO 63105
Telephone: (314) 721-5200
Facsimile: (314) 721-5201
Email: bwinters@scwstl.com

Attorneys for Relator,
Jason H. Malashock