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 REPLY BRIEF

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

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RELATOR'S REPLY BRIEF

In Respondent's Brief, Defendant Chesterfield Valley Power Sports, Inc. ("CVPS") makes what it calls two arguments in opposition to Relator's Petition and this Court's preliminary writ: (1) that Relator's initial designation of Herbert Newbold as a testifying expert constituted a waiver of Relator's work product privilege; and (2) that the Newbold designation was substantially similar to Relator's other expert designations, in which those experts' opinions were revealed, and therefore constituted a waiver of the work product privilege. (Respondent's Brief, pp. 13-14.) However denominated, these points boil down to a single issue: whether Relator's initial designation of Herbert Newbold, by itself, constitutes a waiver of the work product privilege, despite the fact that Mr. Newbold's designation was almost immediately withdrawn, and despite the fact that none of Mr. Newbold's opinions have, to this day, been disclosed to CVPS or its counsel. This issue was fully addressed in Relator's opening brief and has been resolved by this Court in Relator's favor in a set of three decisions of this Court discussed in that brief: *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).

Given this status, Relator need only address a few misleading statements about the law and facts that are set forth in Respondent's Brief.

A. Relator's Initial Designation of Mr. Newbold As a Testifying Expert Did Not Constitute a Waiver of the Work Product Privilege Because That Designation Was Withdrawn and Mr. Newbold's Opinions Have Never Been Disclosed.

As stated at length in Relator's opening brief, Relator's initial designation of Mr. Newbold as a testifying expert could not have effected a waiver of Relator's work product privilege because that designation was almost immediately withdrawn (as expressly permitted by this Court in *Tracy*), and Mr. Newbold's opinions were never disclosed. Relator will not re-hash the law on this issue *in toto*, but does need to correct and clarify several misstatements from Respondent's Brief.

- CVPS employs a straw man in arguing against Relator's position, implying in its discussion of the *American Economy* decision that Relator believes no waiver of the work product privilege can occur until a designated expert's deposition has been taken. (Respondent's Brief, p. 18.) As CVPS well knows, that is not Relator's position. Rather, Relator argues here, buttressed by the opinions of this Court, that no waiver occurs until there's been a disclosure of the expert's opinions (*i.e.*, a "disclosing event"), whether that disclosure occurs during the expert's deposition in the case or at some other time. In *American Economy*, that disclosure occurred when the expert's deposition was taken and all of his materials were produced in prior litigation. In *American Economy*, this Court expressly acknowledged the language in *Tracy* that permits the withdrawal of an expert designation, then went on to discuss why the attempted withdrawal was ineffective in that

case: "Here . . . ***the disclosing event already took place through discovery in the earlier case***, and the proposed deposition is simply the permissible inquiry into that earlier disclosure." *American Economy*, 75 S.W.3d at 246 (emphasis added). In this case, there has been no such disclosing event.

- In discussing *Crown Power*, CVPS ignores two of the three bases for that decision. In addition to the fact that Crown Power's expert had been identified to testify only at a venue-related hearing, not at the trial on the merits, this Court also found significant that the expert had never disclosed any of his materials other than those relevant to the limited issue for which he was designated to testify, and that, in fact, he never testified. *Crown Power*, 309 S.W.3d at 801. The Court then went on to quote (again) the language from *Tracy* that permits a party to withdraw the designation of an expert who is no longer expected to be a trial witness (just as Crown Power's expert was not intended to be trial witness). *Id.* Because Mr. Newbold is not intended to be a trial witness, and because (like Crown Power's expert) he has not testified as to or disclosed any of his opinions, Relator was entitled to withdraw his designation.

- And, finally, CVPS mistakenly claims that the language of Rule 56.01(b)(4)(b) "clear[ly] and unambiguous[ly]" supports its position, arguing that the rule does not require both a designation and a disclosing event in order for a deposition to occur. (Respondent's brief, pp. 19-20.) But CVPS misreads the rule: all the rule actually says is that "[a] party may discover by deposition the facts and opinions ***to which***

the expert is expected to testify." Rule 56.01(b)(4)(b) (emphasis added). There's nothing in the rule that prohibits the withdrawal of an expert designation, as Relator has done here and as this Court, in *Tracy*, expressly approved. In this case, Mr. Newbold's designation has been withdrawn, and he is not "expected to testify" as to any facts or opinions. For these reasons, he may not be deposed.

CVPS's arguments about these cases amount to just another version of a common misconception within the Missouri bar – that the mere designation of a testifying expert by itself effects a waiver of the work product privilege. And, in fact, it's true that in the vast majority of cases the designation will ultimately result in waiver, once the designated expert has been deposed or has otherwise revealed his or her opinions. But unlike the majority of cases, the narrow issue here is whether the designation may be withdrawn altogether and, more precisely, if it can be withdrawn, when/where is the proverbial *point of no return* beyond which it cannot? Said another way: at what point in the "process of waiving the privilege" – begun by designation – is the process complete, *i.e.*, irreversible? CVPS simply pretends that a designation doesn't start a process, but that it *is* the process, and ignores this Court's several decisions to the precise contrary.

B. Relator's Designation of Mr. Newbold Did Not Disclose His Opinions and Was Not Substantially Similar to the Designations of Relator's Other Testifying Experts.

Failing in its first argument, CVPS next strains to liken Relator's initial designation of Mr. Newbold to those of Relator's other designated experts, arguing that their supposed similarity means that Mr. Newbold's opinions were also disclosed and the work product privilege thereby waived. (Respondent's Brief, pp. 22-24.) However, as Relator has already discussed at length in his opening brief, there are material differences between the Newbold designation and those of the other experts. In sum, Relator has shown that Mr. Newbold's designation is qualitatively different from the others in that it merely announced the "general nature of the subject matter" on which Mr. Newbold was expected to testify (as required by Rule 56.01(b)(4)), while the other designations included the actual substance of those experts' opinions. (Relator's Brief, pp. 12-14.)

What has not yet been addressed is CVPS's fuzzy argument that, somehow, the fact that the Rosenbluth designation contains language similar to that of one of Mr. Newbold's proposed subjects proves that Mr. Rosenbluth assumed Mr. Newbold's opinions, thus permitting CVPS to depose Mr. Newbold and obtain his otherwise privileged file. (Respondent's Brief, pp. 6-8.) Specifically, CVPS states, "Since [Relator] 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." (Respondent's Brief, p. 8.) Untangling this argument reveals its many flaws.

First, the fact that Mr. Rosenbluth might or might not have been designated to testify as to all or any part of a topic previously assigned to Mr. Newbold has nothing to do with any possible waiver of the work product privilege, and CVPS obviously can't and doesn't cite any case law supporting any such theory. If this supposed switch had taken place prior to the designations – as often happens in litigation – it wouldn't be an issue, and it's not one now. The true question is whether Mr. Newbold's opinions were ever disclosed, not whether someone else is or is not testifying on a similar topic.

But, second, and more importantly, Mr. Rosenbluth's designation certainly did NOT include "testimony which was set forth in Newbold's designation." To support this position, CVPS misleadingly quotes only part of the section it claims as proof of that point. The language CVPS references (Respondent's Brief, p. 8) appears in the introduction portion of Mr. Rosenbluth's designation, not among his opinions, and actually supports a proposition directly opposite to the point CVPS makes: Mr. Rosenbluth's designation expressly states that he "***conducted his own study, testing and investigation***, which included a quasi-static quantification of the minimum force applied by the roof structure on Jason's arm." (Respondent's Appx., A82; emphasis added.) There is nothing in Mr. Rosenbluth's designation that suggests he got any of his

information or based any of his opinions on anything he heard or read or saw from Mr. Newbold or that his testimony would resemble in any way the opinions about which Mr. Newbold had previously been expected to testify.

In fact, this argument by CVPS serves only to reinforce Relator's own point that it is impossible to determine from the face of the Newbold designation anything about what the substance of Mr. Newbold's opinions would have been. (Respondent's Appx., A49.) Those opinions might have been similar to Mr. Rosenbluth's, or they might have been directly contrary to or otherwise inconsistent with his. Based on these designations, we simply cannot tell. Because Mr. Newbold's designation did not disclose his opinions, it cannot be deemed to have effected a waiver of Relator's work product privilege with Mr. Newbold.

And, third, beyond the designations, it is clear from Mr. Rosenbluth's deposition testimony, cited by CVPS here, that he did not, in fact, rely on any of Mr. Newbold's work.[1] Mr. Rosenbluth testified as follows:

Q: Did Mr. Newbold visit the scene of the accident?

A: I believe he did.

Q: Do you know when that was?

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[1] None of Mr. Rosenbluth's deposition testimony was part of the record before Respondent and did not form any basis for Respondent's opinions below. CVPS included portions of that testimony in the record for the first time in the court of appeals.

A: You'd have to ask Mr. Newbold.

Q: **Did he take photographs?**

A: **I assume he did.**

Q: **Did he take video?**

A: **I don't know one way or the other.**

Q: **Did he drive the vehicle?**

A: **I am not sure.**

Q: **Did he do any testing on the vehicle?**

A: **I don't know. I wasn't there.**

Q: Did you speak to him?

A: I speak to Herb periodically.

Q: I guess my question is: Have you had any conversations with Mr. Newbold about this case?

A: Yes.

Q: And during those conversations did you ever discuss whether Mr. Newbold visited the scene, took photos, took video, and drove the vehicle?

A: I know he visited the scene. **And I can only assume that he took at least digital still photographs. I don't know if he took video and I do not know if he drove the vehicle.**

Q: **Was that information shared with you?**

A: **No.**

(Respondent's Appx., A94-A95; emphasis added.)

Regarding Mr. Newbold's taking of videos and photos, Mr. Rosenbluth testified further as follows:

Q: Did you know there are apparently photos and video taken by Mr. Newbold from his work at the scene of the accident on November 25, 2013?

A: I don't really know one way or the other.

Q: **And so none of that information has ever been shared with you?**

A: **Correct.** I think during my inspection of the vehicle at Mr. Newbold's place of business in Colorado, it's my recollection that he did have photographs of the vehicle in the scene; but I didn't see any video.

Q: Did you look at those photographs?

A: A handful, that's all, **and assumed they were Herb's photographs. I don't know one way or the other.**

Q: **Are Herb's photographs or Herb's videos a part of your file?**

A: **No.**

(Respondent's Appx., A91; emphasis added).

In a section of Mr. Rosenbluth's testimony not shared by CVPS, he testified that he was not offered any of the information gathered by Mr. Newbold and did not know even the purpose for which it was gathered. (Relator's Supp. Appx., A18-A19.)[2]

[2] Almost as a side-note and without any supporting case law, CVPS also argues here, for the first time, that Mr. Newbold should produce certain unspecified "information and evidence from the scene of the accident" (*i.e.*, his work product) because CVPS now claims a "substantial need" for those materials under Rule 56.01(b)(3). (Respondent's Brief, p. 24.) However, not only was this issue never presented to Respondent, but CVPS has failed even to attempt the required showing that it is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." *See* Rule 56.01(b)(3); *State ex rel. Rogers v. Cohen*, 262 S.W.3d 648, 654-55 (Mo. 2008). To meet this requirement, CVPS must first specify what it wants, then, at the very least, show why it could not have done this same work itself, an impossible task given that CVPS's lawyers and experts have been given repeated access to the vehicle at issue in this case and to the property where the accident occurred. *Rogers*, 262 S.W.3d at 654-55; *May Dep't Stores Co. v. Ryan*, 699 S.W.2d 134, 136-37 (Mo. App. E.D. 1985). CVPS cannot now sit back and profit from privileged work that was done by someone else's efforts and at someone else's expense. *May*, 699 S.W.2d at 136 ("an attorney may not sit in a rocking chair and then blithely appropriate opposing counsel's efforts through discovery procedure").

C. This Court's Preliminary Writ of Prohibition Should Be Made Absolute.

There are important reasons for protecting a consultant's work product. As this Court recognized in *Rogers*, citing the U.S. Supreme Court decision in *Hickman v. Taylor*, the very purpose of providing work product immunity is to allow a party's counsel and representatives to work without intrusion from their opponents, to develop their case and advocate their clients' interests as effectively and efficiently as possible. *Rogers*, 262 S.W.3d at 650. And, importantly, this privilege encourages these representatives' zeal, by preventing one party from "reaping the benefits of his opponent's labors." *Id.* at 654 (internal quotation and citation omitted).

These same, time-tested considerations militate against CVPS's discovery of Mr. Newbold's work and opinions here, work he performed confidentially for Relator's benefit and has never disclosed to CVPS or its counsel, in his designation, at deposition, or otherwise. Mr. Newbold should not now be forced to reveal what would otherwise unquestionably be deemed privileged work, merely because he was briefly identified, then withdrawn, as a possible expert witness, without having disclosed any of his opinions.

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

Respectfully submitted,

SHER CORWIN WINTERS LLC

Bradley A. Winters #29867MO
Vicki L. Little #36012MO
Douglas J. Winters #65284MO
190 Carondelet Plaza, Suite 1100
St. Louis, MO 63105
314-721-5200
Fax: 314-721-5201
bwinters@scwstl.com

Attorneys for Relator,
Jason H. Malashock

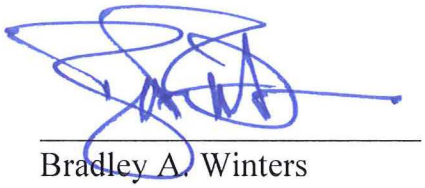
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Relator's Reply Brief** was served on the following parties via first-class mail and electronic mail on this 24th day of June, 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

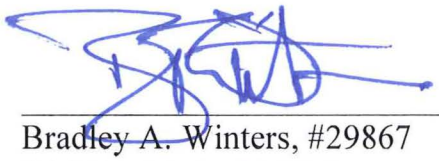
Donald J. Ohl
Knapp, Ohl and Green
6100 Center Grove Road
P. O. Box 446
Edwardsville, IL 62025
Telephone: (618) 656-5088
Facsimile: (618) 656-5466
Attorney for Defendant Chesterfield Valley Power Sports, Inc.



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 2,672 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 via electronic mail 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