

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JOHN DOE, et al.,

Case No. 02:08 CV 575

Plaintiffs,

JUDGE GREGORY L. FROST

v.

Magistrate Judge NORAH MCCANN KING

**MOUNT VERNON CITY SCHOOL
DISTRICT BOARD OF EDUCATION,
et al.,**

Defendants.

**COUNTERCLAIMANT/DEFENDANT JOHN FRESHWATER (IN HIS PERSONAL
CAPACITY) MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL**

Now comes Counterclaimant/Defendant John Freshwater (hereinafter Freshwater), by and through his Trial Counsel, R. Kelly Hamilton, who represents Freshwater in his personal capacity, to file a Memorandum in Opposition to Plaintiffs' Motion to Compel.

Counsel for Freshwater asserts Plaintiffs motion is moot and further that counsel's effort and work was and had been protected pursuant to the attorney work product doctrine.

Respectfully submitted,

s/ R. Kelly Hamilton

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Attorney for Counterclaimant/Defendant John Freshwater

MEMORANDUM IN SUPPORT

I. Plaintiff's Motion to Compel Is Moot

Plaintiff's motion to compel is moot as all information, evidence and exhibits from the administrative hearing have been made available to Plaintiff's counsel. Running concurrently with this action and still ongoing has been an administrative hearing conducted pursuant to Ohio Revised Code §3319.16. Both current and previous counsel for Plaintiffs have been in attendance at each of the thirty plus (30+) days of the administrative hearing, sitting at the trial table with and working in collaboration alongside the attorneys representing the Mount Vernon City School Board of Education.

Counsel for Freshwater negotiated a practice with Plaintiff's previous counsel whereby any document or exhibit desired by Plaintiff's counsel could and would be obtained from the court reporter in charge of the record-taking during the administrative hearing. This practice was implemented and acknowledged in a letter from the undersigned to Plaintiff's previous counsel dated January 30, 2009, and attached as Exhibit A in addition to the discovery response provided in attached Exhibit B.

II. Work Product of Counsel for Freshwater is Protected by Fed. Rules Civ. Proc. Rule 26(b)(3)

Federal Rules of Civil Procedure Rule 26(b)(3) states:

(3) Trial Preparation: Materials.

(A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

- (i) they are otherwise discoverable under Rule 26(b)(1); and
- (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

Federal Rules of Civil Procedure Rule 26(b)(5) states:

(5) Claiming Privilege or Protecting Trial- Preparation Materials.

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Rule 26(b)(3) is very specific and direct in its application and requires the district judge to take specific sequential steps when a claim is made that material should be protected because of trial preparation. *Toledo Edison Co. v. G A Technologies, Inc. Torrey Pines Technology Div.* 847 F.2d 335 (6th Cir. 1988). When a claim that materials have been "prepared in anticipation of litigation or for trial" is made, the court must go through the sequential steps set out in Fed.R.Civ.P. 26(b)(3) as follows:

1. The party requesting discovery must first show that, as defined in Rule 26(b)(1), the materials requested are "relevant to the subject matter involved in the pending litigation" and not privileged. Because the application of subdivision (b)(3) is limited to "documents and tangible things otherwise discoverable under subdivision (b)(1)," the burden of making this showing rests on the party requesting the information. *Id.*

2. If the party requesting discovery meets this burden and the court finds that the claimed material is relevant and not privileged, the burden shifts to the objecting party to show that the material was "prepared in anticipation of litigation or for trial" by or for that party or that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer or agent. This showing can be made in any of the traditional ways in which proof is produced in pretrial proceedings such as affidavits made on personal knowledge, depositions, or answers to

interrogatories. This showing can be opposed or controverted in the same manner. The determination of this matter is the second sequential determination that must be made by the court. *Id.*

3. If the objecting party meets its burden as indicated above and the court finds that the material was prepared in anticipation of litigation or for trial by one of the persons named in the rule, the burden shifts back to the requesting party to show that the requesting party (a) has substantial need of the materials in preparation of the party's case, and (b) that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In doing this, attention is directed at alternative means of acquiring the information that are less intrusive to the lawyer's work and whether or not the information might have been furnished in other ways. *Id.*

If this Court deems Plaintiff's request is not moot or that Plaintiff's motion for the claimed materials is relevant and not privileged, the burden then shifts to counsel for Freshwater to show the materials requested were prepared in anticipation of litigation.

III. Additional Deposition of Freshwater

The scope of any further deposition of Freshwater should be limited to no more than the materials and topics Plaintiff's claim in their motion

CONCLUSION

WHEREFORE, Defendant John Freshwater respectfully requests this Court to issue an order denying Plaintiffs' Motion to Compel.

Respectfully submitted,

s/ R. Kelly Hamilton

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Attorney for Counterclaimant/Defendant John Freshwater

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2010, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ R. Kelly Hamilton

The Law Office of R. Kelly Hamilton (0066403)

THE LAW OFFICE OF R. KELLY HAMILTON, LLC

January 30, 2009

Jessica Philemond
250 East Broad Street
Suite 900
Columbus, Ohio 43215-3742

Email Transmission – Jkp@isaacbrant.com

Exhibit - A

RE: Doe, et al. v. Mount Vernon City School, et al
2:08-cv-575

Dear Jessica Philemond,

Attached please find Defendant/Counterclaimant Freshwater's *supplemental* responses to Plaintiff's First Interrogatories and Plaintiff's First Request for Production of Documents, and Defendant/Counterclaimant Freshwater's response to Plaintiff's Supplemental Interrogatory Requests.

Your letter dated January 2, 2009, identifies issue with responses made to interrogatories 4, 5, 6, 7, and 8. However, your withdrawn motion to compel takes issue with interrogatories 4, 5, 6 and 9. Similarly, your letter dated January 2, 2009, identifies issues with responses made to request for production of documents at requests numbers 3, 6, 7, 9, 10, 11, and 14. However, your withdrawn motion to compel takes issue with responses to requests numbers 3, 6, 7, 9, 10 and 11. Despite the confusion stated above, I have attempted to resolve all identified issues by providing more detail to the answer and responses contained in this most recent communication.

Interrogatory 4 and 5

Although noted on the interrogatory response, I specifically note herein that Mr. Freshwater continues to review materials to supplement interrogatory numbers 4 and 5.

Interrogatory 6

Although you have attended each day of testimony, it is important to note that testimony has been provided detailing that Mr. Freshwater did not remove items from his room in preparation for his suspension from teaching. Therefore, Mr. Freshwater is adamant he only removed personal items such as his wallet, keys, pictures of his children and maybe some cards given to him by students.

Interrogatory 7

Your letter dated January 2, 2009, indicates a misunderstanding on your part of any testimony by Mr. Freshwater in that you believe he somehow had a practice of collecting handouts. You can develop your understanding through a deposition. But I assert to you your characterization is incorrect as stated in your letter.

Interrogatory 8

Your letter dated January 2, 2009, identifies issue with interrogatory number 8 however your withdrawn motion to compel identifies issue with interrogatory number 9. To the

THE LAW OFFICE OF R. KELLY HAMILTON, LLC

Jessica Philemond
January 30, 2009
Page 2

extent of my understanding that you are requesting names of those persons Mr. Freshwater applied the tesla coil, I assert the extent of Mr. Freshwater's memory is complete as depicted by the supplemental response.

Document 3

The information requested will accompany this letter via the United States Postal Service.

Document 6

The information requested will accompany this letter via the United States Postal Service.

Document 7

The information requested consists of Mr. Freshwater's wallet, keys, pictures of his family and maybe some cards gifted to him from students. You can contact me to make arrangements to see those items.

Document 9

I assert that Mr. Freshwater has not knowingly destroyed anything referenced in this request.

Document 10

I assert that Mr. Freshwater has not knowingly destroyed anything referenced in this request. Any documents you request of this nature are a public record and contained in the investigative report of HR on Call. If you need assistance obtaining originals or copies of the originals I commit to obtain those from the court reporter who would have an unblemished copy.

Document 11

Due to copyright protections I cannot obtain a copy of the original. You may make arrangements with me to inspect the original but we will not relinquish control of the document.

Document 14

I assert that Mr. Freshwater does not have any copy or replica of the Bibles formerly in the back of his classroom.

If you have any questions or further concerns regarding these items please contact me immediately.

Respectfully,

R. Kelly Hamilton

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JOHN DOE and JANE DOE,	:	
individually and as the Natural Parents	:	
and Next Friends of Their Minor Child,	:	CASE NO. 08-CV-575
JAMES DOE,	:	
	:	JUDGE FROST
 Plaintiffs,	:	MAGISTRATE JUDGE KING
 v.	:	
 MOUNT VERNON CITY SCHOOL	:	
DISTRICT BOARD OF	:	
EDUCATION, ET AL.	:	
	:	
 Defendants.	:	

**DEFENDANT/COUNTERCLAIMANT JOHN FRESHWATER’S RESPONSE TO
PLAINTIFFS’ SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Defendant/Counterclaimant John Freshwater, in his personal capacity, by and through counsel, states his responses and objections to Plaintiff’s Request for Production of Documents. .

GENERAL OBJECTIONS

1. Defendant/Counterclaimant John Freshwater, in his personal capacity, objects to the Request for Production of Documents to the extent the request requires information reflecting conduct or circumstances prior to the 2007-2008 school year of the Mount Vernon City School District. Plaintiff has alleged the first cause of action accrued on December 6, 2007, and that Freshwater’s conduct was violative through the remainder of the school year. Therefore, any

production of documents requesting information regarding conduct or circumstances prior to December 6, 2007, or after June 1, 2008, seek information that is irrelevant and such requests are overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence in determining whether or not Freshwater's conduct was violative.

2. Defendant/Counterclaimant John Freshwater, in his personal capacity, objects to the Request for Production of Documents, and any implied or express instruction or direction in the request, that impose or seeks to impose burdens greater than those imposed by the Federal Rules of Civil Procedure.

3. Defendant/Counterclaimant John Freshwater, in his personal capacity, objects to the Request for Production of Documents to the extent they seek disclosure of information protected under the attorney-client privilege, the work-product doctrine, or any other applicable privilege or immunity.

4. Defendant/Counterclaimant John Freshwater, in his personal capacity, objects to the Request for Production of Documents to the extent they are overly broad, unduly burdensome, or not reasonably calculated to lead to the discovery of admissible evidence.

5. Defendant/Counterclaimant John Freshwater, in his personal capacity, reserves all objections as to the competence, relevance, materiality, admissibility, or privileged status of any information provided in response to these Request for Production of Documents, unless specifically stated otherwise.

6. The following responses and objections are based upon information now known by Defendant/Counterclaimant John Freshwater, in his personal capacity, who has not yet completed discovery or preparation for trial in this action and therefore will supplement these responses and objections to the extent required by these Rules of Civil Procedure.

RESPONSES AND OBJECTIONS

15.

RESPONSE: Defendant/Counterclaimant does not have the tesla coil used by him nor does he have any other tesla coil.

16.

RESPONSE: Defendant/Counterclaimant does not have knowledge of any specific pictures of his classroom other than those presented at the administrative hearing. However, Defendant/Counterclaimant will make arrangements for Plaintiff's counsel to view his family's photographs if Plaintiff's counsel desires.

17.

RESPONSE: Defendant/Counterclaimant does not have the list of "suggested FCA speakers". Testimony by another party indicates Defendant/Counterclaimant's former classroom was cleaned by an unknown party(s).

18.

RESPONSE: Defendant/Counterclaimant will make arrangements with Plaintiff's counsel to obtain copies of the exhibits when Plaintiff's counsel is at the next hearing date or Defendant/Counterclaimant will make copies at the next hearing date and provide to Plaintiff's counsel.

19.

RESPONSE: Defendant/Counterclaimant does not have any permission slips from any class.

20.

RESPONSE: Defendant/Counterclaimant will provide Plaintiff's counsel with a copy of all exhibits as stated herein and will supplement by providing "...each and every document which refers to the allegations set forth in .." the federal complaint as each document becomes known to Defendant/Counterclaimant subject to the any privileges.

Respectfully submitted,

s/ R. Kelly Hamilton

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Attorney for Defendant/Counterclaimant John Freshwater

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2009, a copy of the foregoing was served to the following counsel via electronic mail and ordinary U.S. mail.

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