

BRADLEY & MERRELL
JONES, JONES, CLOSE & BROWN, CHARTERED
Seventh Floor — Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101-6026
(702) 385-4202

MESSAGE FROM XEROX 7024: (702) 385-1655

DATE: 7/22/93

TO: David Schalk, Esq. / *David McCreary, Esq.* FAX #: (412) 553-5239
c/o The Westin Hotel
Shady Side Room PHONE #: (412) 281-7100

FROM: Bradley & Merrell

CLIENT/MATTER: Nevada Power v. Monsanto

CLIENT/MATTER NO.: 11927.2

DOCUMENT(S) DESCRIPTION:

NUMBER OF PAGES (including cover page): 7

MESSAGE: *Please contact Paul re: the attached asap*

THIS TELECOPY IS INTENDED ONLY FOR THE ADDRESSEE NAMED ABOVE. IT MAY CONTAIN INFORMATION THAT IS PRIVILEGED AND CONFIDENTIAL. IF YOU HAVE RECEIVED THE TELECOPY IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, DESTROY ALL COPIES, AND DO NOT DISSEMINATE THE INFORMATION TO ANYONE. THANK YOU FOR YOUR ASSISTANCE.

IF YOU EXPERIENCE PROBLEMS WITH THIS TRANSMISSION,
please call (702) 385-4202 and ask for: Operator, Ext. 615

IN THE MORGAN CIRCUIT COURT

STATE OF INDIANA)

SS

COUNTY OF MORGAN)

LEON DALE MULLIS,)

Plaintiff,)

vs.)

WESTINGHOUSE ELECTRIC)
CORPORATION,)

Defendant.)

To Paul McNell
Please fax to
David McCrea
W. P. H. H. H.

Cause No. C-83-C-249

ORDER ON PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS,
DEFENDANT'S RESPONSE TO PLAINTIFF'S REQUEST FOR PRODUCTION
OF DOCUMENTS, AND DEFENDANT'S MOTION TO SET DATE FOR
SUMMARY JUDGMENT AND TO STAY DISCOVERY

FACTS

Plaintiff, Leon Dale Mullis ("Plaintiff"), claims health problems caused by exposure to PCB's contained in capacitors manufactured by Defendant, Westinghouse Electric Corporation ("Westinghouse"). Plaintiff scavenged the capacitors from the Lemon Lane dump site in the late 1950's and early 1960's.

Plaintiff seeks discovery into certain documents that may be located at Westinghouse's Industrial Hygiene Department. In a 1988 memorandum authored by Westinghouse attorney Jeffrey Blair, these documents were referred to as potential "smoking gun" documents.

Plaintiff has requested an Extension of Time to Respond to Westinghouse's Motion for Summary Judgment until these documents are made available to Plaintiff through discovery. Westinghouse maintains, among other things, that the documents sought are irrelevant to Plaintiff's case and production of the documents would violate the work products doctrine. Westinghouse moves for a hearing date on its Motion for Summary Judgment and seeks to stay discovery until such time.

ISSUES

- 1) Should Plaintiff's Motion for Production of Documents be granted?
- 2) Should Westinghouse's Motion to Set Date on Westinghouse's Motion for Summary Judgment and To Stay Discovery be granted?

DISCUSSION

I) Relevance To Plaintiff's Case:

In its Response to Plaintiff's Request for Production of Documents, filed May 7, 1993, Westinghouse maintains that the requested documents are "wholly unrelated to plaintiff's claims for personal injury, and are not reasonably calculated to lead to the discovery of admissible evidence." *Response*, p. 2. It is well-settled that "relevance" is the logical tendency to prove a material fact. Mers v. State, 496 N.E.2d 716, 718 (Ind.Sup.Ct. 1986). Evidence is relevant when it throws or tends to throw light on a party's culpability even though its tendency to do so is slight. Bieghler v. State, 481 N.E.2d 78, 79 (Ind.Sup.Ct. 1985).

Plaintiff contends that the documents may provide evidence that could be essential in Plaintiff's preparing a response to Westinghouse's Motion for Summary Judgment. In order to meet the test of relevancy, evidence sought to be elicited need not be complete, direct or decisive of the issues in question. Loft, Inc. v. Corn Products Refining Co., 103 F.2d 1, 5 (7 Cir. 1939).

While Plaintiff cannot show with certainty that the requested documents will help his case, Plaintiff is specifically seeking all "PCB/furan/dioxin related" documents. Relevancy for purposes of discovery is not the same as relevancy at trial. A document is relevant to discovery if there is the possibility that the information sought may be relevant to the subject matter of the action. CIGNA-INA/Aetna v. Hagerman-Shambaugh, 473 N.E.2d 1033, 1036 (Ind.App. 3 Dist. 1985).

Westinghouse claims that the proposal was not concerned with PCB-related documents as these documents had been previously collected, copied and preserved for production. *Westinghouse's Response to Plaintiff's Request for Production of Documents*, p 3. However, for purposes of allowing Plaintiff adequate discovery, Westinghouse's own assurances cannot act as a bar to Plaintiff's search. Westinghouse's objection that the requested documents are irrelevant to Plaintiff's case is therefore overruled.

II) Failure to Describe With Reasonable Particularity:

Westinghouse alleges that Plaintiff's Motion to Compel fails to describe the requested documents with "reasonable particularity," contrary to the requirements of Indiana Trial Rule 34(B). An item has been described with reasonable particularity if the description enables the opposing party to identify either the item or category sought and enables the trial court to determine whether there has been sufficient compliance with the order. Whether a request is set out with reasonable particularity depends on the facts of the individual case, the nature of the items sought to be discovered, etc.. Sexton v. State, 276 N.E.2d 836, 838 (Ind.Sup.Ct. 1972).

Plaintiff has requested any and all "PCB/furan/dioxin related" "documents," "correspondence," "records," "historical files," and "materials" described as "smoking gun" documents on pages seven (7) to ten (10) of the Bair/Bickerstaff memorandum and/or which may be located in:

- 1) "...4 feet of cards and each card containing anywhere from one to forty documents";
- 2) "...14 file cabinets of records in hard copy.";
- 3) "...485 microfiche cards...";
- 4) "...344 microfiche cards...";
- 5) "...222 microfiche cards...";
- 6) "...210 microfiche cards...";
- 7) "...112 microfiche cards...";
- 8) "...one file drawer...";
- 9) "...two file drawers";
- 10) "...five file cabinets..." and
- 11) "...26 rolls of microfilm records..."

Moreover, Plaintiff's request refers to passages contained in the Bair/Bickerstaff memorandum which describe the information sought in more detail.

The memorandum itself was written over five years ago and was an internal draft outline prepared for Mr. Bair's superiors in the legal department. These individuals were presumably knowledgeable as to the location and existence of the documents in question. If Westinghouse is correct, and no documents were destroyed pursuant to the Bair/Bickerstaff memorandum, then the documents described still exist and can be made available to Plaintiff.

While Plaintiff may not identify the exact documents sought, he certainly identifies the category sought. When coupled with the references to the Bair/Bickerstaff memorandum, Plaintiff's Motion to Compel describes the requested items with "reasonable particularity" in light of the facts of the case and the nature of the items sought. Westinghouse's objection that the request fails to describe the items sought to be produced with reasonable particularity is therefore overruled.

III) Work Products Material:

Westinghouse maintains that the "smoking gun" documents requested fall within the work product doctrine as producing the documents at this date would reveal Westinghouse attorney's mental impressions, conclusions, opinions and legal theories concerning the case. See, Indiana Trial Rule 26(B)(3). If documents are prepared in anticipation of litigation, the opposing party is not entitled to this information. Richey v. Chappel, 594 N.E.2d 443, 445 (Ind.Sup.Ct. 1992). Work product material is accorded an almost absolute protection. Amax Coal Company v. Adams, 597 N.E.2d 350, 355 (Ind.App. 4 Dist. 1992).

The test for determining whether the work product privilege is applicable to a particular document is whether the document can fairly be said to have been prepared or obtained because of the prospect of litigation. Burr v. United Farm Bureau Mut. Ins. Co., 560 N.E.2d 1250, 1254 (Ind.App. 4 Dist. 1990). If the documents were not prepared in anticipation of litigation, then they are freely discoverable, including the mental impressions, conclusions and opinions of the preparer. CIGNA-INA/Aetna v. Hagerman-Shambaugh, 473 N.E.2d 1033, 1037 (Ind.App. 3 Dist. 1985).

In his draft memorandum of late 1987 or early 1988, Mr. Bair characterized certain categories of documents as "potential smoking gun documents." Westinghouse admits that this proposal was "not concerned with documents that were related to pending or threatened litigation." *Westinghouse's Response to Plaintiff's Request for Production of Documents*, p 4. Allowing discovery into these documents would therefore not violate the work product doctrine. This is especially true in that the actual documents sought are routine company reports, presumably prepared by employees who were not acting as counsel.

Furthermore, blanket claims of privilege are not favored. The claim of privilege must be made and sustained on a question-by-question or document-by-document basis. Petersen v. U.S. Reduction Company, 547 N.E.2d 860, 862 (Ind.App. 3 Dist. 1989). Westinghouse has not identified any of the documents in question or explained why any individual document is privileged.

However, Westinghouse attorneys cannot be compelled to determine which individual documents Mr. Bair was speaking of in his memorandum. To do so would require Westinghouse, acting through its attorneys, to select from all properly discoverable documents. Requiring this selection process would violate Indiana Trial Rule 26(B)(3). Amax Coal, 597 N.E.2d at 355. Westinghouse's objection that production of the documents would violate the work products doctrine is therefore sustained in part and overruled in part.

IT IS, THEREFORE, ORDERED by the Court that Plaintiff's discovery requests be granted as follows:

- 1) Any and all pre-1984 documents contained on microfiche cards located in the Industrial Hygiene Department at the Research and Development Center ("Industrial Hygiene");
- 2) Any and all documents maintained in file cabinets of records in hard copy at Industrial Hygiene;
- 3) Any and all plant correspondence dated prior to January 1, 1978 contained on microfiche cards at Industrial Hygiene;
- 4) Any and all plant correspondence dated subsequent to January 1, 1978 through 1985 contained on microfiche cards at Industrial Hygiene;
- 5) Any and all test records dated prior to January 1, 1978 contained on microfiche cards at Industrial Hygiene;
- 6) Any and all test records dated subsequent to January 1, 1978 through 1984 contained on microfiche cards at Industrial Hygiene;
- 7) Any and all historical files of Industrial Hygiene from 1936 (Court notes that the date on the memorandum is unclear);
- 8) Any and all post-1985 plant correspondence contained in hard copy at Industrial Hygiene;
- 9) Any and all post-1984 test records contained in hard copy at Industrial Hygiene;
- 10) Any and all material cards, material data safety sheets, purchasing department spec cards, safe practice data sheets and safe practice data sheet historical files at Industrial Hygiene; and
- 11) Any and all microfilm records for Industrial Hygiene located at the Document Retention Center at Boyers, Pennsylvania (the "Mines").

As claimed by Plaintiff, information contained in these documents may be essential to Plaintiff's Answer to Westinghouse's Motion for Summary Judgment. Therefore, until such time as this Order is complied with, a hearing on Westinghouse's Motion for Summary Judgment is continued. It is FURTHER ORDERED that Westinghouse respond to Plaintiff's Request to Authenticate the August 18, 1972 Proprietary Class II Memorandum.

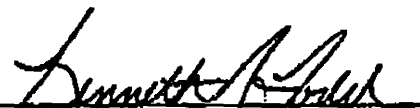
Broad discovery is granted in this instance due to the nature of the Blair/Bickerstaff memorandum. Westinghouse has demonstrated, at the highest corporate levels, a desire to at least consider the destruction of material that could be used as evidence against it. Such a cost-benefit analysis warrants scrutiny and supports the scope of discovery now granted.

Conversely, Plaintiff's counsel is reminded that he assured the Court at the time Westinghouse's Motion for Dismissal was heard that he was ready to immediately proceed to trial. That seems now deserving of skepticism. Counsel should be prepared to demonstrate that any further discovery sought could

not have been previously requested in the exercise of due diligence.

Furthermore, while the Court realizes that tensions may have developed on both sides during the case's decade-long proceedings and related cases between the same counsel, this should not impair the professionalism expected in this proceeding. The Court therefore requests that counsel refrain from using pejorative language in materials submitted for consideration.

SO ORDERED THIS 21st DAY OF JULY, 1993.


Kenneth G. Todd, Special Judge
Monroe Circuit Court III

BRADLEY & MERRELL
JONES, JONES, CLOSE & BROWN, CHARTERED
Seventh Floor — Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101-6026
(702) 385-4202

MESSAGE FROM XEROX 7024: (702) 385-1655

DATE: 7/22/93

TO: David Schalk, Esq. / David McCrea Esq. FAX #: (412) 553-5239
c/o The Westin Hotel
Shady Side Room PHONE #: (412) 281-7100

FROM: Bradley & Merrell

CLIENT/MATTER: Nevada Power v. Monsanto

CLIENT/MATTER NO.: 11927.2

DOCUMENT(S) DESCRIPTION:

NUMBER OF PAGES (including cover page): 7

MESSAGE: Please contact Paul re: the attached asap

THIS TELECOPY IS INTENDED ONLY FOR THE ADDRESSEE NAMED ABOVE. IT MAY CONTAIN INFORMATION THAT IS PRIVILEGED AND CONFIDENTIAL. IF YOU HAVE RECEIVED THE TELECOPY IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE. DESTROY ALL COPIES, AND DO NOT DISSEMINATE THE INFORMATION TO ANYONE. THANK YOU FOR YOUR ASSISTANCE.

IF YOU EXPERIENCE PROBLEMS WITH THIS TRANSMISSION,
please call (702) 385-4202 and ask for: Operator. Ext. 616

TRANSMISSION REPORT

THIS DOCUMENT WAS CONFIRMED
(REDUCED SAMPLE ABOVE - SEE DETAILS BELOW)

** COUNT **

TOTAL PAGES SCANNED : 7
TOTAL PAGES CONFIRMED : 7

*** SEND ***

No.	REMOTE STATION	START TIME	DURATION	#PAGES	MODE	RESULTS
1	4125535239	7-22-93 11:46AM	4'24"	7/ 7		COMPLETED 9600

TOTAL 0:04'24" 7

NOTE:

No. : OPERATION NUMBER 48 : 4800BPS SELECTED EC : ERROR CORRECT G2 : G2 COMMUNICATION
PD : POLLED BY REMOTE SF : STORE & FORWARD R1 : RELAY INITIATE RS : RELAY STATION
MB : SEND TO MAILBOX PG : POLLING A REMOTE MP : MULTI-POLLING RM : RECEIVE TO MEMORY