

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-

CITY OF PERTH AMBOY,
A Municipal Corporation,

Plaintiff/
Counterclaim-
Defendant,

v.

WITCO CORPORATION,

Appellant-Defendant/
Counterclaimant/
Third-Party
Plaintiff,

v.

MONSANTO COMPANY, *et al.*

Respondent-Third-
Party Defendant.

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: ON MOTION FOR LEAVE TO
: APPEAL AN INTERLOCUTORY
: ORDER FROM THE LAW
: DIVISION, MIDDLESEX COUNTY

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: Sat Below:
: Hon. Thomas B. Mannion, J.S.C.

:

: Civil Action

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RESPONDENT-THIRD-PARTY DEFENDANT MONSANTO COMPANY'S
APPENDIX OF UNREPORTED AND UNOFFICIALLY REPORTED CASES

PITNEY, HARDIN, KIPP & SZUCH
Attorneys for Respondent-
Third-Party Defendant
Monsanto Company
P.O. Box 1945
Morristown, NJ 07962-1945
(201) 966-6300

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CASES

EXHIBIT

<i>In Re IBM Peripheral EDP Devices Antitrust Litigation,</i> 5 Computer L. Serv. Rep. 878 (N.D. Cal., February 10, 1975)	A
<i>The City of Bloomington, Indiana, et al. v. Westinghouse Elec. Corp. and Monsanto Co., Cause No. IP83-9-C (S.D. Ind., June 30, 1988)</i>	B
<i>Cecil Scott, et al. v. Monsanto Co., Civil Action No. B-84-1103-CA (E.D. Tex., March 10, 1987)</i>	C
<i>Stroh Die Casting v. Monsanto Co., Case No. 639-887 (Wis. Circuit Court, Milwaukee County, November 28, 1988)</i>	D

or effect, but full credit shall be allowed by CT/East, Inc. for all payments actually made to it.*

So Ordered:

Charles H. Tenney
U. S. D. J.

* Counsel advises the transaction was consummated and the action dismissed—Editor.

IBM PERIPHERALS

United States District Court, ND Cal, February 10, 1975

MDL No. 163—RM

5 CLSR 878

[5-4.3, 5-4.4, 7-1] Discovery of computerized trial support system developed by IBM counsel denied

Court will not exercise its discretion to compel disclosure of information from or about a computerized trial support system, prepared solely for litigation. The documents are available to plaintiffs through normal discovery without undue hardship. The support system reflects mental impressions, theories and thought processes and a detailed description of the systems or its use by opposing counsel would impinge on IBM's right to organize and use the material.

Order Denying Motion To Compel Further Answers to Interrogatories Concerning the Trial Support System Used by IBM's Attorneys

McNICHOLS, J. On December 2, 1974, plaintiffs filed certain interrogatories inquiring, inter alia, as to whether IBM had recorded documents demanded by them in any computerized system;

On December 27, 1974, IBM supplied plaintiffs with a draft of its answers to said December 2, 1974 interrogatories. These draft answers were thereafter revised, and as revised were filed on January 21, 1975. Both the draft and the answers as filed stated, inter alia, that IBM had created no computerized system of the character described in plaintiffs' December 2, 1974 interrogatories, but that IBM's counsel have developed a computerized trial support system which includes summaries and

analyses of certain of the IBM documents requested by plaintiffs in these actions;

Pursuant to a schedule agreed to by the parties, plaintiffs moved on January 10, 1975, for an order compelling IBM to describe its attorneys' computerized trial support system with particularity. In said motion, plaintiffs stated that their ultimate intention was to seek an order entitling them to use said computerized trial support system to identify documents pursuant to search criteria designated by plaintiffs;

On January 20, 1975, IBM filed a memorandum and affidavits of Charles M. Waygood and Nicholas deB. Katzenbach in opposition to plaintiffs' motion with respect to the computerized trial support system;

Plaintiffs' motion to compel further answers regularly came on for hearing on January 24, 1975, and argument was heard from both sides.

Now, therefore, the Court finds as follows:

1. The computerized trial support system developed by IBM's counsel and the material contained therein was prepared solely for litigation, and it was put in the computerized form so that it could be used in connection with litigation.

2. All documents and other materials referenced by the trial support system of IBM's counsel are available through normal discovery to the plaintiffs. The trial support system in no way hides, destroys or deprives the plaintiffs of access to any evidence whatsoever.

3. The trial support system created by IBM's counsel reflects their mental impressions, theories and thought processes, and the Court is not satisfied that information contained in that system can be segregated from such lawyers' mental impressions and theories.

4. To allow plaintiffs a more detailed description of the trial support system, or to allow plaintiffs to make use thereof, would impinge on the right of IBM's counsel to organize material in the perspective they want to put it in, and to utilize such information in their trial preparation. Plaintiffs have failed to make a sufficient showing of need or urgency to justify such a result.

5. Plaintiffs have failed to show that there are no alternate means available to them to obtain the equivalent information without undue hardship.

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6. The Court will not exercise its discretion to compel disclosure of information from or about the trial support system simply because it would be somewhat more convenient for plaintiffs if the Court did so.

Based on the foregoing, it is hereby ordered that:

IBM will not be required to make any further answer to plaintiffs' Interrogatory No. 5 of December 2, 1974; and

Neither IBM nor its attorneys will be required in further discovery proceedings in this litigation to divulge trial support proceedings sought to be reached in that form.

ED GUTH REALTY, INC. v. GINGOLD

New York Court of Appeals, June 26, 1974
5 CLSR 880, 34 NY2d 440, 358 NYS2d 367

[5-4.1, 5-4.2] Standards for admissibility of records and summaries (New York)

On appeal from judgment reducing assessment on realty, New York Court of Appeals held that computer printouts bearing on the state equalization rate were admissible (1) under the business entry exception to the hearsay rule to prove the amount of overassessment on taxpayer's property; and (2) under the voluminous writings exception to the best evidence rule, where the taxing authority against whom the computer printouts were offered was not denied access to the underlying material.

Appeal from judgment of the Onondaga Special Term, William J. Sullivan, J., reducing assessment on realty and fixing expenses and attorney's fees. The Supreme Court, Appellate Division, 41 AD2d 479, 344 NYS2d 270; 345 NYS2d 990, modified and affirmed judgment as to reduction of assessment and affirmed as to fees and costs and cross appeals were taken. The Court of Appeals, Gabrielli, J., held that state equalization rate can be used as basis for decision in inequality proceeding as to tax years from 1970 onward but cannot be used as sole evidence of overassessment for prior tax years, that when a property owner seeks to rely on the equalization rate the taxing authority is entitled to show that the equalization ratio is inappropriate to the taxing unit, to the category of property involved and to the particular property or any other valid reason which would

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

6-30-85

THE CITY OF BLOOMINGTON,
INDIANA, et al.

vs.

WESTINGHOUSE ELECTRIC CORP.
and MONSANTO COMPANY

CAUSE NO. IP83-9-C

ENTRY

This cause comes before the Court on plaintiff's motion and supporting memorandum to compel defendant Monsanto Company to produce documents, defendant's brief in opposition, and plaintiff's reply memorandum. The Court, having considered the foregoing and being duly advised, hereby grants in part plaintiff's motion to compel.

This discovery dispute revolves around the following production requests made by the plaintiff on November 30, 1986:

REQUEST NO. 40: A list of all documents which have been withheld from prior production to plaintiffs under any claim of privilege.

REQUEST NO. 46: All documents relating to any indexes maintained by Monsanto or its employees relating to any file directories or indexes relating to PCB sales, control, disposal, environmental contamination or health effects.

In response the defendant provided plaintiff with a list of ten (10) documents it had withheld from discovery on the basis of the attorney-client privilege. The defendant, however, refused to identify any documents protected by the work-product immunity. The defendant also refused to produce any indexes relating to

PCBs on the basis of the work-product immunity. After the parties failed to resolve their dispute, the plaintiff filed a motion to compel on September 3, 1987.

The work-product immunity articulated by the Court in Hickman v. Taylor, 329 U.S. 495 (1947) is now codified as Fed. R. Civ. P. 26(b)(3). In general terms, this Rule protects from discovery "'ordinary' trial preparation materials . . . [and] 'opinion' work product reflecting the mental impressions, conclusions, opinions and legal theories of attorneys"

Tronitech, Inc. v. NCR Corp., 108 F.R.D. 655, 656 (S.D. Ind. 1985). This protection, however, applies only to work-product "prepared in anticipation of litigation or for trial"

Fed. R. Civ. P. 26(b)(3). As noted previously, the defendant claims that any index relating to PCB materials is protected by the work-product immunity. The defendant asserts that the only index of PCB-related documents is generated by "computerized litigation support system prepared, monitored, and used by Monsanto's counsel." In support of its contentions, the defendant has submitted the affidavits of Thomas M. Bistline, Joseph G. Nassif, and David M. Moore, II. Upon review, this Court concludes that the defendant's litigation support system constitutes work product within the meaning of Rule 26(b)(3). It is clear that this system was created in anticipation of litigation. This Court also agrees with the court In re IBM Peripheral EDP Devices Antitrust Litigation, 5 Computer L. Serv. Rep. 878 (N.D. Cal. 1975) that the litigation support system will reflect counsel's mental impressions, theories, and thought processes. Furthermore, any index generated by the litigation support system

also constitutes work-product. At a minimum, an index generated by the system will show how the information contained in the system is organized. This in turn will reflect counsel's mental impressions, thoughts, or legal theories. Consequently, this Court denies plaintiff's motion to compel to the extent it seeks the production of an index of PCB-related documents.

Although the plaintiff is not entitled to the production of a PCB document index, the plaintiff is entitled to a list of documents not produced by the defendant under a claim of privilege. As the court in AM International, Inc. v. Eastman Kodak Co., 100 F.R.D. 255 (N.D. Ill. 1981) stated:

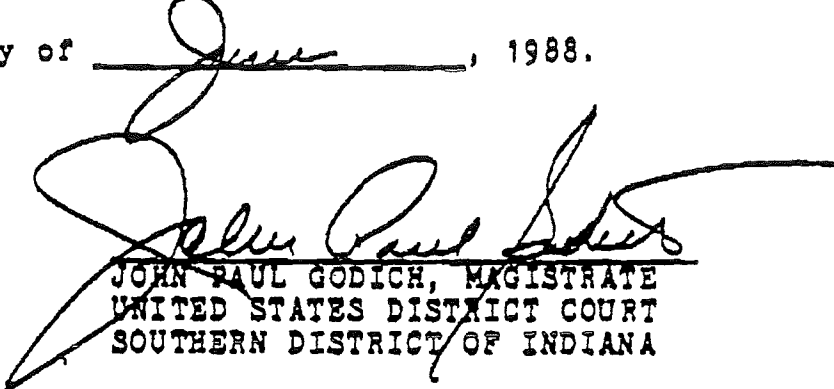
Turning to the question of identification, the law is clear that relevant documents for which a privilege is claimed must be identified. . . . The rationale for such a rule is compelling. Without identification of the documents, the party against whom the privilege is claimed is completely unable to challenge the validity of that claim. The outcome is indefensible.

See also F.T.C. v. Shaffner, 626 F.2d 32, 37 (7th Cir. 1980) (Party must supply court with sufficient information to determine if communication is protected by attorney-client privilege); International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88 (D. Del. 1974) (Party must identify documents protected by attorney-client privilege); 6 C. Wright & A. Miller, Federal Practice & Procedure §2032 (1970) (Work product immunity does not shield from discovery "the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery."). Therefore, this Court orders the defendant to provide plaintiff with a list identifying all documents withheld from discovery under a claim of privilege.

Furthermore, the defendant is reminded of its obligation to respond in good faith and, if necessary to supplement a response, to legitimate discovery requests. If it should subsequently be determined by this Court that the defendant has provided inaccurate or incomplete lists of privileged documents, including the list previously supplied to the plaintiff, this Court will impose sanctions.

Accordingly, this Court grants in part plaintiff's motion to compel production of documents.

DATED this 30th day of June, 1988.



JOHN PAUL GODICH, MAGISTRATE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

Scott/5-10-11

FILED - CLERK
U. S. DISTRICT COURT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CECIL SCOTT, ET AL

VS.

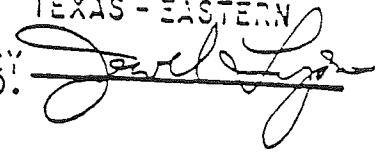
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CIVIL ACTION NO.

B-84-1103-CA

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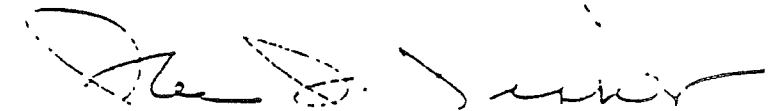


OF ER OVERRULING MOTION TO COMPEL DISCOVERY

Came on for consideration this day the Plaintiffs' Motion to Compel Discovery. Upon consideration of the Motion and the Response to Plaintiffs' Motion to Compel Discovery and Supporting Affidavits and Brief, the Court was of the opinion that the Plaintiffs' Motion to Compel Discovery should be in all things overruled and denied. It is therefore

ORDERED that the Plaintiffs' Motion to Compel Discovery is in all things overruled and denied.

SIGNED and ENTERED this 10 day of March, 1987.


United States District Judge

JBS/SCOTTorder

HARTOLDMON0044407

MILWAUKEE COUNTY

1 THE COURT: In terms of the issue on the data base
2 and the index as to whether or not it falls within the work
3 product with respect to the Wisconsin law cited, I agree with
4 the defense that there is no definitive rule in Wisconsin as
5 to whether this is or is not work product.

6 And in terms of whether the work is done for a
7 specific litigation, the issue of whether that is narrowly
8 or broadly defined, I think that, when we come to an age of
9 where we are now, in a product liability where litigation
10 means not only one particular instance but it's one particu-
11 lar product where it generates hundreds of lawsuits, that the
12 work done for those lawsuits can be deemed work product.
13 Here we have a situation where apparently the lawyers involv-
14 ed have spent literally thousands of hours organizing the
15 documents in a coherent fashion, summarizing them and putting
16 them in an order of relating to one another so that they
17 could have the advantage of having ready responses to allega-
18 tions made at their fingertips, and it's a matter of thou-
19 sands of hours they invested in order to prepare for their
20 defense, and it seems to me that that is the classic type of
21 work product, preparing to organize the materials for use in
22 the litigation, to put them in a fashion where arguments can
23 be presented and supported in a prompt fashion. In terms of
24 whether-- so, I'm satisfied that all of the work that was
25 done in order to organize all of these documents and to

1 summarize these documents for the benefit of those lawyers
2 in defending these cases does constitute work product.

3 With respect to whether there has been good cause
4 shown for turning over the work despite its work-product
5 status, first of all, I am not satisfied that there has been
6 a sufficient showing that the documents which are relied upon
7 by Stroh were so clearly responsive to Stroh's requests as
8 to support any finding of bad faith or inefficiency or neg-
9 ligence on the part of Monsanto. The mere fact that Monsanto
10 narrowly construes rather than broadly construes all of the
11 products' requests does not change it. They are not doing
12 something illegal or inappropriate by taking a narrow con-
13 struction to discovery requests, and it's their right to do
14 that and to require a hearing if more is needed. But I
15 haven't found their responses to be so inadequate, and I have
16 not found sufficient evidence of bad faith or hiding of docu-
17 ments, particularly where the documents relied upon and
18 claimed to be hidden in this case are a matter of public re-
19 cord.

20 Now, the mere fact that specific files were re-
21 quested in the medical department and those files were files
22 mantled by Stroh and no longer exist, I am satisfied that
23 there has been no adequate showing that these files were
24 dismantled and reorganized because of the litigation. I am
25 satisfied with the representations that they were dismantled

1 long before the litigation, and I do not find the connection
2 here to be such as to require the loss of work-product
3 privilege.

4 And I am satisfied, further, that other things
5 could be done to obtain whatever is out there, one of which
6 is, as I suggested, by simply asking for everything that has
7 ever been asked for and ever been produced before in other
8 litigations.

9 And so, for all of those reasons, I'm satisfied
10 that the indexes are work product in this case, and I'm
11 satisfied further that the plaintiff has failed to meet its
12 burden of showing good cause for bypassing the privilege in
13 this case, and so the Motion To Compel is denied.

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1 STATE OF WISCONSIN)
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MILWAUKEE COUNTY)
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10 I, Renata Berschdorf, an official court reporter
11 in and for Milwaukee County, Branch #4, do hereby certify
12 that the foregoing is a true and correct transcript of my
13 stenographic notes taken in this matter.

14 Dated at Milwaukee, Wisconsin, this 22nd day of
15 December, 1988.

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18 Renata Berschdorf
19 Court Reporter
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