

NORTH CAROLINA  
DAVIDSON COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
06 CVS 948

AZALEA GARDEN BOARD & CARE,  
INC.,

Plaintiff,

v.  
MEREDITH DODSON VANHOY,  
Personal Representative of the Estate of  
Ricky C. Dodson, Deceased; LARRY S.  
GIBSON; NINA G. GIBSON; DANIEL  
W. TUTTLE; TIMOTHY D. SMITH; and  
HARVEY ALLEN, JR.

Defendants.

**DEFENDANT DANIEL W. TUTTLE'S  
BRIEF IN SUPPORT OF DEFENDANT  
TUTTLE'S MOTION TO  
COMPEL DISCOVERY**

**NOW COMES** Defendant, Daniel W. Tuttle ("Mr. Tuttle"), by and through counsel, and respectfully submits his Brief in Support of his Motion to Compel Discovery.

**STATEMENT OF THE FACTS**

On March 11, 2008, Mr. Tuttle served Defendant's First Set of Interrogatories and Request for Production of Documents seeking information related to the expert(s) Plaintiff intends to designate for the purpose of providing testimony in support of Plaintiff's claims. Despite David H. Wagner's ("Mr. Wagner") position as president of the Plaintiff, Plaintiff chose to designate Mr. Wagner as its sole testifying expert in support of its claims, and continues to allege Mr. Wagner is a testifying expert in Plaintiff's Answers and Responses to Defendant's First Set of Interrogatories and Request for Production of Documents (the "Discovery Responses"). However, for the reasons stated in its Response, Plaintiff would prefer to have its cake and eat it too. Plaintiff denies the Defendants their right to access the information considered by its expert in forming his opinion (by claiming the attorney-client privilege extends

to communications with a testifying expert), yet it would still have this Court treat the witness as an expert. Plaintiff has clearly waived that privilege.

**I. DEFENDANT TUTTLE IS ENTITLED TO DISCOVERY OF ALL COMMUNICATIONS AND DOCUMENTS BETWEEN COUNSEL AND ITS TESTIFYING EXPERT AS THERE IS NO ATTORNEY-CLIENT OR WORK PRODUCT PRIVILEGE BETWEEN AN ATTORNEY AND AN EXPERT.**

Quite simply, a testifying expert is not the client. Moreover, the law in this jurisdiction holds that once a witness is designated as an expert, the party waives the work product privilege and the opposing party is entitled to all documents and communications between the expert and the attorney. Elm Grove Coal Co. v. Director, O.W.C.P., 480 F.3d 278 (4th Cir. 2007) (draft expert reports that are prepared by counsel and provided to testifying experts and attorney-client communications which explain the lawyer's concept of the underlying facts are not entitled to protection under the work-product doctrine); State v. Holston, 134 N.C. App. 599, 518 S.E.2d 216 (1999) (work product privilege that attached to attorney's summary of defendant's medical records was waived when defendant's attorney provided expert with the summary prior to expert's testimony). See also Manufacturing Admin. and Management Systems, Inc. v. ICT Group, Inc., 212 F.R.D. 110 (E.D.N.Y. 2002) (expert discovery rule mandates disclosure of attorney work-product given to a testifying expert, including core work product, such as attorney's mental impressions and opinions).

The attorney-client privilege must be strictly construed, and the burden is on the party asserting it to demonstrate its application. United States v. (UnderSeal), 748 F.2d 871 (4th Cir. 1984). The privilege may be waived, either intentionally or inadvertently, and intent to waive the privilege is only one factor in determining whether a waiver has occurred. O'Leary v. Purcell Co., 108 F.R.D. 641 (M.D.N.C. 1986). Plaintiff, in this action, has waived the attorney-client privilege as to those communications with Mr. Wagner which relate to his responsibilities

as an expert witness. Accordingly, under Rule 26 of the North Carolina Rules of Civil Procedure, Mr. Tuttle is entitled to discovery of communications and documents between Plaintiff's counsel and Plaintiff's expert, Mr. Wagner. Under Rule 26(b)(4)(a)(1), Mr. Tuttle is entitled not only to the subject matter on which Mr. Wagner will testify, but also the grounds for each opinion. Those "grounds" likely include information obtained from Plaintiff's counsel.

In Shooker v. Superior Court, 111 Cal.App.4th 923, 4 Cal.Rptr.3d 334 (Cal.App. 2 Dist. 2003), plaintiff partner of a venture capital company sued the company and its owner for breach of partnership agreement and breach of fiduciary duty. Id. at 926, 4 Cal.Rptr.3d at 336. After substantial discovery, plaintiff designated six expert witnesses, including himself. Id. At his deposition, plaintiff was asked about conversations with his lawyers, which plaintiff objected to based on attorney-client privilege and the work-product doctrine. Id. Defendant claimed that, by designating himself as an expert witness, plaintiff had waived the attorney-client privilege. Id. at 926, 4 Cal.Rptr.3d at 337. The deposition was suspended to permit plaintiff to seek a protective order and no privileged information was disclosed. Id.

At plaintiff's motion for a protective order, the Court stated that by designating himself as an expert, he impliedly waived the attorney-client privilege. Id. Plaintiff then served notice that he was withdrawing the designation of himself as an expert witness. Id. at 927, 4 Cal.Rptr.3d at 337. Defendant rescheduled the deposition and plaintiff filed a petition for a writ of mandate to the California Court of Appeals. Id.

The California Court of Appeals held that the designation of a party as an expert trial witness was not, by itself, an implied waiver of the party's attorney-client privilege. Id. at 925, 4 Cal.Rptr.3d at 336. The Court stated that "if the designation is withdrawn before the party discloses a significant part of a privileged communication, or before it is known with reasonable

certainty that the party will actually testify as an expert, the privilege is secure; if the party produces privileged documents or testifies as an expert, the privilege is waived.” Id. The Court stated that even though plaintiff had designated himself as an expert, he had not waived the attorney client privilege based on the fact that he had withdrawn *before* he was deposed or had produced privileged information. Id. at 930 4 Cal.Rptr.3d at 340.

Certainly, if Mr. Wagner were not the president of Plaintiff and was simply hired as an outside third-party to evaluate the transaction as an expert in the field of law, there is no doubt that Mr. Tuttle would be entitled to the discovery that he is seeking in this matter. See Vaughan Furniture Co. Inc. v. Featureline Mfg., Inc., 156 F.R.D. 123 (M.D.N.C. 1994) (plaintiff waived opinion work-product protection of its attorney by naming its attorney as expert witness and was required to produce all documents considered in process of formulating expert opinion, including documents containing opinions). Instead, by designating its primary fact witness and president as its expert, Plaintiff seeks to reap the benefit of allowing Mr. Wagner to give opinion testimony as an expert, but use his status as a fact witness to shield him from unfavorable inquisitions using the attorney-client privilege. Indeed, Plaintiff is seeking to “double-dip” under the rules to the detriment of Mr. Tuttle.

To allow Plaintiff to rely on the attorney-client privilege to prohibit full discovery would “produce in acute form the very evils that discovery has been created to prevent.” As in Shooker, Plaintiff impliedly waives the attorney client privilege when Mr. Wagner testifies as an expert at deposition or trial.

Mr. Tuttle’s Motion to Compel seeks an Order ruling that no attorney client privilege exists between counsel for Plaintiff and Mr. Wagner for any issue related to Mr. Wagner’s purported expert testimony. Under the law, once Mr. Wagner is identified as an expert, he is not

shielded by the attorney-client privilege. Likewise, Mr. Tuttle is entitled to all documents exchanged between counsel and its expert, Mr. Wagner, as they are no longer protected by the work product doctrine. Mr. Tuttle requests the Court grant Mr. Tuttle's Motion to Compel, to declare there is no attorney-client privilege between Plaintiff's counsel and its retained testifying expert, Mr. Wagner, and that Mr. Tuttle is entitled to discover the information known to and conveyed to Plaintiff's expert on which his opinions are based.

### CONCLUSION

Defendant Daniel W. Tuttle respectfully prays the Court for an Order granting his Motion to Compel as set forth above, and for such other and further relief as shall be just and proper.

This the 30<sup>th</sup> day of April, 2008.

/s/ Jeffrey D. Patton

JEFFREY D. PATTON

N.C. State Bar No. 21246

*Attorney for Defendant Daniel W. Tuttle*

/s/ Nathan B. Atkinson

NATHAN B. ATKINSON

N.C. State Bar No. 27695

*Attorney for Defendant Daniel W. Tuttle*

### OF COUNSEL:

SPILMAN THOMAS & BATTLE, PLLC

110 Oakwood Drive, Suite 500

Winston-Salem, NC 27103

Telephone: (336) 725-4491

Facsimile: (336) 725-4476

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AZALEA GARDEN BOARD & CARE, )  
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Plaintiff, )  
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v. )  
MEREDITH DODSON VANHOY, Personal )  
Representative of the Estate of Ricky C. Dodson, )  
Deceased; LARRY S. GIBSON; NINA G. )  
GIBSON; DANIEL W. TUTTLE; TIMOTHY )  
D. SMITH; and HARVEY ALLEN, JR. )  
 )  
Defendants. )

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing **DEFENDANT DANIEL W. TUTTLE'S BRIEF IN SUPPORT OF DEFENDANT TUTTLE'S MOTION TO COMPEL** upon counsel via electronic mail and by depositing a copy in the United States mail, postage prepaid addressed as follows:

*Frederick K. Sharpless, Esq.*  
*Sharpless & Stavola, P.A.*  
*P.O. Box 22106*  
*Greensboro, NC 27420*  
*Attorney for Meredith Dodson*  
[fksharpless@sharpless-stavola.com](mailto:fksharpless@sharpless-stavola.com)

*Joe E. Biesecker, Esq.*  
*Christopher A. Raines, Esq.*  
*Biesecker, Tripp, Sink & Fritts, L.L.P.*  
*P.O. Box 743*  
*Lexington, NC 27293-0743*  
*Attorneys for Plaintiff*  
[jbiesecker@lexcominc.net](mailto:jbiesecker@lexcominc.net)

*Benjamin R. Norman*  
*James C. Adams II*  
*Brooks, Pierce, McLendon,*  
*Humphrey & Leonard, LLP*  
*P.O. Box 26000*  
*Greensboro, NC 27420*  
*Attorney for Harvey Allen, Jr.*  
[bnorman@brookspierce.com](mailto:bnorman@brookspierce.com)  
[jadams@brookspierce.com](mailto:jadams@brookspierce.com)

*Larry S. Gibson*  
*Nina G. Gibson*  
*1115 Carthage Street*  
*Sanford, NC 27330-4162*  
*Pro Se*  
[darthcapt@yahoo.com](mailto:darthcapt@yahoo.com)

This the 30<sup>th</sup> day of April, 2008.

/s/ Jeffrey D. Patton  
Jeffrey D. Patton  
N.C. State Bar No. 21246  
*Attorney for Defendant Daniel W. Tuttle*

**OF COUNSEL:**  
Spilman Thomas & Battle, PLLC  
110 Oakwood Drive, Suite 500  
Winston-Salem, NC 27103