NORTH CAROLINA

DAVIDSON COUNTY

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.

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

> BRIEF IN SUPPORT OF MOTION FOR SANCTIONS

Defendant, Daniel W. Tuttle ("Mr. Tuttle"), respectfully submits this Brief in support of his Motion for Sanctions. In support of his Motion, Mr. Tuttle states as follows:

SUMMARY OF ARGUMENT

As the Court is well aware, Plaintiff has been confused about its obligations under Rule 26 throughout the discovery phase of this action. As described more particularly herein, Plaintiff's neglect or willful and inexcusable refusal to follow the rules that govern discovery has cost Mr. Tuttle unnecessary and avoidable fees and cots. Unfortunately, Plaintiff's inability to adhere to the law on this issue is symptomatic of its haphazard approach to this litigation generally. For Mr. Tuttle, Plaintiff's refusal to acknowledge the rules governing discovery is one to which he is now entitled to sanctions under the law.

FACTS

As the Court is aware, Plaintiff, through its counsel, designated its own president, David Wagner ("Mr. Wagner"), and Gene Tarr ('Mr. Tarr") as "possible" testifying experts. Solely as a result of Plaintiff's designation, on March 11, 2008, Mr. Tuttle drafted and served

Interrogatories and Document Requests pursuant to Rules 26, 33, and 34 to conduct discovery into the knowledge of Mr. Wagner and Mr. Tarr in their capacity as experts, as well the information they reviewed, utilized, and considered in forming their "expert" opinions. Plaintiff responded to Mr. Tuttle's inquiries into Mr. Wagner's knowledge as retained and testifying "expert" by asserting the attorney-client privilege, refusing to disclose the information to which Mr. Tuttle was entitled, in direct contradiction of Rule 26(b)(4). On March 19, 2008, Mr. Tuttle Noticed the Deposition of Mr. Wagner, and, as such, he was to appear, testify and produce documents as Plaintiff's expert on April 29, 2008. Steps were taken by counsel for Mr. Tuttle to prepare for the deposition. The undersigned alerted Plaintiff's counsel in a letter dated April 23, 2008 that communications between testifying experts and counsel are "neither privileged, nor protected in any manner from disclosure in discovery" (See Exhibit A).

Thereafter, the deposition was rescheduled to allow for Plaintiff's Supplemental Responses to Mr. Tuttle's First Set of Interrogatories and First Request for Production of Documents until May 23, 2008. Steps were taken to prepare for the deposition, but it was again rescheduled until June 24, 2008 following the entry of an Order of this Court on May 22, 2008, extending the expert discovery period until that same date. The delays and rescheduling of the depositions were due to the Plaintiff's incomplete responses and Mr. Tuttle took action in response thereto. Plaintiff withdrew his designation of Mr. Wagner and Mr. Tarr as Plaintiff's experts on June 11, 2008, and the Notice of Cancellation of the deposition of Mr. Wagner was served on Plaintiff on June 20, 2008. Rescheduling the deposition on multiple occasions caused Mr. Tuttle unnecessary expenses and costs in preparing for the deposition.

¹ Although initially reluctant, Plaintiff ultimately backed off its position that Mr. Tarr was a retained expert; however, that did not occur until after receiving correspondence from Mr. Tuttle's counsel and clear direction from the Court identifying the problems with Plaintiff's designation. (See order dated May 6, 2008.)

In lieu of producing the information or acknowledging his mistake, Plaintiff's counsel responded with an email dated April 23, 2008, in which he articulated his refusal to discuss this situation with Mr. Tuttle's counsel over the telephone and asserted that he would only communicate through writing (See Exhibit B). Plaintiff's counsel followed that email with a letter dated April 24, 2008, which incorrectly asserted the Plaintiff's obligations under the North Carolina Rules of Civil Procedure and Rules of Evidence (See Exhibit C). In fact, in his letter Plaintiff's counsel stated and expressly acknowledged that "he could be wrong about the law" but that he did not believe the attorney-client privilege was waived when designating Mr. Wagner as an expert.

As a result of its unreasonable and incorrect position, and despite the law being correctly identified to Plaintiff's counsel, on April 25, 2008, Mr. Tuttle filed a Motion with the Court to Compel Discovery of information known by Mr. Wagner in his capacity as a testifying expert witness, as well as draft a brief in support of the Motion to Compel. The Court responded in its order dated May 6, 2008 that because Plaintiff elected to designate Mr. Wagner as an expert, it must produce the requested information regarding the facts relied upon by Mr. Wagner, or any other information Mr. Wagner, as an expert, used in forming his "expert" opinions. At that time, the Court also ordered Plaintiff to retain Mr. Tarr as an expert within twenty (20) days, if it in fact intended to do so.

On May 19, 2008, Plaintiffs filed a Motion for Instruction regarding the May 6, 2008 Order, asking whether Mr. Tarr could continue to be designed a "possible" expert witness, despite the Court's (and Mr. Tuttle's counsel's) repeated reminders that there was no such thing as a "possible" expert witness under Rule 26. Mr. Tuttle was again forced to incur expense in

responding to the Plaintiff's Motion for Instruction.² In its Order dated May 28, 2008, the Court again informed Plaintiff's counsel that they were incorrect about the Rules of Civil Procedure, as the Rules make no provision for a designation of a "possible expert witness." The Court indicated that its Order in that respect was "clear."

Despite the clarity of the Court's Order, Mr. Tuttle sent a letter dated June 5, 2008, again requesting the discovery regarding Mr. Wagner's capacity as an expert witness, which Plaintiff's counsel refused to disclose. On June 11, 2008, Plaintiff's counsel responded with a letter which again misstated Rule 26. At that time, Plaintiff's counsel also admitted that neither Mr. Tarr nor Mr. Wagner qualify as an expert witness in this case within the meaning of Rule 26(b)(4). In this letter, Plaintiff's counsel withdrew both Mr. Wagner and Mr. Tarr as designated expert witnesses (See **Exhibit D**). This revelation came as no surprise to Mr. Tuttle or his counsel, as Mr. Wagner had previously described himself as a "semi-retired lawyer" who spent very little time engaged in the practice of law (Wagner Dep. 15:20 to 16:4).³

DISCUSSION

Under N.C. Gen. Stat. § 1A-1, Rule 26(g), the signer certifies that he has read the request, response, or objection, and that to the best of his knowledge, information and belief formed after a reasonable inquiry, the discovery is (1) consistent with the rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and

³ The relevant portions of the Wagner deposition are attached hereto as Exhibit E.

² This was not the first "Motion for Reconsideration" filed by Plaintiff. Plaintiff filed a previous "Motion for Reconsideration" regarding the Settlement Agreement signed by Defendant Timothy Smith.

the importance of the issues at stake in the litigation. N.C. Gen Stat. § 1A-1, Rule 26(g) (emphasis added).

Plaintiff has violated N.C. Gen. Stat. § 1A-1, Rule 26 ("Rule 26") in four different ways: (1) by designating Mr. Wagner and Mr. Tarr as a "possible expert witness," the designation of which had no reasonable basis in law; (2) by designating the President, its sole shareholder, of the Plaintiff as its expert witness and primary fact witness and refusing to permit discovery as required under Rule 26 by asserting a misguided and legally inaccurate argument of attorney-client privilege; (3) by filing repeated and unnecessary Motions for Clarification and thereby forcing Defendants to incur discovery costs that were unreasonable, unduly burdensome, and expensive; and (4) by failing to act on his duty to supplement discovery within a reasonable time as required by Rule 26. N.C. Gen. Stat. § 1A-1, Rule 26(g).

A. Plaintiff is Subject to Mandatory Sanctions for Violation of Rule 26(g)

The ability to impose sanctions is one of the inherent powers of the North Carolina courts, and is reviewed only for abuse of discretion. <u>Dunn v. Canoy</u>, 180 N.C. App. 30, 45, 636 S.E.2d 243, 253 (2006). A trial court's inherent authority encompasses not only the "power but also the duty to discipline attorneys, who are officers of the court, for unprofessional conduct." <u>In re Hunoval</u>, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977). Unprofessional conduct subject to this power and duty includes misconduct, deficiency in character, or any dereliction of duty except mere negligence or mismanagement. <u>Id.</u> Rule 11 applies to motions in connection with discovery, but Rule 26(g) applies to discovery request, responses, and objections. <u>Brooks v. Giesey</u>, 334 N.C. 303, 317, 432 S.E.2d 339, 347 (1993). The term "response" includes answers to interrogatories and to requests to admit as well as responses to production requests. <u>Id.</u>, 432 S.E.2d at 347.

1. <u>Plaintiff's Designation of Mr. Tarr and Mr. Wagner as "Possible" Testifying Experts Had No Basis Under North Carolina Law or Rules of Civil Procedure.</u>

Plaintiff's first violation of Rule 26 occurred in its discovery responses, which stated that Mr. Tarr and Mr. Wagner may be designated as testifying experts. Rule 26(g) requires that a party's attorney of record certify that upon reasonable inquiry, the discovery is consistent with the rules and warranted by existing law. N.C. Gen. Stat. § 1A-1, Rule 26(g). Plaintiff's discovery was neither. Nowhere in Rule 26 does it state that someone may designate an individual as a possible testifying expert – the person either is designated an expert, or he is not. He can not be both. Indeed, as the Court itself stated in it its Order on Motion for Clarification on May 28, 2008 – the Rules of Civil Procedure make no provision for designation of "possible" expert witnesses. Thus the discovery was not grounded in any existing law or rules. Had Plaintiff conducted the required reasonable inquiry into the law, or read Rule 26(g) before certifying his response to Defendant's discovery request, he would not have wasted the Court's time and the Defendant's time, money, and effort on a Motion to Compel Discovery, a Motion for Clarification, and a litany of corresponding documentation, briefs, and orders that resulted from Plaintiff's faulty designation. Importantly, counsel for Mr. Tuttle conveyed this information to Plaintiff's counsel in its letter dated April 23, 2008. (See Exhibit A). Plaintiff, by simply reading Rule 26, could have avoided the waste of time, money and effort that was wasted in responding to Plaintiff's position and in preparation for the impending depositions of Mr. Wagner and Mr. Tarr, which were subsequently unnecessary because Plaintiff belatedly withdrew the two witnesses as testifying experts. This is sanctionable conduct under Rule 26 – a reasonable inquiry could have avoided this waste caused by Plaintiff's disregard for Rule 26's requirement of discovery based upon existing rules.

2. <u>Plaintiff Violated Rule 26(g) When It Refused to Permit Mr. Tuttle to Conduct Discovery of Individuals as Testifying Experts.</u>

Second, Plaintiff violated Rule 26 when it designated its own client as an expert witness, and then refused to permit discovery as required under Rule 26. A party is required to make a reasonable inquiry that discovery is consistent with the rules. N.C. Gen. Stat. § 1A-1, Rule 26(g). Here, Plaintiff claimed that Mr. Wagner's information as an expert witness was not discoverable due to the information being protected by attorney-client privilege. However, a "reasonable inquiry" into the law would have shown otherwise. To begin with, Plaintiff could not possibly have conducted the reasonable inquiry required by Rule 26 and still found that Mr. Wagner's information, in his capacity solely as an expert witness, was not discoverable because of a privilege.

Solely resulting from the discovery issues related to Plaintiffs' identification of Mr. Wagner and Mr. Tarr as experts, Defendants have spent over \$10,138.00 in attorney's fees alone⁴ because of Plaintiff's misguided decision to name his own client as an expert while still attempting to assert a privilege to protect all information provided to Mr. Wagner. After a Motion to Compel Discovery, a Motion for Clarification, exchange of multiple correspondence, and expensive deposition preparation, the Plaintiff finally acknowledged its clear error and withdrew Mr. Wagner as a testifying expert a mere two weeks before the deposition was to take place, resulting in unnecessary attorneys' fees and costs to Mr. Tuttle due to the Plaintiff's costly and unreasonable mistakes. All could have been avoided had the Plaintiff acted with due diligence and research to determine that the designation of Mr. Wagner as a testifying expert would waive the attorney-client privilege regarding communications with Mr. Wagner as an expert witness. Thus, because of the Plaintiff's failure to conduct the necessary "reasonable

⁴ Exclusive of fees associated with this Motion, Brief and Hearing.

inquiry," the Plaintiff violated Rule 26(g) when it designated Mr. Wagner, yet refused to disclose any information related to Mr. Wagner's service as "expert" because it believed it was privileged.

3. Plaintiff Violated Rule 26(g) by Causing Defendant to Incur Excessive and Unnecessary Discovery Expenses.

Third, Plaintiff's failure to conduct a reasonable inquiry into the law resulted in Mr. Tuttle having to incur unreasonable, unduly burdensome, expensive, and ultimately unnecessary discovery costs, in violation of Rule 26(g). Rule 26(g) states that "the signature of the attorney or party constitutes a certification that he has read the request, response or objection and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is . . . not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy and the importance of the issues at stake in the litigation." N.C. Gen. Stat. § 1A-1, Rule 26(g). If Plaintiff had taken the time to conduct a "reasonable inquiry" before certifying his discovery response, it would have realized that temporarily designating Mr. Wagner as an expert would be unreasonable, unnecessary, and costly in violation of Rule 26.

In fact, its failure to conduct a reasonable inquiry and subsequent decision to designate Mr. Wagner and Mr. Tarr as "possible experts" was patently unreasonable, and ultimately costly to Mr. Tuttle. This is especially true in light of the fact that the Plaintiff stated in his June 11, 2008 letter to Defendant's counsel that he had made an "erroneous interpretation" of Rule 26's requirements of expert witnesses. (See **Exhibit D**). Plaintiff further admitted that "Mr. Wagner does not qualify as an expert witness within the meaning of Rule 26(b)(4)." Nothing changed in regard to Mr. Wagner's expertise; Mr. Wagner was never qualified to give expert testimony.

This could have been determined much earlier in the case, had Plaintiff conducted the reasonable inquiry required under Rule 26.

In fact, Mr. Wagner himself testified in no uncertain terms that he was a "semi-retired lawyer" who did "very little legal practice." (Wagner Dep. 15:20 to 16:4). Plaintiff's counsel was also aware that Mr. Wagner, the bankruptcy "expert" claimed he did not know what a bankruptcy plan was in its Rule 30 deposition. (Wagner Dep. 124:17). Instead, Plaintiff caused this Defendant to waste unnecessary time, energy, and money because of the Plaintiff's easily-avoidable mistake. Responding to Plaintiff's position and preparing for the depositions were costly expenses to Mr. Tuttle.

4. Plaintiff Failed to "Reasonably" Supplement Its Discovery in Violation of Rule 26.

Plaintiff's fourth violation of Rule 26 occurred because Plaintiff did not supplement its discovery within a reasonable time. Assuming, arguendo, that Plaintiff did conduct a "reasonable inquiry" (but still did not know that by designating its client as an expert it would waive the privilege regarding certain communications, or that its designation of Mr. Wagner and Mr. Tarr as "possible" expert witnesses was not grounded in existing law or rules), it was alerted to these facts in a fairly short order. At the very least, Plaintiff was made aware by the undersigned on April 23, 2008.

Plaintiff is under a duty to adjust certain answers to interrogatories as soon as information has come to light changing the answers. N.C. Gen. Stat. § 1A-1, Rule 26(e). Rule 26(e)(1) states that a party is under a duty to seasonably supplement his response to any question directly addressed to the identify of each person expected to be called as an expert witness at trial. N.C. Gen. Stat. § 1A-1, Rule 26(e)(1). The purpose of this provision of Rule 26 is to prevent a party

who has discoverable information from making evasive, incomplete, or untimely responses to requests for discovery. Willoughby v. Wilkins, 65 N.C. App. 626, 641, 310 S.E.2d 90, 99-100 (1983). Furthermore, a party is under a duty to seasonably amend a prior response if he obtains information upon the basis of which he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment. N.C. Gen. Stat. § 1A-1, Rule 26(e)(2).

Thus, Plaintiff should have known that it would be withdrawing Mr. Wagner as a testifying expert, and should have supplemented its answers to Defendant's discovery, as early as April 23, 2008, when Mr. Tuttle's counsel sent Plaintiff's counsel correspondence indicating that "[S]ince Mr. Wagner has been designated as a testifying expert, there is no privilege associated with those communications related to his service as an expert." (See Exhibit A). At that time, since Plaintiff knew it did not want any of its communications with Mr. Wagner as expert revealed, Plaintiff did not act reasonably in compliance with Rule 26 by immediately withdrawing Mr. Wagner as a testifying expert. Instead, Plaintiff sent a letter the very next day stating that he "could be wrong about the law, but [he] saw nothing in Rule 26(b)(4)" that would require him to waive privilege. (See Exhibit C).

Based upon this position, Mr. Tuttle was forced to file a Motion to Compel Discovery on April 25, 2008, properly arguing that there was no privilege between Plaintiff's counsel and testifying expert (and client), Mr. Wagner. After granting a motion for an extension of time, the Court on May 6, 2008 ruled that "Plaintiff's assertion of the attorney client privilege to shield discovery of any communications with counsel involving his expert opinions is misplaced." Further, the Court added that "Plaintiff has elected to designate Mr. Wagner as an expert. Having done so, it must produce the requested information concerning information supplied by

counsel which constitutes facts relied upon by the expert or other information the expert used in forming his opinions." (See Exhibit F). As if that was not enough notice for the Plaintiff, it then filed a Motion for Instructions regarding the Court's Order (See Exhibit G). On May 28, the Court spelled out clearly, and for the second time, that (as a testifying expert) Plaintiff had waived the attorney-client privilege regarding certain communications between Mr. Wagner Plaintiff's counsel.

Yet Counsel still did not seasonably update its discovery answers. On June 5, Mr. Tuttle's counsel was forced to send Plaintiff's counsel a letter again requesting communications between Mr. Wagner as an "expert" and Plaintiff's counsel. (See Exhibit H). In this letter, Mr. Tuttle's counsel indicated that Plaintiff' counsel continued to confuse the rules of attorney-client privilege. In the letter, the undersigned requested, again, the communications that would have involved Mr. Wagner's expert analysis of the claims and damages of Azalea Gardens, which Plaintiff's counsel now claimed no longer existed, though Plaintiff's counsel had previously refused to disclose that very information because of an asserted attorney-client privilege. Plaintiff's counsel's position was baffling at best.

Finally, on June 11, 2008, less than two weeks before the date of Mr. Wagner's scheduled deposition, Plaintiff finally abided by Rule 26's ongoing requirement to update interrogatory responses and *finally* withdrew Mr. Wagner's designation as a testifying expert. Revealingly, in its letter to Mr. Tuttle's counsel, Plaintiff admitted that he had made an "erroneous interpretation" of the rules of expert witnesses. Plaintiff's counsel finally concluded (and finally admitted) that "Mr. Wagner does not qualify as an expert witness within the meaning of Rule 26(b)(4)." Had Plaintiff made this conclusion prior to certifying its discovery response, or had seasonably supplemented his discovery responses, Mr. Tuttle would have been able to

avoid the burdensome, expensive, and unnecessary costs associated with Mr. Wagner's discovery.

B. <u>If This Court Finds That Plaintiff Committed A Violation of Rule 26, the Court is</u> Required to Sanction Plaintiff

If the Court finds that Plaintiff violated Rule 26, the Court is required to sanction the Plaintiff in accordance with Rule 26.⁵ N.C. Gen. Stat. § 1A-1, Rule 26(g). Rule 26(g) provides that the Court must impose an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney's fees. N.C. Gen. Stat. § 1A-1, Rule 26(g). Due to Plaintiff's disregard of the requirement of a reasonable inquiry, and due to Plaintiff's failure to base its discovery responses upon existing law and Rules of Civil Procedure, Mr. Tuttle suffered over \$10,138.00 in attorneys' fees. As such, Mr. Tuttle respectfully requests that the Court sanction Plaintiff and award reasonable attorney's fees to Mr. Tuttle, as permitted under Rule 26(g).

CONCLUSION

Plaintiff's conduct is clearly sanctionable. Plaintiff should have conducted the necessary research to satisfy a "reasonable inquiry" before designating Mr. Wagner as a testifying witness. At the very least, Plaintiff should have withdrawn Mr. Wagner as an expert witness on April 23,

⁵ Furthermore, Plaintiffs also arguably owe Defendant attorney's fees under Rule 37. If a party is forced to go to the Court and file a Motion to Compel Discovery, and his motion to compel is granted, the Court shall, after opportunity for hearing, require the party whose conduct necessitated the motion to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. N.C. Gen. Stat. § 1A-1, Rule 37. Though Defendant did not request attorney's fees at the time the original Motion to Compel was granted, in light of recent events and the failure of Plaintiff to permit discovery of Mr. Wagner in his capacity as a testifying witness within a reasonable time after the Motion to Compel was granted, Defendant is arguably entitled to reasonable attorney's fees. Such an award would compensate Defendant for the fees incurred in the preparation and arguing of the Motion to Compel, and the Objection to the Second Motion for Instructions on the Order to Compel. It would further compensate Mr. Tuttle for the prejudice incurred in the preparation of a deposition that was rendered unnecessary because of Plaintiff's withdrawal of Mr. Wagner and Mr. Tarr as testifying experts and the prejudice created by Plaintiff's failure to follow the Order to Compel or the Instructions on the Order to Compel in a timely fashion.

2008 when Defendant's counsel alerted Plaintiff to the waiver of attorney-client privilege.

Instead, Plaintiff continued to fight, or ignore, the clear language of Rule 26, even after the Court

issued its Order on the issue. Plaintiff's mistake could have been avoided if Plaintiff had

conducted initial research on the law of Rule 26, or addressed Mr. Tuttle's clear and unequivocal

concerns regarding its designation. Instead, Plaintiff's haphazard certification of the discovery

responses has prejudiced Mr. Tuttle and caused him to incur unreasonable, expensive, and

burdensome fees and costs in anticipation of a deposition that never occurred, not to mention the

unreasonable, expensive, and burdensome costs of defending, drafting, and arguing motions due

to Defendant's unreasonable refusal to understand the Court's Order and refusal to withdraw Mr.

Wagner as an expert or submit to discovery of his information in his expert capacity.

This the 25th day of July 2008.

/s/ Jeffrey D. Patton

JEFFREY D. PATTON

N.C. State Bar No. 21246

Attorney for Defendant Daniel W. Tuttle

<u>/s/ Nathan B. Atkinson</u>

NATHAN B. ATKINSON

N.C. State Bar No.: 27695

Attorney for the Defendant Daniel W. Tuttle

OF COUNSEL:

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STB #1060162v1

NORTH CAROLINA

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

DAVIDSON COUNTY

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.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing *Brief in Support of Motion for Sanctions* upon counsel via electronic mail, by electronic filing, 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

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.

This 25th day of July, 2008.

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

Larry S. Gibson Nina G. Gibson 1115 Carthage Street Sanford, NC 27330-4162 Pro Se

/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



SPILMAN THOMAS & BATTLE, PLLC

ATTORNEYS AT LAW

Nathan B. Atkinson Direct Dial 336.725-4496 natkinson@spilmanlaw.com

April 23, 2008

FILE COPY

Via E-Mail, Facsimile and Via U.S. Mail

Joe E. Biesecker, Esq. Biesecker, Tripp, Sink & Fritts, LLP P.O. Box 743 Lexington, NC 27293-0743

Re: Azalea Garden Board & Care, Inc. v. VanHoy et al.
Davidson County Superior Court File Number 06 CvS 948

Dear Joe:

We have performed an initial review of Plaintiff's answers and responses to Daniel W. Tuttle's First Set of Interrogatories and First Request for Production of Documents (the "Responses"), which were hand delivered to our office yesterday afternoon. There are some glaring problems which need to be immediately addressed. Most of these concerns were raised with Mr. Raines yesterday at the time he dropped off the Responses, but it did not appear from those conversations that we will be able to reach an agreement on the issues. Nonetheless, we would prefer to attempt to resolve the issues with your office before approaching the Court with our concerns.

As the deposition of Plaintiff's expert is currently scheduled for April 29, 2008, it is imperative we work through these issues within in the next couple of days; otherwise, we will need to approach the Court to resolve the disagreements.

First, please clarify whether Gene Tarr ("Mr. Tarr") has been retained as an expert in this case. Mr. Raines told us Mr. Tarr has not been retained, but "may be" in the future. The Responses contain a similar lack of clarity. We are much too late in the process for such gamesmanship. If Plaintiff intends on calling Mr. Tarr as an expert, or is otherwise requesting he be designated as an expert for the purpose of his testimony at trial, we are entitled to the information requested in Interrogatory Number 12 (which is also largely the information required to be disclosed by Rule 26(b)(4)). The Responses to Interrogatory Number 12 are vague, or Plaintiff has completely refused to respond. If Mr. Tarr has been retained, please withdraw the objection and provide the information requested by the end of the week and provide dates on which Mr. Tarr may be deposed. Further, Plaintiff only provided an incomplete and vague description of the testimony which it "believes" Mr. Tarr will provide. Defendants are entitled to much more information if Mr. Tarr has been retained or if Plaintiff intends to ask the Court to designate Mr. Tarr as an expert.

110 Oakwood Drive | Suite 500 | Winston-Salem, North Carolina 27103 www.spilmanlaw.com | 336.725.4710 | 336.725.4476 fax

Joe Biesecker, Esq. April 23, 2008 Page 2

Additionally, Plaintiff has objected to disclosing the dates and subject matter of communications between its "expert" (Mr. Wagner) and Biesecker Tripp Sink and Fritts, L.L.P. As you are aware, communications between testifying experts and counsel are neither privileged, nor protected in any manner from disclosure in discovery. Since Mr. Wagner has been designated as a testifying expert, there is no privilege associated with those communications related to his service as an expert. Surely Plaintiff must have expected to lose the privilege associated with conversations related to his service as an expert. It is unreasonable, if not impossible, for defense counsel to delineate between communications with Mr. Wagner the expert, and Mr. Wagner the president of the Plaintiff. As such, please identify any written or oral communications with Mr. Wagner the expert.

Moreover, in lieu of producing a written report, Plaintiff merely indicates that "Mr. Wagner has expressed his opinions in his answers to various discovery requests and in depositions." (Response 2(d),(e)). Plaintiff inexplicably is willing to blur the line between factual discovery reviewed and verified by Mr. Wagner as president of the Plaintiff, yet also refers to the same as evidence of the expert reports posited by Mr. Wagner the "expert." Plaintiff has blurred the distinction between expert and party representative, such that it is extremely difficult for Defendants to isolate questions at deposition related to communications between counsel and the testifying "expert." Therefore, please withdraw the objections related to Mr. Wagner the "expert" as no such privileged protection exists.

If Plaintiff refuses to withdraw Mr. Wagner as an expert, at the very least, Plaintiff must immediately deliver all non-privileged communications and agreements, as well as a privilege log which clearly describes the author, each recipient, date, and subject matter of each allegedly privileged document.

Please call me upon receipt of this letter as I will need to move the Court to compel by tomorrow afternoon in order to preserve the deposition date.

Sincerely yours,

Spilman Thomas & Battle, PLLC

Nathan B. Atkinson

NBA/cas

FILE COPY

Joe Biesecker, Esq. April 23, 2008 Page 3

cc: Mr. Danny W. Tuttle (via Electronic Mail)
Frederick K. Sharpless, Esq. (via U.S. Mail)
Benjamin R. Norman, Esq. (via U.S. Mail)
Larry and Nina Gibson (via U.S. Mail)
Jeffrey D. Patton, Esq. (via Electronic Mail)

Nathan B. Atkinson

B

----Original Message----

From: Nathan B. Atkinson [mailto:natkinson@spilmanlaw.com]

Sent: Wednesday, April 23, 2008 6:45 PM

To: Joe Biesecker; jbiesecker@lexcominc.net

Cc: bnorman@brookspierce.com; Christopher Raines; fks@sharpless-stavola.com;

jadams@brookspierce.com; darthcapt@yahoo.com

Subject: Re: Azalea Garden Board & Care, Inc. v. VanHoy et al

I'm sorry you feel that way. We had a very pleasant meeting with Christopher yesterday, so I believe we have it within our ability to play nicely with opposing counsel. We certainly have not had similar problems with any other counsel in this matter.

In your response, please be sure to indicate how you believe you have been threatened by my letter. I believe you may be confusing the professional courtesy of trying to work out issues without court intervention as somehow constituting a threat. Perhaps if you would respond to emails and phone calls Judge Tennille would not be bothered with issues that can and should be worked out among counsel. But if you are unwilling to do so, so be it.

Nonetheless, I look forward to your written response and, despite your apparent unwillingness to do so, welcome your phone calls, or even an in-person visit, any time.

Regards,

NBA

Sent using BlackBerry

---- Original Message ----

From: Joe Biesecker <jbiesecker@btsflaw.com>

To: Nathan B. Atkinson; jbiesecker@lexcominc.net <jbiesecker@lexcominc.net>Cc: Benjamin R. Norman, Esq. <bnorman@brookspierce.com>; Christopher Raines

<craines@btsflaw.com>; Frederick K. Sharpless, Esq.
<fks@sharpless-stavola.com>; James C. Adams, II, Esq.

<jadams@brookspierce.com>; Larry and Nina Gibson <darthcapt@yahoo.com>

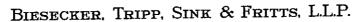
Sent: Wed Apr 23 17:29:09 2008

Subject: RE: Azalea Garden board & Care, Inc. v. VanHoy et al

I have received your letter of 23 April. We have begun and will prepare our written responses.

I decline your invitation to call you by telephone. I have more faith and trust in written communications than in oral communications; and, therefore, I prefer that all of my communications with you be in writing.

Please do not threaten me anymore. You have continuously done so. As to filing anything with the Court, please file whatever you desire whenever you desire.



EXHIBIT

JOE E. BIESECKER
ROGER S. TRIPP
IRVIN R. SINK
WILLIAM F. FRITTS
CHRISTOPHER A. RAINES
DANIELLE DEANGELIS

ATTORNEYS AT LAW
STREET ADDRESS:
THE LAW BUILDING
118 WEST FIRST AVENUE
LEXINGTON, NORTH CAROLINA 27292

24 April 2008

MAILING ADDRESS: POST OFFICE BOX 743 LEXINGTON, N.C. 27293-0743 TELEPHONE (336) 240-9961

FAX (836) 249-3309 REAL ESTATE FAX (836) 249-3300

Mr. Nathan B. Atkinson Spilman Thomas & Battle, PLLC 110 Oakwood Drive, Ste. 500 Winston-Salem, NC 27103

Re: Azalea Garden Board & Care, Inc. vs. Dodson, et al.

06 CVS 948

BTSF No. 18409(f)(1)

Dear Mr. Atkinson:

Due to the nature and subject matter of your letter, I do not believe that I really owe you a response at all because I believe your allegations are ill-founded, accusatory and an attempt to inquire and delve into my work as attorney. Because your letter is asking for the very matters prohibited by Rule 26(b)(3) which provides, "... the court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation ... or work product of the attorney ... of record ...," I do not believe that I am required to respond. Your letter is accusatory because of the assertions of "gamesmanship," "lack of clarity," "vague," "incomplete," "completely refused to respond" and so forth. None of these assertions are true. This letter is not to be construed as a waiver of any attorney-client privilege, nor work-product privilege, nor attorney responsibility, nor the provisions of Rule 26(b)(3) as quoted herein or referred to herein. This letter is not intended to modify nor to be construed as modifying or changing or amending the formal answers in the discovery. It is merely a courteous response to comply with the spirit of the rules of practice in the Business Court.

I caution you also that we have not had time to alert Mr. Wagner to all of this nor to furnish him with a copy of your letter or to discuss with him this response; but I intend to do so.

This is my written response to the letter dated 23 April 2008 which you e-mailed yesterday about the discovery responses.

I. Both Mr. Wagner and Mr. Tarr were identified as *possible* expert witnesses because we are required to identify such person whom we believe *may* testify. We believe that they are indeed experts in their respective fields.

BIESECKER, TRIPP, SINK & FRITTS, L.L.P. Mr. Nathan B. Atkinson 24 April 2008 Page 2

II. Mr. Tarr

We have not retained Mr. Gene Tarr as an expert nor are we required to do so in order to designate him as an expert who may testify. I have not had any conversations with Tarr as an expert witness or a potential expert witness. I briefly interviewed Tarr as a fact witness in preparation for the Azalea I trial and I have spoken with him in court. We have provided you all the information we have concerning Mr. Tarr. He has not prepared a written or oral report to us. I disagree that Azalea Garden must retain or hire Mr. Gene Tarr in order to designate him as an expert. I recognize that I can be wrong about the law, but I saw nothing in Rule 26(b)(4) or anywhere else which requires Azalea Garden to do any such thing. Your interrogatory 1 asked the plaintiff to identify, in addition to David Wagner, all persons who may testify as an expert for Azalea Garden. We did that by identifying Mr. Gene Tarr as a person who may testify as an expert. A witness can be both a fact and expert witness. Indeed, Rule 26(b)(4) begins by providing "discovery of facts known ..." and we recognize that facts may be inquired into. Mr. Tarr is permitted to testify to what he did or says he saw and can render an opinion based upon what he did or says he saw. According to e-mails you and Mr. Patton furnished us in September 2005, Mr. Tarr says that he reviewed pleadings in Azalea Garden's bankruptcy case and concluded that nothing in the case prevented Azalea Garden from delivering marketable title or going forward with the contract. Azalea Garden said this in the answer to Interrogatory 12 and produced the e-mails in which Mr. Tarr rendered this opinion. Based upon what we know, Azalea Garden believes that Mr. Tarr will testify that he reviewed the bankruptcy pleadings and concluded that Azalea Garden was not prevented by the bankruptcy from going forward, if Mr. Tarr testifies consistently with what he says in his e-mails. Since we do not have a contractual basis for Mr. Tarr's testimony, we have no say in when he can be deposed. He is independent of us. We have had no communications or contact with Mr. Tarr since the first case.

III. Mr. Wagner

As to David Wagner, Azalea Garden does not waive the attorney-client privilege merely by designating him as an expert. Again, I recognize that I can be wrong about the law, but I believe that the law requires assertion of the privilege in response to a specific question. We are preserving that privilege from the beginning to alert you to it. In particular, I disagree that confidential communications between David Wagner, as the president of my client, Azalea Garden, and me are subject to disclosure. You are not entitled to learn what legal advice or opinions I rendered to Azalea Garden. There is not, as you claim, a blurring of any distinction between David Wagner as an expert and David Wagner as plaintiff's representative. Again, a witness can be both a fact witness and an expert witness. David Wagner can and has based his testimony that Azalea Garden could perform all necessary actions to deliver marketable title at closing upon what he knew, did and observed. We have disclosed in our discovery responses what he did, what he knew and his opinion based upon what he did, knew and reviewed. We have produced the documents which show what he did, what he knew and the basis for his

BIESECKER, TRIPP, SINK & FRITTS, L.L.P. Mr. Nathan B. Atkinson 24 April 2008 Page 3

opinions. We do not believe there is any correspondence between either Christopher or me and David Wagner as an expert witness. As to responses 2(d) and 2(e), David Wagner did not prepare a written or oral report for Azalea Garden. As to the depositions of Mr. Wagner and Azalea Garden's answers to various discovery requests, you should already have those items.

Sincerely,

BIESECKER, TRIPP, SINK & FRITTS, L.L.P.

Joe E. Biesecker

JEB/lw

ce:

Frederick Sharpless, Esq.

Benjamin R. Norman, Esq.

Mr. Larry Gibson Ms. Nina Gibson

David H. Wagner, Esq.

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EXHIBIT

BIESECKER, TRIPP, SINK & FRITTS, L.L.P.

ATTORNEYS AT LAW
STREET ADDRESS:
THE LAW BUILDING
118 WEST FIRST AVENUE

IRVIN R. SINE LEXINGTON, NORTH CAROLINA 27292 WILLIAM F. FRITTS 11 June 2008 CHRISTOPHER A. RAINES

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TELEPHONE (336) 249-9961
FAX (336) 249-8309

REAL ESTATE FAX (336) 249-3300

Via E-Mail and United States Mail Mr. Jeffrey Patton Spilman Thomas & Battle, PLLC 110 Oakwood Drive, Ste. 500 Winston-Salem, NC 27103

Re: Azalea Garden Board & Care, Inc. v. Dodson, et al.

06 CVS 948

BTSF No. 18409(f)

Dear Mr. Patton:

JOE E. BIESECKER

DANIELLE DEANGELIS

ROGER S. TRIPP

This letter responds to your letter of June 5, 2008. It appears we have differing views of what constitutes an expert opinion and the breadth of what you are entitled to discover from Azalea Garden.

Azalea Garden initially named Mr. Wagner as an expert witness in a supplemental response dated 14 August 2007 to the following interrogatory of Tim Smith:

11. If plaintiff or plaintiff's attorneys expect to call to testify in this case an expert witness, state the following: (a) the name, employer, current address(es), telephone number(s), area(s) of expertise and qualification(s) of each such expert witness; (b) describe in detail the substance of all of the facts, opinions and conclusions to which each expert is expected to testify; and (c) provide the substance of the facts and opinions to which each such expert is expected to testify and a summary of the grounds of each such opinion.

As Azalea Garden understood this interrogatory, Azalea Garden was requested to identify any person who might possibly testify as an expert. Out of an abundance of caution and in order to alert all parties to "possible" experts and avoid the appearance of withholding information, we identified Mr. Wagner as a possible expert witness. We readily admit that we were broadly applying the rules as to expert witnesses. This has now proved to be an erroneous interpretation. This identification was based upon Mr. Wagner's expert knowledge as an attorney and was done in order to fully respond to the interrogatory. We have made it clear that Mr. Wagner was an actor and viewer with respect to the transactions and occurrences which are the subject matter of this lawsuit. While Mr. Wagner has expert knowledge as an attorney, he is a fact witness. Rule 26(b)(4) is not addressed "to the expert whose information was not acquired in preparation for trial but rather because [that expert] was an actor or viewer with respect to the transactions or occurrences that are a part of the subject matter of the lawsuit." Official Comment to Rule

Letter to Mr. Patton, 11 June 2008 Page 2

26(b)(4); Green by Green v. Maness, 69 N.C.App. 403, 409-410, 316 S.E.2d 911, 915 (1984); Turner v. Duke University, 325 N.C. 152, 168, 381 S.E.2d 706, 715-716 (1989); Huffman v. Inglefield, 148 N.C.App. 178, 181, 557 S.E.2d 169, 171 (2001).

Assuming for discussion purposes that Rule 26(b)(4) is applicable, we have complied with its requirements and the orders of Judge Tennille. Rule 26(b)(4) only permits discovery of the facts and opinions of an expert acquired in anticipation of litigation. The rule only requires disclosure of information which forms the basis of expert opinions. I do not now the read the rule as applying to lay opinions or opinions which do not require an expert. Naming Mr. Wagner as an expert does not waive the attorney-client privilege or work-product privilege as to every aspect of this lawsuit or the affairs of Azalea Garden. The waivers of the work product and the attorney-client privileges are limited waivers and apply only to the expert opinions being tendered. Vaughan Furniture Co., Inc. v. Featureline Manufacturing, Inc., 156 F.R.D. 123, 128-129 (M.D.N.C. 1994). Azalea Garden is only required to produce those documents which Mr. Wagner considered in forming his expert opinions. Id. at 125. The term "considered by" Mr. Wagner "does not require that all documents" from Azalea Garden's files or our files be produced. Id. I believe this is how Judge Tennille in his Order of 6 May 2008 interprets Rule 26(b)(4) by speaking of "facts relied upon by the expert or other information the expert used in forming his opinions." [Emphasis added.]

Azalea Garden identified in its responses to your expert discovery two opinions which Mr. Wagner might have rendered as a possible expert witness: (1) that Azalea Garden was able to deliver marketable title at closing and that (2) nothing in the bankruptcy prevented Azalea Garden from going forward. In Azalea Garden's first supplemental response dated 23 May 2008 to your expert discovery, we identified previous interrogatory responses of Azalea Garden and deposition testimony of Mr. Wagner in which these opinions were expressed. These were responses to interrogatories from you in Azalea I and Smith in Azalea II. All of these opinions and statements were presented before Mr. Wagner was designated as a possible expert witness. Mr. Wagner in fact held these opinions before any of this litigation started. As Judge Tennille ordered in his 6 May 2008 order, Mr. Wagner stated on the record that he independently developed his opinions based upon facts or information which did not come from counsel. All documents and facts upon which David Wagner may rely for these opinions have been produced. As we have repeatedly said, the facts upon which Mr. Wagner bases these opinions are within the personal knowledge of Mr. Wagner because he was an actor or viewer with respect to the transactions and occurrences with respect subject matter of the lawsuit. We have disclosed what Rule 26(b)(4) and cases interpreting it and Judge Tennille required. In fact, we have disclosed everything pertaining to Mr. Wagner's testimony.

You refer to "analysis of the claims and damages as an expert on behalf of Azalea Gardens [sic]." Mr. Wagner is not offering any such expert analysis on the case in general. Instead, his possible expert opinions were limited to the narrow issues of Azalea Garden's ability to deliver marketable title at closing and the effect of the bankruptcy on Azalea Garden's ability to go forward with the transaction. Mr. Wagner is not tendering *expert* opinions regarding what parties are or may be liable or the damages he believes Azalea Garden is entitled to recover. The "changing of parties from whom [Azalea Garden seeks] damages" is not related to whether Azalea Garden could have delivered marketable title at closing or whether the bankruptcy

Letter to Mr. Patton, 11 June 2008 Page 3

prevented Azalea Garden from going forward with the transaction. Therefore, any such discussions or thoughts which might exist are protected by the attorney-client and work-product privileges. Mr. Wagner has not and is not rendering *expert* opinions on Azalea Garden's damages. Mr. Wagner can give his opinion about Azalea Garden's damages without being an expert witness.

We do not have any documents pertaining to the formulation of a retained expert opinion by Mr. Wagner. There simply has never been any such thing. Further, we do not have and have never had a privilege "log" to which you refer in your letter. I do not even know what this log is.

Nevertheless, upon further and closer review, we have concluded that Mr. Wagner does not qualify as an expert witness within the meaning of Rule 26(b)(4). Therefore, we intend to withdraw him as a designated expert witness. By withdrawing him as an expert, this should obviate the need to take his deposition. We still intend and reserve our right to call him as a witness to testify as an actor or viewer with respect to the subject matter of the litigation. We have also decided to withdraw Mr. Tarr as a designated expert witness on the grounds that we have concluded that he is an actor or viewer with respect to the transactions and occurrences which are part of the subject matter of the lawsuit. We do not believe Mr. Tarr is an expert witness within the meaning of Rule 26(b)(4). We may call and reserve our right to call him as a witness who was an actor or viewer of the events involved in the lawsuit. We will serve a formal supplemental response to this effect.

Sincerely,

BIESECKER, TRIPP, SINK & FRITTS, L.L.P.

Joe E. Biesecker

JEB:car

Cc: Mr. David H. Wagner

Mr. Fredrick K. Sharpless

Mr. James C. Adams II

Mr. Larry Gibson

Mrs. Nina Gibson

EXHIBIT

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David H. Wagner, Jr. - 04/05/04

Page 1 to Page 234

CONDENSED TRANSCRIPT AND CONCORDANCE PREPARED BY:

Sandra Harper & Associates 3447 Robinhood Road, Suite 206 Winston-Salem, NC 27106 Phone: 336-768-3694

Page 13

- (1) Q. Today what are Azalea Garden's assets?
- (2) A. It has none.
- (3) Q. Was Brookside the primary asset of Azalea
- (4) Garden?
- (5) A. It was the only asset ---
- (6) Q. But the plaintiff is still an ongoing entity?
- (7) Is it still an ongoing entity?
- (8) A. It is still an active corporation, yes.
- (9) Q. Okay.
- (10) A. But Azalea does not own Brookside now.
- (11) Q. Does it do any business whatsoever?
- (12) A. Not other than resolving matters that are
- (13) still pending.
- (14) Q. Are you the majority the majority
- (15) shareholder of any other entity?
- (16) A. Yes, I am.
- (17) Q. What would those be?
- (18) A. Urban Housing, Inc., which is a management
- (19) corporation, and I am the sole stockholder in that
- (20) entity.
- (21) Q. What is the address of Urban Housing?
- (22) A. 2500 Old Greensboro Road, Winston-Salem, North
- (23) Carolina.
- (24) Q. Okay. Any other any other entities that
- (25) you are the majority shareholder of?

Page 14

- (1) A. I am majority shareholder in Dogwood Manor
- (2) Board & Care.
- (3) Q. What's its what's its address?
- (4) A. The address is the corporation is 2500 Old
- (5) Greensboro Road, Winston-Salem, North Carolina. Its
- (6) only asset is a lien against the rest home that was
- (7) operated as Dogwood Manor Board & Care, and it's now
- (8) being operated as a rest home by another firm.
- (9) Q. Any other entities?
- (10) A. Not that I am majority shareholder.
- (11) Q. Any others?
- (12) A. There are some other entities that I'm
- (13) involved in.
- (14) Q. Tell me about those.
- (15) A. Huh?
- (16) Q. Tell me about those, please.
- (17) A. There are some housing developments in which I
- (18) am the general partner. One is Plantation Garden
- (19) Apartments in Myrtle Beach, South Carolina; Carolina
- (20) Garden Apartments in Kings Mountain, North Carolina;
- (21) Rose Hill Garden Apartments in Fayetteville, North
- (22) Carolina; and Lakeview Terrace Apartments in Greenville,
- (23) North Carolina; and Eastview Garden Apartments in
- (24) Winston-Salem, North Carolina.
- (25) Q. I'm sorry. Did you say that you are a partner

- Page 15
- (1) in these entities?
- (2) A. Well, in all of them I am a general partner.
- (3) In in two of them I am the sole general partner, but
- (4) I don't own the majority interest in them.
- (5) Q. What about your wife? Is she the majority
- (6) shareholder of any other entities?
- (7) A. No.
- (s) Q. Could you briefly run through your educational
- (9) background for me, please?
- (10) A. I completed high school in Davidson County -
- (11) or Lexington, North Carolina, in 1944. I got a
- (12) bachelor's degree in chemistry from A & T State
- (13) University in Greensboro. I have a master's in
- (14) education from in 1957 from A & T State University,
- (15) and I have a J.D. degree from Wake Forest University in
- (16) 1968.
- (17) Q. Do you still practice law?
- (18) A. (No response.)
- (19) Q. Do you still practice law?
- (20) A. I consider myself semi-retired, and that adds
- (21) up to no.
- (22) Q. When did you stop practicing law? Oh, I'm
- (23) sorry. Did you ---
- (24) A. I haven't really stopped. I still have an
- (25) office, but ---

Page 16

- (1) Q. Do you still have a practice?
- (2) A. Huh?
- (3) Q. Do you still have a practice?
- (4) A. I do if you call what I do a practice, I
- (5) may draw a will, or I may go to court on a traffic case
- (6) or something like that, but I do very little legal
- (7) practice.
- (8) Q. And where is your office?
- (9) A. It's at 2500 Old Greensboro Road, Winston-
- (10) Salem, North Carolina.
- (11) Q. Let's talk about Brookside, which was well,
- (12) you tell me. Describe what Brookside is for me, please.
- (13) A. Brookside is a rest home. It's a 120-bed rest
- (14) home located in Winston-Salem. It was ---
- (15) Q. Where is it located?
- (16) A. --- developed as Azalea Garden Board & Care,
- (17) and I believe it first opened in 1990.
- (18) Q. I'm sorry. What was the address there?
- (19) A. Huh?
- (20) Q. What was the address of Brookside?
- (21) A. 2562, I believe it is.
- (22) Q. Okay. And so just to be clear, if I refer to
- (23) Brookside, we'll both understand that that was the
- (24) entity which is the subject of this lawsuit?
- (25) A. Right, and and I may refer to it as

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1	NORTH CAROLINA) IN	THE GENERAL COURT OF	JUSTICE
2.)	SUPERIOR COURT DIV	ISION
3	DAVIDSON COUNTY)	02-CVS-2522	
4		·	
5			
6			
7	AZALEA GARDEN BOARD & CARE,	·)	
8	INC.,)	
9	Plaintiff,)	
10	vs.)	
11	MEREDITH DODSON, et al.,)	
2	Defendants.)	٠ ج
з		•.	
4			
5	RULE 30(b)6 D	EPOSITION OF:	
6	DAVID HOLLIS	WAGNER .TP	

August 31, 2005

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The Rule 30(b)(6) deposition of DAVID HOLLIS WAGNER, JR., was taken in the Conference Room of Biesecker, Tripp, Sink & Fritts, LLP, 118 West First Avenue, Lexington, North Carolina, commencing at 10:25 a.m. on Wednesday, August 31, 2005.

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Sandra Harper & Associates

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MR. PATTON: We should make this a part of the -- I think I have another copy. I'm going to

Six.

hand the court reporter what's being marked as Exhibit 6, and I would assume by stipulation of all counsel we can stipulate that this is the verification for what was previously marked as Exhibit 4, the supplemental responses.

MR. JAMES: Yes.

COURT REPORTER:

MR. BIESECKER: Yes.

MR. GAUFFREAU: Yes.

(Exhibit Number 6 marked.)

- Q. (By Mr. Patton) Mr. Wagner, just a few more questions. Do you understand what a bankruptcy plan is?
 - A. Do I understand what now?
 - Q. What a bankruptcy plan is.
 - A. I don't know that I do.
- Q. Well, the corporation that you're testifying on behalf of is part of a bankruptcy plan of reorganization; is it not?
 - A. Do what now?
- Q. The corporation that you're here testifying on behalf of is currently a party to a bankruptcy plan of reorganization; is it not?
 - A. It's a party to a bankruptcy plan of

Sandra Harper & Associates



NORTH CAROLINA

DAVIDSON COUNTY

IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 06 CVS 0948

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.

SECOND ORDER ON MOTION TO COMPEL

This matter is before the Court on a Motion to Compel filed by Defendant Daniel W. Tuttle on April 25, 2008. The Court entered an Order on April 28, 2008, extending the time for expert discovery to allow the Court time to enter the present order on the substance of the motion to compel. (See Order Apr. 28, 2008.) Mr. Tuttle seeks to compel the Plaintiff to produce all documents exchanged between counsel and its designated expert, David H. Wagner, with respect to his expert opinions. Mr. Wagner is President of the Plaintiff and its central fact witness. For the reason set forth below, the Motion to Compel is GRANTED as specified herein.

Pursuant to an Order of this Court, all parties were required to designate their experts and comply with the North Carolina Rules of Civil Procedure requiring disclosure of expert opinions. (See Case Management Order, Sept. 10, 2007.) Defendant Tuttle served Plaintiff with a First Set of Interrogatories and Requests for Production of Documents. (Def. Mot. ¶ 2.) The Court has reviewed the responses to the Interrogatories and Requests for Production attached to Defendant's motion and finds them deficient in several respects.

First, with respect to Mr. Wagner, the Court can only ascertain one opinion identified in the interrogatory answers: "Azalea Garden expects David Wagner to render an opinion that Azalea Garden could have performed all necessary actions to convey at the closing of the transaction marketable title to Brookside." (Def. Mot. Ex. A, Answer 3(b).) Plaintiff adequately described the basis for that opinion. (Def. Mot. Ex. A, Answer 3(b).)

To the extent Plaintiff seeks to elicit other expert opinions from Mr. Wagner, those opinions have not been adequately disclosed. Stating that Mr. Wagner has "expressed his opinions in his answers to various discovery requests and in depositions" is not an adequate disclosure of any other expert opinions. (Def. Mot. Ex. A, Answer 2(d–e).) Plaintiff's assertion of the attorney client privilege to shield discovery of any communications with counsel involving his expert opinions is misplaced. (Pl. Resp. ¶ 13.)

Expert witnesses are subject to specific rules of discovery under the North Carolina Rules of Civil Procedure. N.C.R. Civ. P. Rule 26(b). Generally, the facts known to and the opinions held by an expert are discoverable as well as the materials the expert relied upon in coming to his or her opinion. See id. at Rule 26(b)(4), 26(b)(1). If Mr. Wagner's opinions are based upon any information supplied to him by counsel that information is discoverable and Plaintiff is required to make disclosures of that information.

Plaintiff has elected to designate Mr. Wagner as an expert. Having done so, it must produce the requested information concerning information supplied by counsel which constitutes facts relied upon by the expert or other information the expert used in forming his opinions. Plaintiff has twenty (20) days from the date of this Order to identify any other opinions of Mr. Wagner and fully respond to Defendant Tuttle's discovery requests. If Mr. Wagner independently developed his opinion based on facts or information which did not come from counsel, he should so state for the record.

Second, with respect to Gene B. Tarr, it is obvious from the interrogatory answers that Mr. Tarr has not been retained as an expert. Plaintiff has twenty (20) days from the date of this Order to retain Mr. Tarr and provide responses from him with respect to his opinions or he will not be permitted to testify as an expert. Identifying a possible expert witness who Plaintiff obviously wishes to avoid paying and putting the burden on Defendant to depose him so Plaintiff can see what he will say is not the way the system works.

IT IS SO ORDERED this 6th day of May, 2008.

/s/ Ben F. Tennille

The Honorable Ben F. Tennille Chief Special Superior Court Judge for Complex Business Cases



NORTH CAROLINA DAVIDSON COUNTY IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DAVIDSON COUNTY, C.S.C.

06 CvS 948 BTSF#18409(f)

AZALEA GARDEN BOARD & CARINC.,	Elet-	
Plaintiff,	ĺ	PLAINTIFF'S MOTION FOR
•)	INSTRUCTIONS ON SECOND
v.	j	ORDER ON MOTION TO COMPEL
)	
MEREDITH DODSON et. al.,)	
Defendants.)	

Plaintiff, by and through counsel, Joe E. Biesecker and Christopher Alan Raines, respectfully moves the Court for instructions on its Second Order on Motion to Compel. In support thereof, Plaintiff respectfully shows the following:

- 1. By Order dated 6 May 2008, this Court ordered Azalea Garden to "retain Gene Tarr [as an expert witness] and provide responses from him with respect to his opinions or he will not be permitted to testify as an expert." According to the Order, Plaintiff must do so on or before 27 May 2008. (The 20th day following 6 May 2008 is Memorial Day and, therefore, is a day in which the courts are not open for business.)
- 2. In Azalea Garden's Answers to Defendant Tuttle's First Set of Interrogatories and Requests for Production of Documents, Azalea Garden identified Mr. Tarr as a possible expert witness who might testify to his opinion that nothing in Azalea Garden's bankruptcy proceedings prevented Azalea Garden from selling the Brookside of Winston-Salem Rest Home. Mr. Tarr's opinion is set forth in an e-mail from Mr. Tarr to Brian Herndon, a copy of which is attached to Plaintiff's Exhibit 29. This exhibit was produced in Azalea Garden's responses to Defendant Tuttle's First Set of Interrogatories and Requests for Production of Documents. The e-mail was originally produced to plaintiff by counsel for Tuttle.

- 3. According to the attached e-mail, Mr. Tarr reviewed pleadings from Azalea Garden's bankruptcy cases, concluded that Azalea Garden's bankruptcy did not prevent the sale of Brookside and told Brian Herndon, the closing attorney, of his review and conclusions. This e-mail and these facts reflect what Mr. Tarr did as part of the anticipated sale of Brookside, not any role as an expert witness or otherwise as part of litigation involving the aborted purchase of Brookside. The facts and opinions as reflected in the e-mail existed prior to any litigation involving the aborted purchase of Brookside.
- 4. Perhaps plaintiff's counsel misunderstands the rules applicable to expert witnesses. Counsel represents that he had plaintiff show Mr. Tarr as a *possible* expert witness only because of the conclusions reached by Mr. Tarr as explained in his papers, which have been produced. If Mr. Tarr is a fact witness rather than a retained expert witness, plaintiff needs to know this instruction and needs the Court to so instruct. Plaintiff's counsel believes that Mr. Tarr is a fact witness rather than a retained expert witness.
- 5. Assuming that Mr. Tarr will testify consistently with his e-mail, Azalea Garden proposes to tender Mr. Tarr to testify in connection with what action he took and any legal conclusions he reached in connection with the anticipated sale of Brookside and to other facts within his personal knowledge.
- 6. Mr. Tarr should be permitted to testify, without the necessity of being retained as an expert witness, as to what he did and concluded, the substance of the attached e-mail and any other facts within his personal knowledge.
- 7. Azalea Garden requests an instruction that the Second Order on Motion to Compel does not prohibit Mr. Tarr, without being retained as an expert for Azalea Garden, from testifying or being offered as a witness to testify as a fact witness that he reviewed bankruptcy

pleadings and other documents in connection with the Brookside transaction, that he concluded that nothing in the bankruptcy proceeding prevented Azalea Garden from selling Brookside, that at that time he informed Mr. Herndon of these findings and to any other facts which may be within Mr. Tarr's personal knowledge or to which Mr. Tarr is otherwise permitted to testify.

WHEREFORE, Azalea Garden respectfully prays that this Court instruct on its Second Order on Motion to Compel by ruling and stating that Mr. Tarr is permitted, without the necessity of being retained as an expert for Azalea Garden, to testify as a fact witness that he reviewed bankruptcy pleadings and other documents in connection with the Brookside transaction, that he concluded that nothing in the bankruptcy proceeding prevented Azalea Garden from selling Brookside, that he informed Brian Herndon of these findings and to any other facts which may be of Mr. Tarr's personal knowledge or which Mr. Tarr is otherwise permitted to testify.

19 May 2008.

BIESECKER, TRIPP, SINK & FRITTS, LLP

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Joe E. Biesecker (NC Bar #0329)

BY: Moderne Allan Kaunes

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CERTIFICATE OF SERVICE

The undersigned certifies that on 19 May 2008, copies of Plaintiff's Motion for Instructions on Second Order on Plaintiff's Motion to Compel were served by depositing said copies in the United States Mail, postage prepaid, to Mr. Jeffrey D. Patton, Spilman Thomas & Battle, PLLC, 110 Oakwood Drive, Ste. 500, Winston-Salem, NC 27103; Mr. Frederick K.

Sharpless, Sharpless & Stavola, P.A., P.O. Box 22106, Greensboro, North Carolina 27420; Mr. Larry Gibson, 1115 Carthage Street, Sanford, NC 27330; Mrs. Nina Gibson, 1115 Carthage Street, Sanford, NC 27330; and Mr. Benjamin R. Norman, Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, P.O. Box 26000, Greensboro, NC 27420.

Christopher Alan Raines

Tarr. Gene B.

To: Subject: Herndon, Brian L.

RE: Trillium/Azalea Gardens

I finished reviewing the additional pleadings, etc. that Andy brought me after I sent you the e-mail last night. The pleadings included counterclaims against Azalea Gardens by Blackwell Associates, and 2 judgments recorded in Forsyth county.

The claims by and between Azalea Gardens and Blackwell are not dismissed pursuant to the proposed Settlement Agreement. However, none of the claims affect title to real property and no lis pendens has been filed. I am comfortable with the Azalea Gardens/Blackwell action

I am not comfortable with the judgments. The judgments are, or at least potentially are, liens against the real property. I am not comfortable with the judgments. The judgments are, or at least potentially are, liens against the real property. Walnut Equipment Leasing Company Inc obtained a \$6,083,05 judgment in a case filed in Pennsylvania in 1998. Azalea Gardens filed its first Chapter 11 on Feb. 24, 1997, and the Plan was confirmed on Nov. 12, 1997. Without getting a copy of the complaint from Pennsylvania, we cannot know whether the 1998 action was for prepetition debts or postpetition debts. If it was for prepetition debts, it could have been satisfied by the confirmed Plan (although there is no reference to this claim in the Plan itself). If it is for postpetition, or even post confirmation, debts, it may be a lien. The judgment was recorded in NC 1998, and after it was recorded Gail Ameke filed a Notice of Bankruptcy alleging that the judgment was void as a violation of the automatic stay. She may be right, but she may also be wrong. In any event, the judgment is of record right now and I don't think our clients should be put to the expense of clearing the judgment. See below.

Keith W. Johnson d/b/a Long Life Lighting, Inc. obtained a judgment against Azalea Garden in July, 1996, in Forsyth county magistrates' court. This small (\$768,79) judgment is based on a 1996 claim, so it is obviously prepetition. But, the judgment was obtained more than 90 days before the first Chapter 11 petition was filed, so it should have been treated as a secured claim in the Plan. As far as I can tell, it wasn't treated in the Plan at all. I don't even know if Johnson got notice of the bankruptcy case. In any event, its still out there and should be handled-but not at our client's expense.

The easiest, cheapest way to handle these judgments is for the Seller to persuade the title insurance company to insure over them, require Azalea Gardens to pay them off and get them marked cancelled before or at closing, or get an opinion from reputable counsel (not David Wagner) that the judgments do not impair title. By reputable, I mean an attorney who has malpractice insurance and, unlike Wagner, is not prone to litigating us to death over \$7,000.00 if the opinion turns out to be wrong.

I called Northen to discuss this with him, and perhaps find out that everything has really been resolved. But, he's in court and cannot call me back until later this pm.

Let me know when you want to talk to the clients: gbt

This e-mail contains confidential information for the addressee. Do not read, copy, or disseminate this communication unless you are the intended addressee. If you receive this e-mail by error, then please contact the sender by reply email or Brenda Bowden by phone at 336-761-1250 (collect if you wish).

-Orlginal Message

From: Herndon, Brian L.

Thursday, September 02, 1999 6:02 PM Sent:

To:

Tarr, Gene B. RE: Trillium/Azalea Gardens Subject:

Thanks. We are the closing attorney.

-Original Message-Tarr, Gene B. From:

Thursday, September 02, 1999 5:59 PM Herndon, Brian L.

Sent: To:

Subject: Trillium/Azalea Gardens

I have reviewed copies all pleadings Andy gave me concerning civil actions involving Azalea Gardens Board & Care, Inc and/or David Wagner, whether pending in Forsyth County, or in the District Court for the Middle District of North Carolina. I have also reviewed the dockets for both Azalea Gardens' Chapter 11 cases (known as "Azalea I and Azalea II"), and the District Court for the Middle District of North Carolina.

The proposed Settlement Agreement attached to John Northen's August 31, 1999 letter to Robert Franklin at Tuggle Duggins satisfactorily addresses termination of all state and federal court actions, and corresponding appeals, that would affect title to the real property. Two actions against Azalea Gardens et al, pending in Forsyth County Superior Court, are not entirely resolved by the Settlement Agreement. First, Gordon Reeves has sued Azalea Gardens seeking damages for (essentially) wrongful death. The Settlement Agreement does not mention that suit. Andy assures me that no notice of lis pendens has been filed in that case, and I don't see how the suit would affect "title to real property" anyway. The second action is by Azalea Gardens against WRH, Blackwell Assoc., et al. The Settlement Agreement provides for dismissal with prejudice of all claims by and between Azalea



Gardens and WRH et al, but leaves the claims by and between Azalea Gardens and Blackwell et al in place. No lis pendens has been filed in this case, either. In fact, Andy told me there were no lis pendens at all against Azalea Gardens or Wagner.

I have also reviewed the various dismissals, motions to dismiss, dismissal of appeals, etc., enclosed with Northen's letter to Franklin. The proposed Settlement Agreement requires delivery to Northen Blue LLP, before closing, of all motions, consent orders, dismissals, etc. and requires Northen Blue to file them with the appropriate Court immediately following the closing date. If the parties perform in accordance with the terms of the proposed Settlement Agreement, no pending litigation will affect title to the real property.

Who is the "closing attorney" referred to in the Settlement Agreement? The closing attorney is to receive a release deed from WRH and UCC termination statement contemporaneously with the payment of the purchase price. This, too, is satisfactory.

The Debtor's (Azalea I) confirmed Chapter 11 Plan, as amended, does not specifically provide for a sale of the real property. There appear to be non-insider, unsecured creditors, holding claims of approx \$66,000.00. However, the Plan does not give the creditors a lien on the real property, and all assets (including the real property) vested in Azalea Gardens upon confirmation. In addition, the Bankruptcy Court previously found that Azalea Gardens had defaulted under the Plan, ordered the escrow agent to deliver the deed in lieu of foreclosure to WRH, and, in the order dismissing the Azalea II bankruptcy, mentioned that the Debtor wanted more time to "market" the real property. Based on all of the foregoing, and the lack of any objection by any unsecured creditor to any action taken with regard to the real property, I am satisfied that the provisions of the confirmed Plan do not prohibit the sale of the real property. Azalea Gardens will still be contractually obligated to pay the \$66,000.00 to holders of unsecured claims.

For your edification, I will give you copies of the package I received via fax from Northen today. If you need anything else, let me know. gbt

This e-mail contains confidential information for the addressee. Do not read, copy, or disseminate this communication unless you are the intended addressee, if you receive this e-mail by error, then please contact the sender by reply e-mail or Brenda Bowden by phone at 336-761-1250 (collect if you wish).

ATTORNEYS AT LAW

EXHIBIT

Jenney D. Patton

Direct Dial 336.725-4491 ipatton@spilmanlaw.com

June 5, 2008

Via E-Mail, Facsimile and Via U.S. Mail

Joe E. Biesecker, Esq. Biesecker, Tripp, Sink & Fritts, LLP P.O. Box 743 Lexington, NC 27293-0743

Re: Azalea Garden Board & Care, Inc. v. VanHoy et al.
Davidson County Superior Court File Number 06 CvS 948

Dear Joe,

I am writing in regard to Plaintiff's Supplemental Answers and Responses to Daniel W. Tuttle's First Set of Interrogatories and Request for Production of Documents (the "Discovery"). Despite the Court's clear direction, Azalea Garden Board and Care, Inc. ("Azalea Garden") continues to either confuse the protection afforded by the attorney-client privilege, or is simply refusing to properly supplement its responses. Moreover, it was clear from your initial responses to the Discovery that communications did, in fact, take place between Mr. Wagner and counsel, which would have directly involved Mr. Wagner's analysis of the claims and damages as an expert on behalf of Azalea Gardens. You had noted your objection based upon their attorney-client privilege, and refused to provide that information. Now it appears Plaintiff has changed that position, and instead is now claiming no conversation took place and no documents were exchanged between your firm and Mr. Wagner which would have affected his understanding of the claims and damages in the case. It is simply unfathomable that no communications have been exchanged between your firm and Mr. Wagner during your representation of Azalea Gardens in this case and the previous litigation.

For example, the Complaint has been amended to change the parties from whom you seek damages. Did you discuss that with Mr. Wagner? Why was that done? If Mr. Wagner is an expert who intends to testify about the Plaintiff's ability to transfer title to these particular Defendants, surely the conversations you had with Mr. Wagner about the proper defendants to be named may have some bearing on his opinions as an expert. And, it is very clear from his earlier depositions that any opinion Mr. Wagner may have on damages is based on information received from counsel. And, as I'm sure you know, it is not only the information Mr. Wagner utilized to form his opinion, but also information he may have disregarded in forming his opinion, to which

we are entitled. As you are well aware, we are entitled to all information given or relayed to Mr. Wagner irrespective of his status with Azalea Garden.

As such, we again ask that you provide the information sought in our discovery, namely the dates of meetings, telephone conversations, and correspondence exchanged between your firm and Mr. Wagner so that he may be properly deposed on these issues and the facts which form the basis for his expert opinion. Further, if documents are being withheld under a claim of privilege, we ask that you provide a privilege log identifying the author, all recipients, all individuals copied on the correspondence, the substance of the communication, whether the communication was provided for the purpose of obtaining legal advice and, if so, the nature of the advice sought, and the date of the correspondence.

Please let me know whether you will be supplementing your responses, and whether you will prepare the privilege log, within five (5) days of the date of this letter, or if the Court's intervention will be necessary. I look forward to your response.

Sincerely yours,

Spilman Thomas & Battle, PLLC

Jeffrey D. Patton

NBA/clw

cc:

Mr. Danny W. Tuttle (via Electronic Mail)

Frederick K. Sharpless, Esq. (via Electronic Mail)

Benjamin R. Norman, Esq. (via Electronic Mail)

Larry and Nina Gibson (via U.S. Mail)