

STATE OF NORTH CAROLINA
COUNTY OF CURRITUCK

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14 CVS 389

AMANDA S. GRIGGS, BRADLEY C. GRIGGS,)
DANIEL K. GRIGGS, DANIEL K. GRIGGS,)
JR., SARAH E. GRIGGS, TYLER L. GRIGGS,)
WILBUR R. GRIGGS, JR., and WILBUR R.)
GRIGGS, II,)

Plaintiffs,)

v.)

BITTERSWEET FARMS, LLC, PAMELA G.)
BALLANCE, Successor Trustee of the Minnie)
S. Griggs Revocable Trust dated March 2,)
2004, PAMELA G. BALLANCE, Individually,)
CURTIS SHAY BALLANCE, KELSIE B.)
PITTMAN, and G. ELVIN SMALL, III,)
Administrator of the Estate of Minnie S.)
Griggs,)

Defendants.)

ORDER ON DISCOVERY MOTIONS

THIS MATTER comes before the Court on Defendants Bittersweet Farms, LLC, Pamela G. Ballance, and Curtis Shay Ballance's¹ Motion to Compel ("Motion to Compel"), and Plaintiffs' Motion for Protective Order ("Motion for Protective Order," together with Motion to Compel, "Motions"), and

THE COURT, having considered the Motions, briefs in support of and in opposition to the Motions, argument of counsel, and other appropriate matters of record, concludes, in its discretion, that the Motion to Compel should be GRANTED and the Motion for Protective Order should be DENIED for the reasons below.

1. The Motions arise out of the same discovery dispute and the underlying facts are undisputed. During the depositions of Daniel K. Griggs held on January 8, 2015, Wilbur R. Griggs, Jr. held on February 8, 2015, and Tyler Griggs held on February 20, 2015, counsel

¹ Defendants Bittersweet Farms, LLC, Pamela G. Balance, and Curtis Shay Balance are hereinafter referred to Moving Defendants.

for Moving Defendants asked a number of questions concerning the financial status of the deponent, including each deponent's assets and liabilities. Additionally, during Daniel K. Griggs' deposition, counsel for Moving Defendants inquired into the status, but apparently not the substance, of an ongoing criminal investigation involving Daniel K. Griggs.

2. With regard to these lines of questions, no claim of privilege was made by Plaintiffs' counsel during these depositions, nor has any claim of privilege been asserted at any time after these depositions. Nevertheless, no answers were given to the questions posed by counsel for Moving Defendants, and, in some instances, Plaintiffs' counsel specifically instructed the deponent not to answer.² Instead, Plaintiffs' counsel indicated that he would seek a protective order from this Court to prevent the disclosure of this information and that no information would be provided until a protective order was secured.³ While Plaintiffs ultimately sought a protective order, they did not file the Motion for Protective Order until July 6, 2015.

3. As an initial matter, it appears to the Court that the information sought is relevant to the claims and defenses raised in this litigation. Moving Defendants have asserted counterclaims for, among other things, abuse of process and malicious prosecution, and seek punitive damages. In determining the amount of punitive damages, the ability of the party to pay is a factor for the Court to consider. N.C. Gen. Stat. § 1D-35(2)(i). Additionally, information concerning a criminal investigation might be relevant for a number of purposes, including impeachment of a witness, and is most likely within the broad scope of discovery under the North Carolina Rules of Civil Procedure ("Rule(s)").

4. However, even if objectionable, the Rules provide that, with limited exceptions including a claim of privilege, "evidence objected to shall be taken subject to the objections."

² See, e.g., Wilbur R. Griggs, Jr. Dep. 101-02.

³ Daniel K. Griggs. Dep. 152-53.

N.C. Gen. Stat. § 1A-1, Rule 30(c). Moreover, Rule 18.3 of the General Rules of Practice and Procedure for the North Carolina Business Court ("BCR") provides that counsel "shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the Court." This requirement has also been recognized as inherent in the rules governing, and the general philosophy of, discovery. *See Raulston Purina Co. v. McFarland*, 550 F.2d 967, 973 (4th Cir. 1977) (recognizing that, under the analogous Federal Rule, the language "evidence objected to shall be taken subject to the objections" prohibits counsel from instructing a witness not to answer where only an objection is proper); *see also* G. Gray Wilson, *North Carolina Civil Procedure* § 30-8 (3d. 2014). While the Court understands Plaintiffs' concerns with disclosing their personal financial information, particularly in the context of an acrimonious family lawsuit, it was incumbent upon them to seek protection from disclosing this type of information prior to, or at the very latest during, the depositions.

5. Accordingly, in the absence of any claim of privilege, the refusal to answer the questions posed by counsel for Moving Defendants was improper, whether at the instruction of counsel or not. Therefore, the Court concludes in its discretion that the Motion to Compel should be GRANTED.

6. As to the Motion for Protective Order, it does not appear to the Court that the disclosure to Moving Defendants of the information sought would, as Plaintiffs contend, annoy, embarrass, or oppress Plaintiffs. Ultimately, the Court concludes in its discretion that the Motion for Protective Order fails to reflect good cause as required by Rule 26(c), and, therefore, the Motion for Protective Order should be DENIED.

7. Moving Defendants also request an award of reasonable attorneys' fees in pursuing the Motion to Compel and in opposing the Motion for Protective Order. Rule 37(a)(4)

provides that, if a motion to compel is granted, the Court shall 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." G.S. § 1A-1, Rule 37(a)(4). An award of attorneys' fees when a motion to compel is granted is mandatory under Rule 37(a)(4) absent such findings. *Benfield v. Benfield*, 89 N.C. App. 415, 422 (1988). Similarly, under Rule 37(a)(4), where a motion is denied, the Court shall "require the moving party to pay to the party or deponent who opposed the motion" reasonable expenses, including attorneys' fees unless the Court finds that the making of the motion was substantially justified. Rule 26(c) provides that the "provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to" a motion for protective order.

8. The Court concludes that Plaintiffs' refusal to respond to questions from counsel for Moving Defendants during their respective depositions, whether at the instruction of counsel or not, and the failure to seek a timely protective order were not substantially justified and, accordingly, Moving Defendants are entitled to their reasonable expenses incurred in obtaining this order pursuant to Rule 37(a)(4).

9. In determining the amount of attorneys' fees to be awarded, the Court must consider "(1) the reasonable time and labor for Plaintiff's counsel expended, (2) skill required by this case, (3) the customary fee for similar cases and (4) the experience and ability of the Plaintiff's attorney." *Morales v. Garcia*, 2014 N.C. App. LEXIS 538 *10 (2014). Counsel for Moving Defendants, John G. Trimpi, has submitted affidavits relating to his skill and experience, hourly rates, the nature and amount of time spent on the professional services rendered in filing and pursuing the Motions. Counsel for Moving Defendants seeks fees for 13.25 hours of attorney time at \$250.00 per hour, or a total of \$3,312.50, for his work in

preparing and filing the Motion to Compel and opposition to the Motion for Protective Order.⁴ The Court concludes that Counsel's hourly rate and the time expended on the Motions is reasonable, and are well within the range of fees charged by attorneys in Counsel's geographic area of comparable skill and experience. Accordingly, the Court concludes that fees should be awarded in the amount of \$3,312.50, and that Plaintiffs Daniel K. Griggs, Wilbur R. Griggs, Jr., and Tyler L. Griggs shall be responsible for one-half the fees awarded (\$1,656.25) and counsel for Plaintiffs shall be responsible for one-half of the fees awarded (\$1,656.25).

THEREFORE, IT IS ORDERED that:

10. The Motion to Compel is GRANTED. Moving Defendants shall be entitled to re-depose Plaintiffs Daniel K. Griggs, Wilbur R. Griggs, Jr., and Tyler L. Griggs regarding this questions subject to the Motion to Compel.

11. The Motion for Protective Order is DENIED.

12. Plaintiffs Daniel K. Griggs, Wilbur R. Griggs, Jr., and Tyler L. Griggs, and counsel for Plaintiffs are hereby ordered to pay Moving Defendants' attorneys' fees incurred in obtaining this order in the amount of \$3,312.50 as described above. The fees shall be paid to Moving Defendants' counsel on or before August 14, 2015.

This the 30th day of July, 2015.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge
for Complex Business Cases

⁴ The Court notes that Counsel has not sought any fees for the time spent in the hearing before the Court on the Motions or for travel to and from Raleigh for the hearing.