



2023 Transportation Practice Group Seminar

April 26-28, 2023

Dealing with Extraneous, Unnecessary, Burdensome, Laborious, Oppressive, Troublesome, Arduous, Pointless, Onerous, Exhaustive and Downright Appalling Written Discovery

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Presentation Outline

- Overview
- Discovery Abuse Generally
- Discovery Abuse – Specifically
 - Interrogatories
 - RFPs
 - RFAs
- Industry Insights
- Suggestions to Combat
 - Best Practices for Clients
 - When Abusive Discovery Received

UNITED STATES DISTRICT COURT

AMY SMITH AND JOHN DOE,

Plaintiffs,

v

DRIVER and TRUCKING COMPANY,

Defendants.

Case No.
Hon.

Attorneys for Plaintiff

Attorneys for Defendants

STIPULATED PROTECTIVE ORDER

The Parties have agreed to the terms of this protective order in (a) to maintain the confidentiality of certain confidential, commercial and/or proprietary information that may be produced by any party in this action, and (b) to provide a mechanism for protecting privileged communications if documents containing them are inadvertently produced by a party.

Therefore, it is ordered that:

1. Definitions:
 - a. "Document" means all written material, information, electronic data, videotapes, audiotapes, and all other tangible items, and orally provided information, produced in whatever format (e.g., hard copy, electronic, digital, spoken aloud in testimony via deposition or trial, etc.) and on whatever

media (e.g., hard copy, videotape, computer diskette, tape, CD-ROM, DVD, by secure electronic transmission, hard drive or otherwise).

b. “Protected Document” means a Document that contains confidential, commercially sensitive, private personal information and/or proprietary information and that has been designated as confidential in accordance with this Order, and all physical or electronic copies thereof.

c. “Qualified Persons” shall have the meaning set forth in Paragraph 8 below.

d. “Notification” shall have the meaning set forth in Paragraph 14(a) below.

2. Confidential Documents. Any party in this litigation that provides a Document containing confidential, commercially sensitive, private personal information and/or proprietary information may designate it as confidential by marking it or the written communication, correspondence, email, etc., with which it is conveyed “Subject to Protective Order,” or “Confidential” (or via substantially similar language on media containing the documents), on the face of the Document or enclosing communication as produced, without obscuring the text or content of the Document, or, if provided orally, by indicating on the record or via a subsequent confirmatory writing that the information conveyed is “Confidential” or “Subject to Protective Order.”

3. Inadvertent or unintentional production of a Document that should have been designated as a Protected Document shall not be deemed a waiver in whole or in part of the producing party's claims of confidentiality for that Document.

4. If a party produces, without a confidentiality designation, a Document that should have been designated “confidential” as permitted by Paragraph 2 of this Order, the following procedures shall apply:

- a. The producing party shall, within fourteen (14) days of the discovery of the disclosure, notify the other party in writing. The receiving party shall then promptly destroy (and certify as destroyed) or return the document, including any copies it has; alternatively, the party receiving such notice shall be entitled to place the appropriate confidentiality designation on the document and to treat the document as if that designation had been placed by the producing party. Within ten (10) days after such document is returned or destroyed, the producing party will produce a new version of any such document that was returned or destroyed, with the appropriate confidentiality designation.
- b. The production of such document does not constitute a waiver of any claim of confidentiality as set forth in this order or any other matter in any other jurisdiction, unless otherwise ordered by the Court.

5. A Protected Document shall be used or disclosed only as provided in this Order. However, nothing in this Order shall limit a party’s use or disclosure of his, her, or its own information even though contained in a Protected Document.

6. If a receiving party disagrees with the applicability of a confidentiality designation, that party will notify the producing party by letter and identify the challenged Document with specificity, including Bates-number, and the specific grounds for the

objection to the designation. If the parties are unable to resolve the issue of confidentiality, the producing party will timely apply to the Court to set a hearing to establish that the challenged Document is confidential. The parties will continue to treat a Protected Document as such until determination by the Court to the contrary.

7. Protected Documents shall be maintained as confidential by the receiving party and shall be used only for prosecuting, defending, or attempting to settle this civil action.

8. Protected Documents shall be disclosed only to "Qualified Persons." Qualified Persons are limited to:

- a. Counsel of record for the parties, and the parties;
- b. Lawyers, paralegals and staff employed by counsel of record and involved in the handling and trial of this action;
- c. A vendor hired by a party to host data and maintain a database of electronic data or perform other work related to the collection, review or production of documents in the case;
- d. Experts and non-attorney consultants retained by the parties for the preparation and/or trial of this case; and
- e. The Court, the Court's staff, deposition or trial witnesses to whom disclosure is reasonably necessary, witnesses, and the jury in this case.

9. The receiving party who wishes to disclose Protected Documents to others must, before that disclosure, make a reasonable effort to ensure the disclosure will be made only to persons meeting the definition of Qualified Persons in Paragraph 8. Before

the receiving party discloses any Protected Document to a person described in Paragraph 8(c) and 8(d) above, the receiving party shall obtain from the person an executed "Written Assurance" in the form contained in Exhibit A attached here. The receiving party shall retain each executed Written Assurance and shall keep a list identifying (a) all persons to whom any Protected Document has been disclosed, and (b) all Protected Documents disclosed to each person.

10. Because a Protected Document may be distributed only to a Qualified Person, no person shall post any Protected Document on any website, social media site or application, or internet-accessible document repository, excepting a vendor-hosted review platform for the sole purpose of allowing counsel to review information for the subject case, or provide a Protected Document to another person except in accordance with this Order. No person shall sell, offer for sale, advertise, or publicize the Protected Documents or the fact that he or she has obtained Protected Documents in this litigation.

11. If a Protected Document is used in written discovery, in a deposition (including exhibits), in other pretrial discovery, or trial testimony or as a trial exhibit, the Protected Document shall remain subject to the provisions of this Order, including any transcript pages of the testimony concerning or referring to the Protected Document. In the case of transcripts of oral testimony, the producing party shall designate transcript pages and exhibits containing reference to a Protected Document (i) by a statement on the record during the proceeding in which the testimony is received, or (ii) by written notice served on counsel of record within thirty (30) business days after the first receipt of the transcript.

12. Absent written permission from the producing party, or a court Order denying a motion to seal filed in accordance with this Court's Local Rules, a receiving party may not file in the public record any Protected Document in whole or in part. There is good cause and there exist compelling reasons to seal any Protected Document. If a party believes that documents designated as Protected Documents cannot or should not be sealed pursuant to the protocols and rules in this Court, including but not limited to Local Rules 5.3 and 26.4, then the party wishing to file the materials shall particularly identify to the producing party, in writing, the documents it wishes to file. The parties will then meet and confer, in a good faith effort to resolve the dispute. Failing agreement, the party wishing to file the materials must request a ruling from the Court in accordance with the Local Rules on whether the Protected Document in question must be submitted under seal. The producing party shall have the burden of justifying that the materials must be submitted under seal and shall be given a reasonable amount of time to submit the necessary documents to support its position that the materials should be filed under seal.

13. Within THIRTY(30) days after the conclusion of this case, counsel for each party that received a Protected Document shall retrieve each Protected Document (including all copies and all Protected Documents disclosed to any other person described in Paragraphs 8(a), (b), (c) and (d)) and shall (i) return all of them to the producing party; or (ii) securely destroy them all and certify such destruction to the producing party under penalty of perjury pursuant to 28 U.S.C. § 1746(2).

14. Privileged Documents. The parties seek to produce responsive documents in this litigation without risking waiver of any attorney-client privilege, work product or other applicable privilege or protection. Therefore:

- a. The production of a Document subject to protection by the attorney-client and/or work product doctrine or by another legal privilege protecting information from discovery shall not constitute a waiver of any privilege or other protection, provided that the producing party notifies the receiving party of the same, in writing, of the production promptly after discovering its production (the “Notification”). At the time of sending Notification, the producing party will also provide (or make arrangements shortly thereafter to provide) a privilege log describing the Documents as required by Federal Rules of Civil Procedure 26(b)(5)(A)(ii). These Documents constitute the “Identified Materials.”
- b. As soon as the producing party sends Notification, the receiving party shall promptly return, destroy or delete the Identified Materials (and all copies) from all systems used to house the documents, including document review databases, e-rooms, file cabinets, flash drives, hard drives, and all other locations that store the Identified Materials. The receiving party may make no use of the Identified Materials during any aspect of this matter or any other matter, including in depositions or at trial, unless and until a court has determined that the Identified Materials are not privileged or protected. If the receiving party has any notes or other work product reflecting the contents of the Identified Materials, the receiving party will not review or use those notes or work product unless and until a court later determines that the

Identified Materials are not privileged or protected. After receiving Notification, the receiving party (i) may not disclose the contents of the Identified Materials to anyone who was not already aware of the contents of them before the Notification was made, and (ii) must take reasonable steps to retrieve the Identified Materials if they were disclosed to others.

- c. If any receiving party receives a Document from a producing party which the receiving party has reason to believe is privileged, the receiving party shall in good faith take reasonable steps promptly to alert the producing party of the production of that Document so that the producing party may make a determination of whether it wishes to have the Document returned or destroyed pursuant to this Stipulation and Order.
- d. The party returning the Identified Materials may move the Court for an order compelling production of some or all of the Identified Material returned or destroyed, but the basis for such motion may not be based on the fact or circumstances of the production.
- e. By virtue of this Order and pursuant to Fed.R.Evid. 502(d), the disclosure of Identified Materials in this action is not a waiver of the attorney-client privilege, work product doctrine or any other asserted privilege in any other federal or state proceeding.

15. No provision of this stipulated order shall constitute a concession by any party that any Document is subject to protection by the attorney-client privilege, the work

product doctrine or any other potentially applicable privilege or doctrine. No provision of this stipulated order is intended to waive or limit in any way any party's right to contest any privilege claims that may be asserted with respect to any Document produced except to the extent set forth here.

16. General Terms. This Protective Order may not be waived, modified, abandoned or terminated, in whole or part, except by an instrument in writing signed by the parties. If any provision of this Protective Order is held invalid for any reason whatsoever, the remaining provisions shall not be affected thereby. Any party to the proceeding (or other person subject to the terms of this Protective Order) may ask the Court, after appropriate notice to the other parties, to modify or grant relief from any provision of this Protective Order, which can include requesting greater protection for certain documents or categories of documents.

17. After termination of this litigation, the provisions of this Order shall continue to be binding. This Court retains and shall have jurisdiction over the parties and recipients of the Protected Documents for enforcement of the provisions of this Order following termination of this litigation.

18. This Protective Order shall be binding upon the parties hereto, upon their attorneys, and upon the parties' and their attorneys' successors, executors, personal representatives, administrators, heirs, legal representatives, assigns, subsidiaries, divisions, employees, agents, independent contractors, expert witnesses, consultants, or other persons or organizations over which they have control.

SO ORDERED.

UNITED STATES DISTRICT JUDGE

Dated:
So stipulated:

Attorney for Plaintiffs

Attorney for Defendants

Dated: _____,

Dated: _____,

EXHIBIT A

AFFIDAVIT OF _____, being duly sworn and personally appearing before the undersigned attesting officer, duly authorized by law to administer oaths, deposes and says that the within statements are true and correct:

1. I have read the Stipulated Protective Order attached hereto, and I understand its terms and meanings.

2. I agree that my signature below submits me to the jurisdiction of the United States District Court, Eastern District of Michigan, in the above-captioned case, for the purpose of enforcing the provisions of this Stipulated Protective Order, and that my signature binds me to the provisions of this Order, including to all promises undertaken in the Order by any party that receives Documents, as if originally agreed by me.

Further Affiant sayeth not.

AFFIANT

SUBSCRIBED AND SWORN to before me
this __ day of _____, 20__.

NOTARY PUBLIC

Name: _____
County and State: _____
My Commission Expires:

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17. All documents relating to Johnny ██████'s possession of any █████ vehicle, including but not limited to toll receipts, food, drink, lodging, fuel receipts, scale/weight tickets, dispatch records, delivery receipts, field tickets, and credit card statements, checks, drafts, daily trip reports;

RESPONSE: Defendants object to this “catch-all” type request as overly broad, unduly burdensome, and not proportional to the needs of the case as Plaintiffs seek “all documents” without any limit of scope or time, including those relating to vehicles and dates wholly immaterial to this lawsuit. Defendants further object to this request as vague and ambiguous as “possession” and is undefined and subject to multiple interpretations.

26. Copies of all driver's manuals, company manuals, and other materials pertaining to company, federal or State rules, in effect at the time of the collision;

RESPONSE: Defendants object to this request as overly broad, unduly burdensome, and not proportional to the needs of the case as Plaintiffs seek “all” manuals, etc. Defendants further object to this request as vague and ambiguous as “manuals” and “other materials” are undefined and subject to multiple interpretations. Defendants further object to this request as it seeks irrelevant information that does not pertain to any of Plaintiffs’ remaining claims, and pursuant to Michigan law, internal policies or procedures are not relevant. See *Hartman v. Shearson Lehman Hutton, Inc.*, 194 Mich. App. 25 (1992); see also *Melick v. William Beaumont Hosp.*, 2015 Mich. App. LEXIS 756 (2015). Furthermore, any responsive materials are likely to include proprietary/private information pertaining to the operation of [REDACTED] which is wholly irrelevant and inadmissible.

36. All documentation of driver discipline imposed, or not imposed, by **K and B** for any violations of company rules or policies, or other infractions, in the 5 years prior to and including the involved collision;

RESPONSE: Defendants object to this request as overly broad, unduly burdensome, and not proportional to the needs of the case as it seeks the production of “all” documentation, etc. without any reasonable limit of scope or time, including years, occurrences, and other drivers wholly immaterial to this lawsuit. Defendants further object to this request as vague and ambiguous as “driver discipline” is undefined and subject to multiple interpretations. Defendants further object to this request as it seeks irrelevant information that does not pertain to any of Plaintiffs’ remaining claims, and pursuant to Michigan law, internal policies or procedures are not relevant. See *Hartman v. Shearson Lehman Hutton, Inc.*, 194 Mich. App. 25 (1992); see also *Melick v. William Beaumont Hosp.*, 2015 Mich. App. LEXIS 756 (2015). Furthermore, any responsive materials are likely to include proprietary/private information pertaining to the operation of **██████** which is wholly irrelevant and inadmissible.

37. **K&B** Transportation's accident log;

RESPONSE: Defendants object to this request as overly broad, unduly burdensome, and not proportional to the needs of the case as it seeks the production of an “accident log” without any reasonable limit of scope or time, including years, occurrences, and other drivers wholly immaterial to this lawsuit. Defendants further object to this request as vague and ambiguous as “accident log” is undefined and subject to multiple interpretations. Defendants further object to this request as it seeks irrelevant information that does not pertain to any of Plaintiffs’ remaining claims and inadmissible pursuant to Fed. R. Evid. 404 and 49 U.S.C. § 504(f) which provides that “[n]o part of a report of an accident occurring in operations of a motor carrier ... and required by the Secretary [of Transportation], and no part of a report of an investigation of the accident made by the Secretary, may be admitted into evidence or used in a civil action for damages related to a matter mentioned in the report or investigation.” *See also Sajda v. Brewton*, 265 F.R.D. 334 (N.D. Ind. 2009) (preventing plaintiff from obtaining accident register in discovery because it is a “required” accident report under FMCSR 390.15).

Produce any and all GPS data in print form, electronically stored or otherwise in your possession for the vehicle that was being driven by the Defendant on the date this incident occurred.

RESPONSE:

Defendant incorporates herein by reference and makes a part hereof its General Objections and Prefatory Statement. Defendant further objects to Request Number 1 to the extent that it seeks “any and all” responsive documents. Defendant has not yet completed its investigation of the facts related to this litigation. Consequently, all of the responses contained herein are based only on such information and documentation that is currently available to Defendant. Defendant corporation further objects to this interrogatory in the manner and form presented as same seeks irrelevant information, which is not relevant to the matters at issue in the above captioned cause and is not proportional to the needs of the case. In support of its objection, Defendant states that Michigan's commitment to open and far-reaching discovery does not encompass fishing expedition[s].” *VanVorous v Burmeister*, 262 Mich App 467, 477 (2004). Further, Michigan law holds that “[m]ere conjecture does not entitle a party to discovery, because such discovery would be no more than a fishing expedition.” *Davis v City of Detroit*, 269 Mich App 376, 380 (2006). Subject to and without waiving said objections, Defendant has provided GPS data available.

Produce a certified copy of all insurance policies which YOU had in effect on the date of the ACCIDENT.

RESPONSE:

Defendant incorporates herein by reference and makes a part hereof its General Objections and Prefatory Statement. Subject to and without waiving said objections, Defendant has provided a copy of its Business Auto declaration page, indicating a policy liability limit of \$ 1,000,000. Any request for additional insurance is neither relevant nor proportional to the needs of the case. In *People v Mills*, 450 Mich 61; 537 NW2d 909 (1995), the Michigan Supreme Court held that, "To be relevant, evidence must be material (of consequence to the determination of the action) and have probative force (make a fact of consequence more or less probable than it would be without the evidence). Plaintiff has failed to provide any evidence on how an umbrella / excess insurance policy would have any probative value.

TABLE OF AUTHORITIES

Davis v. City of Detroit, 269 Mich.App. 376; 711 N.W.2d 462 (2005)

Hartmann v. Shearson Lehman Hutton, Inc., 194 Mich.App. 25; 486 N.W.2d 53 (1992)

Melick v. William Beaumont Hosp., 2015 WL 1739980 (2015)

People v. Mills, 450 Mich. 61; 537 N.W.2d 909 (1995)

Sajda v. Brewton, 265 F. R. D. 334 (2009)

VanVorous v. Burmeister, 262 Mich.App. 467; 687 N.W.2d 132 (2004)

Wesley Corporation v. Zoom T.V. Products, LLC, 2018 WL 372700

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF**

JOHN DOE,

Case No.

Plaintiff,

Hon.

Vs.

DRIVER and TRUCKING COMPANY,

Defendants.

Attorney for Plaintiff

Attorney for Defendants

STIPULATED PROTECTIVE ORDER

At a session of said Court,
held in the City of Detroit,
_____ County, Michigan on

Present: Hon. _____
Circuit Court Judge

Pursuant to MCR 2.302(C), the Court's authority, and on stipulation of the parties,

IT IS HEREBY ORDERED that the documents produced by or on behalf of Defendants DRIVER and TRUCKING COMPANY, (hereinafter "Defendants") will be subject to the following protective conditions:

1. The parties hereby recognize that the information/documents to be produced by the Defendants contain confidential information/documents regarding matters of a personal and sensitive nature; policies and procedures; departmental rules and regulations; private, confidential employee files/materials; and that the dissemination of said information/documents is prohibited.

2. The information/documents shall be used solely and exclusively for purposes of this lawsuit. Such information shall not be used in or for other cases,

proceedings, or disputes, or for any municipal, commercial, business, competitive, or any other purpose whatsoever.

3. The aforementioned information/documents may not be disclosed to any person other than parties, counsel of record for the respective parties to this litigation, the paralegal and clerical staff of same, expert witnesses or consultants engaged by counsel, and the court and court personnel, under such safeguards as the court may direct so as to preserve and to protect the confidentiality of information/documents referenced herein.

4. All the persons to whom this confidential information and/or documents are disclosed are hereby enjoined from using the same except for preparation for trial and in the trial of this action (under such safeguards as the court may require) and from disclosing the same to any other person except as provided herein. A breach of the provisions of this Order shall be subject to appropriate sanctions, in the discretion of the court, as authorized by any statute, rule, or the inherent power of the court, or as otherwise provided by law.

5. The provisions of this Order shall survive and remain in full force and effect after the entry of final judgment (including any appellate proceedings) in this case, whether by settlement or litigation.

6. The agreement of the parties embodied in this Order does not constitute an admission or agreement that any document or information is admissible as evidence in this case. Designation of any information as subject to this Order shall have no meaning or effect whatsoever with respect to the substantive issues in this proceeding or the claim or defenses of any party hereto.

7. All documents produced pursuant to this Protective Order shall be returned to defense counsel at the conclusion of this litigation.

IT IS SO ORDERED.

CIRCUIT COURT JUDGE

Stipulated as to form and substance:

Attorney for Plaintiff

Attorney for Defendants

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