

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Gary Masters

Court of Appeals No. L-11-1273

Appellee/Cross-Appellant

Trial Court No. CI0200707749

v.

Kraft Foods Global, Inc., et al.

Defendants

[SPX Corporation—Appellant/  
Cross-Appellee]

**DECISION AND JUDGMENT**

Decided: November 16, 2012

\* \* \* \* \*

Brian Reddy and Donald J. Kral, for appellee/cross-appellant.

John J. Haggerty, for appellant/cross-appellee.

\* \* \* \* \*

**OSOWIK, J.**

{¶ 1} This is an appeal from a September 27, 2011 order of the Lucas County Court of Common Pleas, which granted a motion to compel appellant/cross-appellee to produce documents containing facts known to a testifying expert, in accordance with Civ.R 26(B)(5)(b).

{¶ 2} On December 22, 2005, appellee/cross-appellant, Gary D. Masters, was injured by equipment designed and manufactured by appellant/cross-appellee, SPX Corporation (“SPX”). On November 29, 2007, Masters filed suit against SPX alleging personal injuries. SPX prepared a report derived from the testimony of a fact witness whom Masters deposed. However, it was not disclosed that this witness was an expert witness until after his deposition. In conjunction with this lack of initial disclosure, SPX then failed to cooperate in making the witness available to be deposed again given his newly disclosed status as an expert witness.

{¶ 3} On January 13, 2011, Masters filed a motion to compel discovery responses from SPX seeking production of documents that contained the commentary of this key expert witness. On September 27, 2011, after performing an in camera inspection, the trial court issued a journal entry granting the motion to compel. The production of the expert’s report and documents was ordered. This appeal and cross-appeal ensued.

{¶ 4} For reasons set forth below, this court affirms the judgment of the trial court.

{¶ 5} SPX sets forth the following sole assignment of error:

THE TRIAL COURT ERRED WHEN IT GRANTED  
APPELLEE/CROSS-APPELLANT GARY D. MASTER’ MOTION TO  
COMPEL DOCUMENTS PROTECTED BY THE ATTORNEY-CLIENT  
PRIVILEGE AND WORK PRODUCT DOCTRINE AND AUTHORED  
BY APPELLANT/CROSS-APPELLEE SPX CORPORATION’S  
EMPLOYEE AND TESTIFYING EXPERT ED LONG.

{¶ 6} The undisputed facts relevant to this case are as follows:

{¶ 7} Masters is employed by Kraft Foods, Inc. and was seriously injured in the course of employment when his arm was crushed by a bacon press that was designed and manufactured by SPX.

{¶ 8} On November 29, 2007, Masters filed a complaint alleging personal injuries based upon this incident. SPX was named as one of the defendants. On June 9, 2010, during the deposition of a witness, the witness testified that he had prepared and sent a “commentary” to SPX’s management team regarding modifications made to the bacon press. This witness had not been disclosed to be an expert witness. Following the deposition, SPX designated the witness as an expert witness. In addition, SPX did not furnish the referenced documents prior to Masters’ deposition of the witness. Thus, Masters could not properly depose the witness regarding his expert opinions.

{¶ 9} SPX asserted that their general counsel requested the witness’s commentary prior to the start of litigation. The witness sent multiple memorandums to SPX’s management and general counsel which SPX alleged rendered the documents protected by attorney-client privilege. On January 13, 2011, Masters filed a motion to compel discovery responses seeking production of the expert witness’s documents.

{¶ 10} On August 16, 2011, the trial court held an in camera inspection of the disputed documents. Based upon the inspection, the trial court concluded that SPX had waived its attorney-client privilege when, as held by the trial court, it “voluntarily, affirmatively, and offensively” named the expert witness. In other words, SPX’s own

tactical decision rendered the materials discoverable. On September 27, 2011, the court granted the motion, and ordered SPX to produce the documents.

{¶ 11} SPX's sole assignment of error claims that the trial court erred in granting the motion to compel documents because they were protected by attorney-client privilege. Appellant argues that the trial court incorrectly applied outdated federal jurisprudence. We disagree.

{¶ 12} SPX claims that the trial court relied on principles of outdated federal jurisprudence that were never adopted by the Ohio courts. This explicitly contradicts the trial court's written entry in favor of Masters which plainly states that the ruling was not done in reliance upon an interpretation of federal rules. On the contrary, the trial court relied on the language of Civ.R. 26(B)(5)(b) which states that:

(b) As an alternative or in addition to obtaining discovery under division (B)(5)(a) of this rule, a party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter. Discovery of the expert's opinions and the grounds therefore is restricted to those previously given to the other party or those to be given on direct examination at trial.

{¶ 13} Thus, the trial court relied on the plain language of Civ.R. 26, which renders the expert's testimony discoverable in this case. The court stated that the in camera documents "actually fall within the express scope of Civ.R. 26(B)(5)(b) in that they pertain to 'facts known or opinions held by the expert which are relevant to the stated subject matter.'" Despite SPX's claim, the record shows that trial court relied on the above-quoted language and not on an interpretation of federal law.

{¶ 14} When SPX identified the disputed witness to be a person it "expects to call as an expert witness at trial," Masters was thereby entitled to discover facts known by the expert and was not restricted to those offered on direct examination. Masters is entitled to discovery of facts and opinions previously given to appellant by the expert witness. The expert witness disclosed in his testimony that he had provided his opinions to SPX prior to suit being filed. The opinions discussed the pre-injury modifications of the bacon press and are highly relevant to the case. The trial court reviewed those materials in camera and ruled that the materials fall under the scope of discovery pursuant to Civ.R. 26(B)(5)(b). The trial court stated,

Specifically, the Court finds that, contrary to [appellant's] reading of Civil Rule 26(B)(5)(b), the *in camera* documents would otherwise fall within the express scope of that Rule in that they pertain to "facts known or opinions held by the expert which are relevant to the stated subject matter" and, in particular, to opinions "previously given to the other party."

{¶ 15} SPX is claiming that since the rule is “silent” on the word “document” we should hold that those documents are not discoverable. Civ.R. 26(B) states otherwise. According to Civ.R. 26(B), “parties may obtain discovery regarding any matter which is relevant to the subject matter involved in the pending action \* \* \* including the existence \* \* \* of any books, documents, electronically stored information \* \* \*.” Civ.R. 26(b)(5)(b) expands the scope of discovery to expert opinions. Given the statute’s clear language, the lower court’s decision was proper.

{¶ 16} SPX is claiming that the expert’s opinion is protected under the attorney-client privilege doctrine. However, SPX waived any attorney-client protection encompassing the disputed materials when it, as held in pertinent part by the trial court in response to the discovery dispute, “voluntarily, affirmatively, and offensively” named the trial witness as an expert witness. Wherefore, we find SPX’s assignment of error not well-taken.

{¶ 17} Lastly, Masters filed a cross-appeal from the trial court’s ruling that the expert witness’s opinions were originally protected from discovery under the doctrine of attorney-client privilege. This issue is subsumed by our above decision on SPX’s assignment of error. Therefore, this cross-appeal is moot.

{¶ 18} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. SPX is ordered to pay costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

Masters v. Kraft Foods  
Global, Inc.  
C.A. No. L-11-1273

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Thomas J. Osowik, J.  
CONCUR.

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JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <a href="http://www.sconet.state.oh.us/rod/newpdf/?source=6">http://www.sconet.state.oh.us/rod/newpdf/?source=6</a>.</p>
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