

STATE OF WISCONSIN, )  
 )  
 Plaintiff, )  
 v. )  
 )  
 ABBOTT LABORATORIES, *et. al.*, )  
 )  
 Defendants. )

Case No.: 04 CV 1709

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION  
 REQUESTING A PROTECTIVE ORDER PERTAINING TO  
 DEFENDANTS' NOTICE TO DEPOSE GREGORY L. KIPFER**

Plaintiff's request for an order prohibiting Defendants from taking the deposition of Gregory L. Kipfer is ill-founded and unwarranted. Defendants seek Mr. Kipfer's testimony regarding non-privileged matters that are plainly relevant to this case (i.e., what the State learned from the 1998 Ven-A-Care presentation) and are entitled to depose him under Wis. Stat. §§ 804.01 and 804.05. Plaintiff has failed to provide any basis for denying Defendants the ability to pursue this legitimate discovery. Accordingly, Plaintiff's motion for a protective order should be denied.

**ARGUMENT**

The Wisconsin Rules of Civil Procedure permit a party to take the deposition of any person, including a party, regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.<sup>1</sup> Defendants are seeking testimony from Mr. Kipfer<sup>2</sup> that is both relevant and non-privileged, and thus is discoverable. Even if

<sup>1</sup> See Wis. Stat. §§ 804.01, 804.05.

<sup>2</sup> Gregory Kipfer is currently employed by the Wisconsin Department of Financial Institutions as a Securities Examiner. At the time relevant to this motion, Mr. Kipfer was employed by the Wisconsin Department of Justice as an Investigator in the Medicaid Fraud Control Unit. See Supplemental Verification of Gregory L. Kipfer In Response to Defendants' Seventh Set of Interrogatories and

Defendants were seeking work product, which they are not, Defendants would be entitled to such discovery because there is a substantial need for information that cannot be obtained through other means.

**A. Mr. Kipfer's Knowledge is Relevant to This Action.**

Wisconsin discovery rules are to be liberally construed to allow parties to “formulate, define and narrow the issues to be tried ... and give each party opportunity to fully inform himself of the facts of the case and the evidence which may come out at trial.”<sup>3</sup> Deposing Mr. Kipfer is necessary to “fully inform the parties of the facts of the case,” in light of discrepancies between the State’s written discovery responses and certain documents that have been introduced as exhibits to depositions taken in this action.

Documents produced during a deposition taken in this and other litigation reveal that Mr. Kipfer attended a March 19, 1998 National Association of Medicaid Fraud Control Units (“NAMFCU”) meeting, at which a presentation was made by representatives of Ven-A-Care, a specialty pharmacy, concerning the use of AWP in reimbursement formulas.<sup>4</sup> During that presentation, these Ven-A-Care representatives made several statements regarding AWP that are directly relevant to significant issues in this case.<sup>5</sup>

Testimony concerning Mr. Kipfer’s attendance at this presentation and any materials he received on behalf of the State is relevant to Plaintiff’s understanding of AWP in 1998. The State’s understanding of AWP, of course, is an important issue in this case.

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Requests for Production (“Kipfer Verification”) at 1 (May 14, 2008) (attached as Ex. A). To Defendants’ knowledge, Mr. Kipfer is not an attorney.

<sup>3</sup> *State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis.2d 559, 576, 150 N.W.2d 387, 397 (Wis. 1967).

<sup>4</sup> See “Receipt for Ven-A-Care of the Florida Keys, Inc. Presentation Material at the National Association Medicaid Fraud Control Unit Conference on March 19, 1998” at 5 (attached as Ex. B); Transcript of Deposition of Zachary T. Bentley (“Bentley Tr.”) at 467 (March 6, 2008) (excerpt attached as Ex. C) (introducing the receipt as an exhibit); Cross-Notice of Deposition of Zachary Bentley (Feb. 19, 2008) (attached as Ex. D).

<sup>5</sup> See “Ven-A-Care of the Florida Keys, Inc. Presentation Material at the National Association Medicaid Fraud Control Unit Conference on March 19, 1998,” (attached as Ex. E); Bentley Tr. at 471 (Ex. D).

As Judge Niess ruled, Plaintiff's understanding of that term is critical to determining whether the published AWP's for Defendants' drugs were "untrue, deceptive, or misleading" – an essential element of Plaintiff's § 100.18 claim.<sup>6</sup>

Likewise, Mr. Kipfer's presence at the Ven-A-Care presentation also is relevant to Defendants' statute of limitations defense. Plaintiff's assertion that Mr. Kipfer's testimony is protected from disclosure under the work product doctrine only reinforces its relevancy to this defense. The work product doctrine protects information that was "prepared or obtained because of the prospect of litigation."<sup>7</sup> The State's objection presupposes that the State was considering litigation concerning the publication of allegedly false AWP's as far back as March 1998. If true, Mr. Kipfer's knowledge supports Defendants' argument that Plaintiff's claims are barred by the six-year statute of limitations, given that Plaintiff did not file its complaint until June 2004.

Mr. Kipfer's failed recollection of having attended the Ven-A-Care presentation is beside the point.<sup>8</sup> Defendants are entitled to understand the reasons for Mr. Kipfer's failure to recollect attending the meeting, test his credibility and attempt to refresh his recollection. If this were, for example, a case involving an automobile accident, a passenger claiming she has no recollection of whether the light was red or green can still be deposed to probe the basis for the lack of recollection and to test the witness's credibility. Were this not the case, no witness claiming a failed memory could ever be deposed.

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<sup>6</sup> See Decision and Order On Plaintiff's Motions for Partial Summary Judgment Against Novartis, AstraZeneca, Sandoz and Johnson & Johnson at 6-7 (May 20, 2008) (attached as Ex. F).

<sup>7</sup> *Lane v. Sharp Packaging Systems, Inc.*, 251 Wis.2d 68, 117, 640 N.W.2d 788, 811, 2002 WI 28, ¶ 61 (2002).

<sup>8</sup> See Kipfer Verification (Ex. A). Most curiously, Mr. Kipfer admits to attending the NAMFCU meeting, but fails to recall having attended the Ven-A-Care presentation, notwithstanding that counsel for the State has indicated that the signature acknowledging receipt of the Ven-A-Care materials is indeed Mr. Kipfer's.

**B. Defendants Do Not Seek Privileged Testimony From Mr. Kipfer, and Even If They Were, Counsel Will Be Present To Object and Instruct the Witness.**

The State points this Court to *Dudek* (which sets forth the standard for determining whether work product is discoverable), mistakenly asserting that Defendants have an obligation to show “good cause” for seeking information from Mr. Kipfer, and that this information “is not available by other less intrusive means.”<sup>9</sup> Plaintiff’s reliance is misplaced, because Plaintiff has not shown (nor can it) that the testimony sought from Mr. Kipfer is protected by the work-product doctrine in the first place.

The work product doctrine protects “materials, information, mental impressions and strategies collected and adopted by a lawyer...in preparation of litigation and relevant to the possible issues [of that litigation].”<sup>10</sup> Defendants are not seeking testimony regarding the “mental impressions and strategies” Mr. Kipfer may have “collected and adopted” at the presentation in preparation of litigation. Rather, Defendants seek testimony regarding the *factual* circumstances surrounding Mr. Kipfer’s attendance at the Ven-A-Care presentation and the non-privileged (and now produced) materials he received there.<sup>11</sup>

Moreover, the party asserting work-product bears the burden of showing that the information sought is entitled to protection, before the requesting party must show “good cause” for its production.<sup>12</sup> Plaintiff’s brief skips this step, and baldly asserts that

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<sup>9</sup> Plaintiff’s Motion and Brief Requesting a Protective Order Pertaining to Defendants’ Notice to Depose Former Medicaid Fraud Investigator Gregory L. Kipfer at 13 (June 13, 2008).

<sup>10</sup> *Dudek*, 34 Wis.2d at 589, 150 N.W.2d at 404 (adopting rationale of *Hickman v. Taylor*, 329 U.S. 495 (1947)) (emphasis added); see also Wis. Stat. § 804.01(2)(c).

<sup>11</sup> See *Dudek*, 34 Wis.2d at 588 (finding that “where relevant and non-privileged *facts* remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had.”) (emphasis added).

<sup>12</sup> See *Lane*, 251 Wis.2d at 118, 640 N.W.2d at 811 (overruling the circuit court’s work-product determination in part because “there [was] no determination that the documents were prepared or obtained because of the “prospect of litigation”); *Borgwardt v. Redlin*, 196 Wis.2d 342, 358, 538 N.W.2d 581, 587 (Wis. Ct. App. 1995) (requiring the party asserting work-product to “list the date, author, recipient, and privilege or privileges claimed for each document” so that the trial court could make a determination as to whether work-product applied); *Dudek*, 34 Wis.2d at 601, 150 N.W.2d at 410 (“Once it is determined that a certain item is qualifiedly privileged, the burden rests upon the

Defendants are seeking attorney-work product without providing a shred of support for its contention.<sup>13</sup> Notably, Plaintiff does not argue that Mr. Kipfer's attendance at the Ven-A-Care presentation was "in preparation of litigation," but instead asks the Court to infer that, because Mr. Kipfer was working for the Department of Justice, anything he did and any materials he may have received are entitled to protection. Plaintiff's brief does not even state whether Mr. Kipfer was acting at the direction of an attorney,<sup>14</sup> or attempt to explain why the Department of Justice's files reveal no mention of Mr. Kipfer's attendance of the NAMFCU meeting.

Nor is the possibility that Defendants *may* ask questions regarding privileged information a valid basis for preventing the deposition from going forward. As is the case with all depositions, Plaintiff's counsel is free to object during the deposition to any questions it believes seek information covered by the work product doctrine, and provide the witness with appropriate instructions.

Plaintiff, however, is not free to simply refuse to allow Mr. Kipfer to be deposed altogether. In fact, Plaintiff's sudden assertion to the contrary is inconsistent with its own actions in this litigation to date—notably, the work-product doctrine did not deter Plaintiff from cross-noticing the depositions of several attorneys for AstraZeneca.<sup>15</sup>

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party seeking discovery to demonstrate sufficient reason for discovery to the trial court in light of policy as related to the particular facts of the case.”)(emphasis added).

<sup>13</sup> See Plaintiff's Br. at 10-12.

<sup>14</sup> *Dudek's* holding is limited to “the work product of the lawyer[.]” *Dudek*, 34 Wis.2d at 591, 150 N.W.2d at 405. Although *dicta* suggests that statements taken by investigators may be entitled to some protection, the court clearly limits this protection to statements taken “at an attorney's instance.” *Id.* at 594-95.

<sup>15</sup> See Cross-Notice of Videotaped Depositions (June 26, 2008) (attached as Ex. G); Cross-Notice of Videotaped Depositions (May 1, 2008) (attached as Ex. H).

**C. Even If the Work Product Doctrine Applied, Defendants Have Shown a “Substantial Need” and a Lack of “Other Means” of Obtaining the Information.**

Even if Defendants were seeking testimony protected by the work product doctrine (which they are not), Defendants would be entitled to such information. A party may obtain discovery of otherwise privileged materials by showing a “substantial need of the materials...and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”<sup>16</sup> Mr. Kipfer is clearly the sole source of his personal knowledge or recollection regarding events surrounding the the Ven-A-Care presentation, receipt of the Ven-A-Care materials, and the meaning and/or significance, if any, of his signature on the presentation sign-in page. As discussed above, Defendants have a “substantial need” for this information, because confirmation that the State did indeed attend this presentation, especially if its attendance was “in preparation of litigation,” would establish that Plaintiff’s claims are barred by applicable limitations. Defendants have attempted to secure this information by “other means,” mainly by serving interrogatories and following up with Plaintiff regarding this issue, but neither has proven satisfactory.

As the Supreme Court noted in *Dudek*, “what is good cause for discovery depends upon the reason a certain item is classified work product and the reason advanced for demanding discovery. ... It is a question of fairness tempered by the basic concepts of our adversary system and the desirable aspects of pretrial discovery.”<sup>17</sup> It is patently unfair for Plaintiff to evade discovery of facts potentially fatal to its case by hiding behind faulty memories and improper assertions of privilege to purely factual evidence.

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<sup>16</sup> Wis. Stat. § 804.01(c).

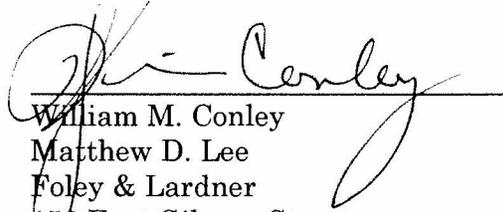
<sup>17</sup> *Dudek*, 34 Wis.2d at 592, 150 N.W.2d at 405.

## CONCLUSION

For the foregoing reasons, Defendants ask this Court to deny Plaintiff's motion for a protective order prohibiting the deposition of Gregory L. Kipfer.

July 1, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read "W. M. Conley", is written over a horizontal line. The signature is fluid and cursive.

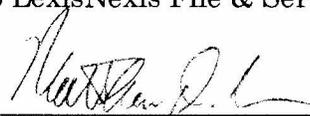
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## CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2008, a true and correct copy of the foregoing was served upon all counsel of record via electronic service pursuant to Case Management Order No. 1 by causing a copy to be sent to LexisNexis File & Serve for posting and notification.



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