

TWENTY-THIRD JUDICIAL CIRCUIT
OF VIRGINIA



DAVID B. CARSON, CHIEF JUDGE
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CIRCUIT COURT FOR THE COUNTY OF ROANOKE
CIRCUIT COURT FOR THE CITY OF ROANOKE
CIRCUIT COURT FOR THE CITY OF SALEM

COMMONWEALTH OF VIRGINIA

March 27, 2020

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Re: *Nikki Sweeney v. Dominion Pathology Associates, et al*
Roanoke City Circuit Court
Case No. CL19-1151

Dear Counsel:

As always, I appreciate the thorough and professional manner in which you have presented the issues in this case to the Court. Plaintiff's Motion to Compel is denied, and the Court's reasoning follows.

BACKGROUND

This is a medical malpractice case in which Plaintiff alleges that Defendants misdiagnosed Plaintiff with a specific cervical cancer for which Plaintiff subsequently received treatment. In the course of discovery, Plaintiff deposed one of the Defendants, Dr. Pragna Sheth ("Dr. Sheth"). Dr. Sheth testified, *inter alia*, that after suit had been filed, at her counsel's

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direction, and in the presence of her counsel, she took photographs of certain biopsy slides that she concluded supported her diagnosis of the specific cancer at issue.

Plaintiff has filed a Motion to Compel in which she seeks copies of the photographs taken by Dr. Sheth. Defendant, by counsel, objects on both attorney-client and work product grounds.

ANALYSIS

Dr. Sheth prepared the photographs at issue after Plaintiff had filed her suit and at the request of her attorneys as part of her defense to this lawsuit. Under the circumstances, I conclude the photographs were prepared in anticipation of litigation or for trial and thus are work product. Plaintiff's request is thus premised on meeting the high standard established by Rule 4:1(b)(3), which states, in relevant part, as follows:

A party may obtain discovery of [work product] . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials . . . the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Under this framework, the questions for the court are:

- Has Plaintiff demonstrated a substantial need; and
- Is Plaintiff unable, without due hardship, to obtain the substantial equivalent.

In this case, the Court concludes that Plaintiff has failed to demonstrate a substantial need or an inability to obtain the substantial equivalent. Specifically, when Plaintiff's counsel deposed Dr. Sheth, she identified specifically two of the thirteen biopsy slides that, in her opinion, supported her diagnosis. So, while there may be a need to have exact copies of the photographs that Dr. Sheth took, that need is far from substantial – particularly because the particular biopsy slides exist and Plaintiff can obtain – without undue hardship – the substantial equivalent of Dr. Sheth's photographs from the existing biopsy slides.¹

Plaintiff further asks to compel a re-deposition of Dr. Sheth – presumably to discuss the photographs that the Court has already concluded are work product. Though conflating the work product analysis in Rule 4:1(b)(3), the Court does not appreciate how a re-deposition could avoid

¹ This does not address any best evidence implications, but the best evidence in this situation is the slides themselves.

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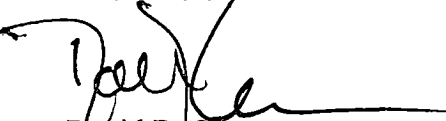
having Dr. Sheth either having to become (at least potentially) an expert witness against herself, or having her (at least potentially) disclose mental impressions, conclusions, opinions, or legal theories of Dr. Sheth's counsel.

CONCLUSION

For the reasons stated above, Plaintiff's Motion to Compel production of the photographs at issue and a re-deposition of Dr. Sheth are denied.²

By April 3, Ms. Perrow shall submit an agreed Order to the Court for entry, which of course preserves all Plaintiff's objections. If the Order is not agreed, then Mr. Segura shall submit his proposed Order by April 7.

Very truly yours,



David B. Carson

DBC:kab

² The Court does not need to address the attorney-client prong of Defendant's opposition to the Motion to Compel because nothing has been done – to date – to waive any such privilege, assuming – without deciding – that the privilege applies.