IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

YVONNE JOHNPOLL Plaintiff, v. BRIX TAVERN, LLC, Defendant.	)	Case No. 17CV33824 ORDER RE. PLAINTIFF'S MOTION FOR SANCTIONS AGAINST DEFENDANT

Plaintiff's Motion for Discovery Sanctions was brought pursuant to ORCP 46 D against Defendant Brix Tavern, LLC. The motion came before the court for oral argument by counsel on April 20, 2018, with the Honorable Marilyn Litzenberger presiding at the hearing. Plaintiff was represented by her attorney, Kristin L. Olson of Olson Brooksby PC. Defendant Brix Tavern, LLC appeared through its attorneys, Sarah Pettey and Dipendra Rana of the Wiles Law Group.

Plaintiff seeks an award of sanctions for what she contends are discovery abuses by Brix Tavern, LLC. ("Brix") arising out of Brix's failure to produce email correspondence that Plaintiff requested when this action commenced. The subject emails were not produced until approximately six months later, on the eve of the deposition of Defendant's corporate representative, Mr. Byrum. This deposition was scheduled to take place in mid-January 2018, but was postponed at his request due to inclement weather predicted for the Portland-metro area. It is undisputed that the communications memorialized in the "withheld" emails fall within Plaintiff's request for production served on Brix in August 2017, with Plaintiff's Summons & Complaint.[1]

The content of the emails, according to Plaintiff, is an admission of Brix's liability for Plaintiff's damages arising from her fall at the Brix restaurant premises. Plaintiff

[1] Plaintiff's request was specific, not vague, in calling for "all documents relating to any claims, complaints, notices, action, and/or reports concerning slips, trips and/or falls at [Defendant's] Restaurant by any person or patron." Plaintiff's First Request for Production No. 9 (exhibit 5 to Olson Declaration signed March 7, 2018).

contends that she hired experts[2] and incurred their fees and her attorneys' fees to investigate and establish ways that Brix breached its duty to her as a patron of the restaurant, when the emails appear to establish liability on their face. Plaintiff is asking the court to award her monetary sanctions of at least $13,925.00, which includes the costs of preparing her motion for discovery sanctions.

Brix contends that sanctions are not appropriate here because its conduct was not willful. In preparing for his deposition, Byrum mentioned the email exchange between himself and others, so a further search was conducted to retrieve those email communications. As soon as they were found, they were produced to Plaintiff. What begs the question, however, is why Defendant's initial search for documents responsive to Plaintiff's request did not "find" these communications. Defendant offers no explanation or excuse (other than it was a mistake) and do not describe the due diligence they undertook to locate the documents requested by Plaintiff in late August 2017. This is the primary reason the court has imposed sanctions against the Defendant here. The court does not understand why Defendant's corporate representative was not engaged in this case until a few days before his deposition was to be taken, which was almost seven months after Defendant was served with the Summons and Complaint and after his deposition had been rescheduled on two other occasions.

The court believes there must be a consequence to Defendant to underscore the importance of taking Plaintiff's claim and discovery requests seriously,[3] especially when Defendant's apparent failure to do so results in consequences that would otherwise have been avoidable.[4] Here, the consequence was Plaintiff approaching the case without information that disclosed Defendant's prior notice of the allegedly unreasonably dangerous condition of the step that resulted in Plaintiff's injury (and which had caused

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[2] Plaintiff retained a biomechanical engineer and an engineer. Both submitted declarations with their names redacted, which stated that some of their investigative work would not have been necessary if they had seen the Brix emails before they started work on the case.

[3] Plaintiff is not asking for sanctions associated with rescheduling Defendant's corporate deposition multiple times at Defendant's request, (*see* Olson Declaration, ¶10); however, the court is concerned with this conduct and pattern of delaying Plaintiff's legitimate discovery requests.

[4] Defendant notes that it is not unusual for discovery documents to be produced at various times during litigation. The court observes this is a pattern in today's litigation practices, but does not condone the practice of partial discovery. Sincere efforts should be made at the beginning of a case to confer with a client when filing an Answer or responding to Requests for Production.

others before Plaintiff to fall). Even though Plaintiff's attorneys and experts would have had to investigate the premises and opine as to their condition, the scope of their work would have been narrowed and presumably more focused if the emails at issue had been produced to Plaintiff when they were due for production in late September 2017, as opposed to mid-January 2018. To Defendant's credit, its managing member represents that he did not try to hide, alter or delete these emails and produced them immediately after finding them. The court has considered this mitigating evidence, but still concludes monetary sanctions are appropriate here.

Plaintiff suggests an appropriate sanction is to award her the costs she has incurred in expert and attorney fees to bring this motion for sanctions. She has submitted a statement of those fees and represents that those do not include fees that she would have incurred in prosecuting her slip and fall suit regardless of the untimely production of documents describing how the step was unreasonably dangerous. Her fee request includes two declarations of unnamed experts, who say they performed work they otherwise would not have needed to perform to form their opinion regarding the dangers present at Brix's premises where Plaintiff fell. Defendant sought to depose the experts to challenge these statements. Plaintiff moved to quash Defendant's notices of her unnamed experts' depositions based on Oregon's "no discovery of expert opinions" rule.

Defendant is not entitled to discover Plaintiff's experts' opinions regarding Defendant's liability for failing to warn customers of the undisclosed latent defects associated with its staircase. Plaintiff, however, has come dangerously close to waiving the privileges she asserts by offering her experts' opinions to support her motion for sanctions. The court concludes Plaintiff has not waived the attorney-client privilege or her attorneys' work product that encompasses Plaintiff's experts' opinions here because the court is bound to construe any potential waiver narrowly, where it can, to protect the privilege asserted. *State v. Lewis*, 36 So 3d 72, 77–78 (Ala Crim App 2008) (citing cases, noting "overwhelming majority of courts hold that the waiver of the attorney-client privilege should be narrowly applied"); *see Longo v. Premo*, 355 Or 525, 538 (2014) (concluding that exceptions to the attorney client privilege "should be construed narrowly to avoid disclosing any more of the client's confidences than are necessary for the lawyer to defend against the client's claim or obtain redress for breach of duty by the

client" (quoting Laird C. Kirkpatrick, OREGON EVIDENCE § 503.12[3] (4th ed 2002)); *see also State v. Taylor*, 247 Or App 339, 346 (2011) ("The purpose of the privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." (internal quotations and omitted)). Additionally, as a practical matter, allowing Defendant to depose Plaintiff's experts on their opinion and the facts giving rise to their opinions that they would not have had to do as much work on the case if the emails had been known to them earlier, would necessarily have required the experts to describe the scope of the investigative work performed and what the opinions they reached were before the emails were produced. Some of that work may overlap with the opinions Plaintiff intends to offer at trial should Defendant not admit it is liable for Plaintiff's injuries and damages resulting from her fall. Based on these findings, the court granted Plaintiff's motion to quash Defendant's attempt to depose her experts.

Plaintiff's success in preventing her experts from being deposed may have had an unintended consequence. Preventing Defendant from challenging the expert's statements in their declarations also denies the court access to that information—and to facts that might alleviate the court's concern that Plaintiff's experts cannot, without hindsight, ascertain what work they would or would not have needed to do in this case.[5] Plaintiff offers to allow the court to examine these facts *in camera*, but the court is not inclined to do so because that step compromises the adversary process that courts rely on to make and rebut the parties' legal and factual arguments. As the court noted in its oral ruling on Plaintiff's motion for sanctions, it is not inclined to include Plaintiff's experts' fees as part of any monetary sanction imposed for Defendant's failure to timely produce responsive documents in this case. Plaintiff now suggests the court defer its decision in that regard until the end of the trial, after the experts have testified and the privilege asserted has been waived completely. This suggestion has merit because it will

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[5] Plaintiff's statement of services includes two hours of Mr. Brooksby's time consulting with the two experts regarding liability theories ($800.00) and 10.6 hours of Ms. Olson's time for preparing Plaintiff's motion for sanctions ($2,650.00). Mr. Brooksby also spent time (1.6 hours) working on the motion ($640.00). The problems identified by the court in assessing whether the experts' services were mooted by Defendant's delayed email production similarly apply to the time Plaintiff's attorneys spent with the experts or considering the experts' investigation, analysis, and opinions regarding liability issues. The court therefore declines to include those fees in the monetary sanction imposed here against Defendant.

preserve the "no expert discovery rule" and allow the court to consider the experts' statements in context with other evidence presented at trial which, in turn, will allow the court to discern what aspects of the experts' work was or was not obviated by Defendant's employees' admissions made in the emails that are the subject of Plaintiff's sanctions motion. The court accepts Plaintiff's suggestion and defers consideration of the experts' fees until the trial is concluded.[6]

Plaintiff's attorneys represent their fees and costs in pursuing Plaintiff's motion for sanctions total $3,290.00.[7] The motion itself was not lengthy or complex, but the work necessary to support Plaintiff's position that sanctions were warranted due to Defendant's conduct was. Therefore, the court awards Plaintiff sanctions pursuant to ORCP 46 D, requiring Defendant and its attorneys to pay this amount based on their failure to diligently and completely respond to Plaintiff's August 8, 2017 request for production of documents in a timely manner.

IT IS SO ORDERED.

DATED this 1st day of June, 2018.

Marilyn E. Litzenberger
Circuit Court Judge

Original: Court File
cc: Kristin Olson, Counsel for Plaintiff
Dipendra Rana/Sarah K. Pettey, Counsel for Defendant

[6] Because Multnomah County Circuit Court uses a master trial assignment system, Judge Litzenberger may or may not preside over the trial of this case. For this reason, she leaves consideration of Plaintiff's request to include her experts' fees as part of any sanctions awarded on the motion for sanctions at bar to the assigned trial judge.

[7] The court understands $300 of this total represents expert fees associated with the declarations the experts submitted in support of Plaintiff's sanctions motion.