

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JOHN DOE, et al.,

Plaintiffs,

v.

MOUNT VERNON CITY SCHOOL
DISTRICT BOARD OF EDUCATION, et al.,

Defendants.

Case No. 2:08 CV 575

Judge Frost

Magistrate Judge King

**PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND
FURTHER DEPOSITION OF JOHN FRESHWATER**

Pursuant to the Federal Rules of Civil Procedure and Local Rules 37.1 and 37.2, Plaintiffs Stephen and Jenifer Dennis, individually and as the natural parents and next friends of their minor child, Zachary Dennis (hereinafter the "Dennises"), hereby move the Court for an order compelling Defendant John Freshwater (hereinafter "Freshwater") to produce documents he is withholding from the Dennises and to make himself available to be further deposed regarding these documents. The documents requested fall squarely within the scope of previous discovery requests by the Dennises and were never produced but were recently used by Freshwater as exhibits in his state termination hearing. Despite recent written and oral requests to resolve this discovery issue, Freshwater's attorney refuses to respond to these requests and to produce his client for deposition on the same. The Dennises, therefore, respectfully request that the Court enter an order compelling Freshwater to produce the requested documents and to make himself available to be further deposed.

Respectfully submitted,

/s/Douglas M. Mansfield

Douglas M. Mansfield (0063443)

(Trial Attorney)

dmansfield@jonesday.com

JONES DAY

325 John H. McConnell Blvd. Ste. 600

Columbus, OH 43215

(614) 469-3939 (telephone)

(614) 461-4198 (fax)

Mailing Address:

JONES DAY

P.O. Box 165017

Columbus, OH 43215-2673

Attorney for Plaintiffs

I. INTRODUCTION

The Dennises, by and through counsel, served discovery requests on Freshwater seeking documents they need to prosecute their case and to defend against Freshwater's counterclaims. Freshwater responded to these requests months ago, purportedly producing all responsive documents, but numerous documents introduced as exhibits at Freshwater's termination hearing on December 8, 10, and 11, 2009 indicate that his previous responses were wholly inadequate. As set forth in the attached declaration of the Dennises' attorney, Douglas Mansfield (attached as Ex. 1) (hereinafter "Mansfield Decl."), the Dennises, by and through counsel, corresponded and conferred with Freshwater's counsel to attempt to resolve these disclosure issues without the Court's intervention. Despite these efforts, however, Freshwater has failed to produce these documents that are directly responsive to the Dennises' long-standing discovery requests. Further, because these documents were not produced in a timely manner, the Dennises have been unfairly prejudiced because they did not have the opportunity to ask Freshwater about these documents during his deposition. This Court's intervention therefore is necessary to compel production of these documents and to extend Freshwater's deposition on the same.

II. ARGUMENT

A. Standard for Production.

The Federal Rules of Civil Procedure permit parties in litigation to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Specifically relating to documents in their possession, parties subject to a request must produce:

(A) Any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or (B) any designated tangible things;

Id. at 34(a)(1). Regarding such requests for production, the Sixth Circuit has emphasized that “the rules are broad, and litigants are required to comply with all properly propounded document requests.” *Varga v. Rockwell Int’l Corp.*, 242 F.3d 693, 697 (6th Cir. 2001), *cert. denied*, 534 U.S. 821 (2001) (citing Fed. R. Civ. P. 34). In light of these rules, their broad construction, and the Dennises’ repeated requests for relevant documents, Freshwater stands in clear violation of the rules governing document production.

B. The Dennises Properly Propounded Requests For Documents, And Freshwater Improperly Withheld These Documents.

The Dennises’ document Requests 2 and 4 seek respectively “[a]ll statements, whether in writing or tape-recorded, taken of any witness” and “[a]ll documents and any other item that you expect or intend to produce or offer as either an exhibit or as evidence at trial.” (Pls.’ First Req. for Produc. of Docs. ¶¶ 2, 4 (attached as Ex. 2)). Further, Request 11 seeks “[c]opies of all religious materials you had posted in your eighth grade science classroom at Mount Vernon Middle School at any time over the past ten years.” (*Id.* at ¶ 11.) Additionally, Requests 18 and 20 seek respectively “[a]ll exhibits identified during the administrative hearing of Defendant Freshwater” and “[e]ach and every document which refers to the allegations set forth in this federal Complaint.” (Pls.’ Second Req. for Produc. of Docs. ¶¶ 18, 20 (attached as Ex. 3).) Freshwater responded to these and other requests by producing a limited number of documents, but exhibits introduced at his termination hearing on December 8, 10, and 11, 2009 indicate that numerous documents—including those introduced as exhibits *and* any untold number of yet unrevealed documents—were improperly withheld. These improperly withheld documents include, but are not limited to, the following:

- *Notes*: These include handwritten notes made by Freshwater before, during, after, or in connection with all meetings or discussions with Mount Vernon City School

District officials regarding his employment or the activities in his classroom at issue in this case. Providing an example of such documents, Freshwater's counsel, R. Kelly Hamilton, introduced Employee's Exhibit 131 at the termination hearing on December 10, 2009. (*In the Matter of the Termination of Employment of John Freshwater* (hereinafter "Freshwater Termination Hearing"), Employee's Ex. 131 (attached as Ex. 4); *see also* Mansfield Decl. ¶ 7 (referencing the exhibit).) Employee's Exhibit 131 contains Freshwater's personal notes from a meeting of the Mount Vernon City School Board and includes comments directly relevant to this case. In addition, John Freshwater acknowledged at the termination hearing on December 30, 2009 that there are other documents, including handwritten notes, that he possesses but that have not been introduced at the hearing. (Mansfield Decl. ¶ 7.) These notes and similar documents were not and have not been produced to the Dennises but are directly responsive to Requests 2, 4, 18, and 20.

- *Sworn Affidavits:* These include at least 15 affidavits, including all electronic copies of these affidavits from counsel's computer, signed by Freshwater regarding his employment or the activities in his classroom during his tenure at Mount Vernon Middle School. For example, Mr. Hamilton introduced Employee's Exhibit 128 at the termination hearing on December 8, 2009. (Freshwater Termination Hearing, Employee's Ex. 128 (attached as Ex. 5); *see also* Mansfield Decl. ¶ 8 (referencing the exhibit).) Employee's Exhibit 128 is an affidavit, dated May 25, 2008, in which Freshwater swears to various observations regarding his use and knowledge of the Tesla coil at issue in this

lawsuit. This affidavit and similar documents were not and have not been produced to the Dennises but are directly responsive to Requests 2, 4, 18, and 20.

- *Educational Materials:* These include Freshwater's personal textbook or a copy of his personal textbook, *Finding Common Ground*, utilized during Freshwater's participation in David Daubenmire's course regarding religion in the classroom at Mount Vernon Nazarene University. Mr. Hamilton introduced this textbook at the termination hearing on December 10, 2009. (See Mansfield Decl. ¶ 9 (referencing the exhibit).) In his deposition on October 14, 2009, however, Freshwater stated that he did not remember if he had the textbook. (Def. Freshwater's Dep. at 55, Oct. 14, 2009 (hereinafter "Freshwater Dep.") (attached as Ex. A to Pls.' Mot. for Partial Summ. J. (Doc. No. 60)).) Yet, less than two months later, this very textbook was introduced in Freshwater's defense at his termination hearing. This and similar documents were not and have not been produced to the Dennises but are directly responsive to the questions posed at Freshwater's deposition and Requests 4, 18, 20, and potentially, 11.
- *Religious Materials:* These include the Ten Commandments book covers or posters displayed in Freshwater's classroom or replicates thereof. Mr. Hamilton introduced a copy of these materials at the termination hearing on December 10, 2009. (See Mansfield Decl. ¶ 10 (referencing the exhibit)). In his deposition on October 14, 2009, however, Freshwater stated that he did not remember what happened to the book covers. (Freshwater Dep. at 126.) Yet, less than two months later, a copy of this same book cover was introduced in Freshwater's defense at his termination hearing. This and similar documents were not and have

not been produced to the Dennises but are directly responsive to the questions posed at Freshwater's deposition and Requests 4, 11, 18, and 20.

Not only did Freshwater fail to appropriately respond to the Dennises' original document requests, but he maintained his obstinacy when the Dennises' counsel attempted to obtain these and similar documents following their introduction as exhibits at the termination hearing. Preferring extra-judicial means, the Dennises' counsel made several efforts to contact Freshwater's counsel to obtain these documents after December 8, 10, and 11, 2009, utilizing regular mail, e-mail, and several phone calls. (Pls.' Counsel's Dec. 15, 2009 Letter to Def.'s Counsel (attached as Ex. 6); Mansfield Decl. ¶¶ 11-17.) Freshwater's counsel, Jason Deschler, responded within the requested time frame by stating that he did not have access to the documents but that Mr. Hamilton did. (See Def.'s Counsel J. Deschler's Dec. 16, 2009 Resp. to Pls.' Counsel's Dec. 15, 2009 Letter (attached as Ex. 7).) Mr. Hamilton did not respond in any form to any of these requests until today, when he refused to agree to produce Freshwater for additional deposition time and continues to fail to produce documents.¹ (Mansfield Decl. ¶¶ 11, 14-18.)

C. Freshwater Should Produce The Improperly Withheld Documents and Should Submit To An Additional Deposition.

As established above, Freshwater ignored the Dennises' properly propounded document requests and also disregarded subsequent efforts by counsel to obtain such documents. Therefore, the Dennises respectfully request that this Court compel production of the documents and require Freshwater to appear for further deposition on these documents.

¹ The Dennises now possess a handful of copies of exhibits from the termination hearing because their counsel obtained some, but not all, of the exhibits from counsel for the Mount Vernon City School Board. This limited possession does not excuse, in part or otherwise, Freshwater's responsibility to produce all documents that are responsive to the Dennises' specific requests for production, including any still in his possession or marked as exhibits at his termination hearing.

The documents—termination hearing exhibits or otherwise—should be produced because their last-minute introduction at the termination hearing created an unfair advantage to the party possessing and withholding the documents. This advantage has resulted in unfair prejudice to the Dennises as they prepare this case for trial. Freshwater obviously possessed these documents for some time, yet he chose—despite clear requests to the contrary—to withhold them from the Dennises in discovery in this case but to introduce them during the termination hearing for his perceived advantage alone. If Freshwater purposefully withholds documents he views as advantageous to his cause, he will be more likely to withhold potentially detrimental documents. These actions reveal a clear lack of regard for this Court, its officers, and the parties before it, and these improper tactics likely will continue without this Court’s strong intervention. Therefore, this Court should grant this motion with language to ensure that all documents relevant to the Dennises’ requests be produced with all deliberate speed.²

Further, because the Dennises and their counsel were only of late made aware of these documents and of the potential that additional responsive but as-yet produced documents may exist, considerations of equity and fairness dictate that the Dennises also be permitted to depose Freshwater for up to three additional hours. *See* Fed. R. Civ. P. 30(a)(2)(ii) (permitting additional deposition by leave where a deponent has already been deposed). Freshwater’s deposition occurred on October 14, 2009, and the Dennises became aware of the improperly withheld documents at the termination hearing on December 8, 10, and 11, 2009. Therefore, it would be unfairly prejudicial to the Dennises not to allow them to take Freshwater’s deposition regarding these and any other withheld documents that come to light. Mr. Deschler already

² Admittedly, this motion falls outside the time-frame allotted for discovery. This deadline should not hinder the Dennises’ ability to request these documents nor the Court’s ability to demand their production because the documents were improperly withheld. Also, the Dennises’ made their relevant requests for production and their counsel re-requested this production before the close of discovery. (*See* Mansfield Decl.)

agreed to extend Freshwater's deposition by an undetermined amount of time. (Ex. 7.) Unfortunately, Mr. Hamilton has refused the Dennises' requests to extend Freshwater's deposition. (Mansfield Decl. ¶ 18.) Because Freshwater is improperly withholding documents and because Mr. Hamilton has refused repeated requests for a stipulated-to deposition extension, this Court should grant the Dennises' request to depose Freshwater for three additional hours on the undisclosed documents in question.

III. CONCLUSION

For the foregoing reasons, the Dennises respectfully request that the Court grant their Motion to Compel.

Respectfully submitted,

/s/Douglas M. Mansfield
Douglas M. Mansfield (0063443)
(Trial Attorney)
dmansfield@jonesday.com
JONES DAY
325 John H. McConnell Blvd. Ste. 600
Columbus, OH 43215

(614) 469-3939 (telephone)
(614) 461-4198 (fax)

Mailing Address:
JONES DAY
P.O. Box 165017
Columbus, OH 43215-2673

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2009, I electronically filed the foregoing Motion to Compel Production of Documents with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following at their e-mail address on file with the Court:

Robert H. Stoffers
Jason R. Deschler
MAZANEC, RASKIN, RYDER & KELLER, CO., LPA
250 Civic Center Drive, Suite 400
Columbus, OH 43215

Counsel for Defendant John Freshwater

R. Kelly Hamilton
4030 Broadway
P. O. Box 824
Grove City, OH 43123

Counsel for Counterclaimant John Freshwater

/s/Douglas M. Mansfield
Douglas M. Mansfield

PLAINTIFFS' EXHIBITS IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND FURTHER DEPOSITION OF JOHN FRESHWATER

Exhibit 1: Declaration of Douglas M. Mansfield

Exhibit 2: Plaintiffs' First Request for Production of Documents

Exhibit 3: Plaintiffs' Second Request for Production of Documents

Exhibit 4: *In the Matter of the Termination of Employment of John Freshwater*, Handwritten Notes of John Freshwater, March 10, 2008, Employee's Exhibit 131

Exhibit 5: *In the Matter of the Termination of Employment of John Freshwater*, Affidavit of John Freshwater, May 25, 2008, Employee's Exhibit 128

Exhibit 6: Plaintiffs' Counsel's December 15, 2009 Letter to Defendant's Counsel

Exhibit 7: Defendant's Counsel J. Deschler's December 16, 2009 Response to Plaintiffs' Counsel's December 15, 2009 Letter

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
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JOHN DOE, et al.,

Plaintiffs,

v.

MOUNT VERNON CITY SCHOOL
DISTRICT BOARD OF EDUCATION, et al.,

Defendants.

Case No. 2:08 CV 575

Judge Frost

Magistrate Judge King

DECLARATION OF DOUGLAS M. MANSFIELD

Douglas M. Mansfield, pursuant to 28 U.S.C. § 1746, declares as follows:

1. I am a member of the law firm of Jones Day and one of the attorneys representing Plaintiffs Stephen and Jenifer Dennis, individually and as the natural parents and next friends of their minor child, Zachary Dennis (hereinafter the “Dennises”), in this case.

2. I have knowledge regarding the events surrounding the Dennises’ counsels’ service of Plaintiffs’ various document requests upon Defendant John Freshwater.

3. On October 27, 2008, the Dennises, through counsel, served Plaintiffs’ First Set of Requests for Production of Documents to John Freshwater’s attorneys. A true and accurate copy of Plaintiffs’ First Set of Requests for Production of Documents is attached as Exhibit 2 to Plaintiffs’ Motion to Compel Production of Documents.

4. On January 2, 2009, the Dennises, through counsel, served Plaintiffs’ Second Set of Requests for Production of Documents to John Freshwater’s attorneys. A true and accurate copy of Plaintiffs’ Second Set of Requests for Production of Documents is attached as Exhibit 3 to Plaintiffs’ Motion to Compel Production of Documents.

5. Defendant John Freshwater produced limited documents in response to these prior requests.

6. On December 8, 10, and 11, 2009, I attended the termination hearing of John Freshwater. At the termination hearing, R. Kelly Hamilton, Freshwater's attorney, introduced several documents as exhibits that were directly responsive to the Dennises' previous requests for documents but that had not been produced to the Dennises. These documents have yet to be produced to the Dennises, but I procured copies of some of these exhibits at the termination hearing from the Mount Vernon City School Board's counsel.

7. Included among the exhibits introduced at the termination hearing were various handwritten notes of John Freshwater that were directly responsive to the Dennises' previous requests for documents but that have not been produced to the Dennises. A true and accurate copy of one of these notes, Employee's Exhibit 131, is attached as Exhibit 4 to Plaintiffs' Motion to Compel Production of Documents. This document was introduced as an exhibit at the termination hearing on December 10 or 11, 2009. John Freshwater acknowledged at the hearing on December 30, 2009 that there are other documents, including handwritten notes, that he possesses but that have not been introduced at the hearing.

8. Included among the exhibits introduced at the termination hearing were at least 15 sworn affidavits of John Freshwater that were subject to the Dennises' previous requests for documents but that have not been produced to the Dennises. A true and accurate copy of one of these affidavits, Employee's Exhibit 128, is attached as Exhibit 5 to Plaintiffs' Motion to Compel Production of Documents. This document was introduced as an exhibit at the termination hearing on December 8, 2009.

9. Included among the exhibits introduced at the termination hearing was Mr. Freshwater's personal textbook or a copy of his personal textbook, *Finding Common Ground*. Mr. Freshwater testified that this textbook was used during his participation in a course at Mount Vernon Nazarene University regarding religion in the classroom. Mr. Freshwater denied knowledge of the whereabouts of this textbook in his deposition (Def. Freshwater's Dep. at 55, Oct. 14, 2009 (hereinafter "Freshwater Dep") (attached as Ex. A to Pls.' Mot. for Partial Summ. J. (Doc. No. 60))) but then introduced it as an exhibit at his termination hearing. The textbook also contains his handwritten notes. This textbook was directly responsive to the Dennises' previous requests for documents, but it has not been produced to the Dennises.

10. Included among the exhibits introduced at the termination hearing was a copy of the Ten Commandments book covers or posters displayed in Mr. Freshwater's classroom during the 2007-2008 school year. Mr. Freshwater denied knowledge of the whereabouts of book covers at his deposition. (Freshwater Dep. at 126.) This document was directly responsive to the Dennises' previous requests for documents, but it has not been produced to the Dennises.

11. Following my attendance at the termination hearing on December 8, 10, and 11, 2009, I sent a letter on December 15, 2009 to Robert H. Stoffers, Jason R. Deschler, and R. Kelly Hamilton, counsel for John Freshwater. I sent this letter via regular mail and e-mail using the addresses on file with the Court. This letter requested documents introduced as exhibits at the termination hearing and similar documents directly responsive to the Dennises' previous requests for documents that had not been produced to the Dennises. The letter requested that these documents be produced no later than December 19, 2009. Also, the letter requested additional time to depose John Freshwater regarding the yet undisclosed documents.

A true and accurate copy of this December 15, 2009 letter is attached as Exhibit 6 to Plaintiffs' Motion to Compel Production of Documents.

12. On December 16, 2009, Mr. Deschler, responded to my request by letter. That letter stated that Mr. Deschler had no knowledge of these documents until they were produced at the termination hearing by Mr. Hamilton. Also, the letter agreed that John Freshwater should submit to be deposed on these undisclosed documents and requested that I suggest the amount of time necessary for the new deposition. A true and accurate copy of this December 16, 2009 letter is attached as Exhibit 7 to Plaintiffs' Motion to Compel Production of Documents.

13. On December 17, 2009, I spoke on the phone with Mr. Deschler, and he reaffirmed the statements made in his December 16, 2009 letter. He also stated that Mr. Hamilton possessed the documents in question.

14. On December 18, 2009, I called Mr. Hamilton's office phone at the number on file with the Court to discuss my December 15, 2009 letter and the Dennises' request for documents. I left a message on the voice mailbox for this number.

15. Neither John Freshwater nor his counsel produced the documents requested in the December 15, 2009 letter by December 19, 2009.

16. On December 21, 2009, I again called Mr. Hamilton's office phone at the number on file with the Court to discuss my December 15, 2009 letter and the Dennises' request for documents. I attempted to leave a message at this number, but the voice mailbox was full.

17. On December 21, 2009, I also attempted to contact Mr. Hamilton on his mobile phone. He did not answer, but I left a message on his voicemail telling him that I wanted to discuss my December 15, 2009 letter and the Dennises' request for documents.

18. Finally, on December 30, Mr. Hamilton replied and refused to produce Mr. Freshwater and continues to fail to produce the requested documents.

19. The Dennises and their counsel have made a good faith effort to resolve the discovery matters at issue but no resolution has been achieved.

20. I declare under penalty of perjury that the foregoing is true and correct.
Executed on December 30, 2009.

/s/Douglas M. Mansfield

Douglas M. Mansfield

16-27-08 2

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JOHN DOE and JANE DOE, individually and as the Natural Parents and Next Friends of Their Minor Child, JAMES DOE,	:	CASE NO. 08-CV-575
	:	
	:	JUDGE FROST
Plaintiffs,	:	MAGISTRATE JUDGE KING
	:	
V.	:	
MOUNT VERNON CITY SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.	:	
	:	
Defendants.	:	

**PLAINTIFFS' FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO DEFENDANT
JOHN FRESHWATER**

Plaintiffs hereby request, pursuant to Rule 34 of the Ohio Rules of Civil Procedure, that Defendant John Freshwater produce and permit Plaintiffs to inspect and to copy each of the following documents.

For purposes of this request, the term "documents" shall be defined in its broadest sense to include any and all written and tape-recorded materials, videotapes, photographs, and other tangible objects in the possession, custody, or control of Defendant, including, but not limited to, all originals and non-identical copies of drafts, correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions of consultants, projections, statistical statements, contracts, books, accident reports, and notes.

1. All statements, whether in writing or tape-recorded, taken of any employee or agent of Plaintiffs.
2. All statements, whether in writing or tape-recorded, taken of any witness.
3. Copies of your federal and state income tax returns filed for years 2001-2005, inclusive, plus any wage information detailing any income received for 2006.
4. All documents and any other item that you expect or intend to produce or offer as either an exhibit or as

evidence at trial.

5.The recording you made of your statement provided to HR On Call pursuant to the investigation conducted by the Mount Vernon City School District.

6.All recordings or statements which you claim are evidence of the defamation claims you have brought against Plaintiffs.

7.Every document you removed from your eighth grade science classroom from April 1, 2008 to the present.

8.All notes kept by you regarding the teachings you provided to your eighth grade science classes for the past ten years.

9.If you have destroyed any notes with regard to the above interrogatory, a description of what was destroyed.

10.Every handout that you provided to students in your eighth grade science class for the past ten years which was not created by the authors of the approved textbook.

11.Copies of all religious materials you had posted in your eighth grade science classroom at Mount Vernon Middle School at any time over the past ten years.

12.All instructions, directions, or warnings regarding the use of the Tesla coil type device which you used in your eighth grade science classroom.

13.All instructions, directions or warnings regarding the curriculum you used to teach your eighth grade science classes using the Tesla coil.

14.One of the Bibles which you kept in a box in your classroom.

Respectfully submitted,

/s/ Jessica K. Philemond

Jessica K. Philemond (0076761)

Email: jkp@isaacbrant.com

Isaac, Brant, Ledman & Teetor, LLP

250 East Broad Street

Columbus, Ohio 43215

Tele: (614) 221-2121; Fax (614) 365-9516

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2008 a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Jessica K. Philemond

Isaac, Brant, Ledman, & Teetor LLP

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JOHN DOE and JANE DOE, :
individually and as the Natural Parents :
and Next Friends of Their Minor Child, : **CASE NO. 08-CV-575**
JAMES DOE, : **JUDGE FROST**
 :
Plaintiffs, : **MAGISTRATE JUDGE KING**
 :
v. :
 :
MOUNT VERNON CITY SCHOOL :
DISTRICT BOARD OF :
EDUCATION, ET AL. :
 :
 :
Defendants. :

**PLAINTIFFS' SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS
TO DEFENDANT JOHN FRESHWATER**

Plaintiffs hereby request, pursuant to Rule 34 of the Ohio Rules of Civil Procedure, that Defendant John Freshwater produce and permit Plaintiffs to inspect and to copy each of the following documents.

For purposes of this request, the term "documents" shall be defined in its broadest sense to include any and all written and tape-recorded materials, videotapes, photographs, and other tangible objects in the possession, custody, or control of Defendant, including, but not limited to, all originals and non-identical copies of drafts, correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions

of consultants, projections, statistical statements, contracts, books, accident reports, e-mail, and notes.

15. The BD-10A tesla coil used by Defendant Freshwater on James Doe and other eighth grade students.
16. Photographs taken of Defendant Freshwater's classroom at any time.
17. Defendant Freshwater's list of "suggested FCA speakers" as referred to by Defendant Freshwater in the administrative hearing.
18. All exhibits identified during the administrative hearing of Defendant Freshwater.
19. All permission slips from your 2007-2008 FCA class.
20. Each and every document which refers to the allegations set forth in this federal Complaint.

Respectfully submitted,

Jessica K. Philemond (0076761)
Email: jkp@isaacbrant.com
Isaac, Brant, Ledman & Teetor, LLP
250 East Broad Street
Columbus, Ohio 43215
Tele: (614) 221-2121; Fax (614) 365-9516
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2009 a copy of the foregoing was served to the following counsel via electronic mail and ordinary U.S. mail.

Robert H. Stoffers (0024419)
Jason R. Deschler (0080584)
Mazanec, Raskin, Ryder & Keller, Co., LPA
250 Civic Center Drive, Suite 400
Columbus, Ohio 43215
(614) 228-5931; F: (614) 228-5934
jdeschler@mrrklaw.com
rstoffers@mrrklaw.com

Counsel for Defendant John Freshwater

R. Kelly Hamilton (0066403)
3800 Broadway
Grove City, Ohio 43213
(614) 875-4174
hamiltonlaw@sbcglobal.net

Counsel for Counterclaimant John Freshwater

Elise C. Keating (0079456)
Krista Keim (0067144)
Sarah J. Moore (0065381)
David Kane Smith (0016208)
Britton, Smith, Peters and Kalail Co., LPA
3 Summit Park Drive
Cleveland, Ohio 44131
(216) 503-5055; F: (216) 503-5065
ekeating@ohioedlaw.com
kkeim@ohioedlaw.com
smoore@ohioedlaw.com
dsmith@ohioedlaw.com

*Counsel for Defendant Mount Vernon
City School District Board of Education*

Jessica K. Philemond (0076761)

MARCH 10th - BOARD MEETING - ATTENDED
DUNFEE, CLINE, MILLER + SAM,
FRADY, RICKY, AL GIFFIN, KERR + (GOLD BUYER)
- WHAT ABOUT THOSE STUDENTS THAT WANTED TO "CHECK IT OUT"
MARCH 19th - BILL WHITE ASK TO SEE ME IN HIS OFFICE
- ASK WHAT IS MY POSITION IN FCA - REPLY - FACILITATOR
- MONITOR
- BILL - "2 COMPLAINTS ABOUT TUESDAY - MARCH 18th - MEETING
PASTOR ZIRHLE
THAT HIS SON WAS "DRAGED" INTO FCA. + HAD NO PERMISSION SIGN
THEN I PRAYED WITH MY HANDS RAISED UP + I WAS CHASING*
DRIVING OUT THE DEVIL - MY RESPONSE "SO YOU ARE SAYING
I HAD AN EXORCISM"

Emp. Exh. 131

JONES DAY

325 JOHN H. MCCONNELL BOULEVARD, SUITE 600
COLUMBUS, OHIO 43215-2673
TELEPHONE: 614.469.3939 • FACSIMILE: 614.461.4198

MAILING ADDRESS:
P.O. BOX 165017
COLUMBUS, OHIO 43216-5017

Direct Number: (614) 281-3943
dmansfield@jonesday.com

JP 919041
325812-600001

December 15, 2009

VIA EMAIL AND REGULAR U.S. MAIL

Robert H. Stoffers
Jason R. Deschler
Mazanec, Raskin, Ryder & Keller, Co., LPA
250 Civic Center Drive, Suite 400
Columbus, OH 43215

R. Kelly Hamilton
4030 Broadway
P.O. Box 824
Grove City, OH 43123

Re: John Doe, et al. v. Mount Vernon City School Dist. Bd. of Ed., et al., Case No. 2:08 CV 575

Gentlemen:

I am writing to address your wholly inadequate discovery responses in the above-captioned case. On December 8, 10, and 11, 2009 you introduced numerous exhibits during the direct examination of your client, John Freshwater, in the ongoing administrative proceedings. These documents had not been produced to the Plaintiffs despite the fact that the exhibits fall squarely within the scope of Plaintiffs' requests. Those requests, of course, were served over 11 months ago and you agreed, at that time, to produce these sorts of responsive documents. We ask that you immediately supplement your discovery responses with these previously undisclosed documents, including, but not limited to the following:

1. Notes that Mr. Freshwater made before, during, after, or in connection with all meetings or discussions with Mount Vernon City School District officials regarding Defendant's employment or the activities in his classroom during his tenure at Mount Vernon Middle School (e.g. Employee Ex. 131 from the administrative proceedings);
2. All sworn affidavits of Mr. Freshwater regarding his employment or the activities in his classroom during his tenure at Mount Vernon Middle School (e.g. Employee Ex. 128 from the administrative proceedings);
3. Mr. Freshwater's personal textbook or a copy of his personal textbook, *Finding Common Ground*, including all notes and marginalia, utilized during Mr. Freshwater's participation in David Daubenmire's course regarding religion in the classroom. See Def. Freshwater's Dep. at 55, Oct. 14, 2009 (attached as Ex. A to Pls.' Mot. for Partial

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JONES DAY

December 15, 2009
Page 2

Summ. J. (Doc. No. 60)) (Defendant stating that he did not remember if he had the textbook);

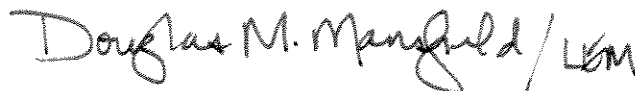
4. The Ten Commandments book covers or posters displayed in Mr. Freshwater's classroom or replicates thereof. *See* Def. Freshwater's Dep. at 126 (Defendant stating that he does not remember what happened to the book covers);
5. Any other documents used or considered for use by Defendant or his counsel as exhibits in the administrative proceedings or at trial, not previously disclosed to the Plaintiffs.

Your failure to timely produce these documents violates your obligations under the Civil Rules. These documents clearly fall under several of Plaintiffs' prior requests (*see, e.g.*, Plaintiffs' Second Req. for Production of Docs. at Request Nos. 18 and 20), and should have been produced long ago. Plaintiffs, for example, previously asked for "[a]ll statements, whether in writing or tape-recorded, taken of any witness." Plaintiffs' First Req. for Production of Docs. at Request No. 2. Mr. Freshwater's multiple affidavits made in May 2008 clearly fall under this request. Likewise, Mr. Freshwater's handwritten notes of his various meetings with school officials fall under several requests and also should have been produced long ago.

Your failure to timely produce these documents has prejudiced the Plaintiffs in their ability to prepare for trial. Because you did not timely produce these documents, we were unable to ask Mr. Freshwater any questions about these documents and the specifics they raise during his deposition. Worse yet, we expressly asked Mr. Freshwater during his deposition whether he still had any of the materials from the religion in the classroom course he took with Mr. Daubenmire and he specifically said the textbook might have been thrown out, when in fact, that very textbook with Mr. Freshwater's notes was introduced as an exhibit during the administrative proceedings less than two months later.

We ask that you fully supplement your discovery responses no later than this Friday, December 19, 2009. We also ask that you let us know by this Friday whether you will voluntarily agree to produce Mr. Freshwater sometime in January for the continuation of his deposition on these undisclosed documents. In the event you do not produce all responsive documents or will not agree to the continuation of Mr. Freshwater's deposition, we intend to move the Court for such relief and in that instance reserve all rights to seek appropriate sanctions, including the imposition of evidentiary inferences.

Very truly yours,

A handwritten signature in black ink that reads "Douglas M. Mansfield" followed by a stylized monogram "DM".

Douglas M. Mansfield



MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A.
attorneys and counsellors at law

Jason R. Deschler
Email: jdeschler@mrrklaw.com
(614) 228-5931, Ext. 205

December 16, 2009

VIA EMAIL: dmansfield@jonesday.com

Douglas M. Mansfield, Esq.
Jones Day
325 John H. McConnell Boulevard, Suite 600
P. O. Box 165017
Columbus, OH 43216-2673

Re: *John Doe and Jane Doe, as the Natural Parents and Next Friends of Their Minor Child, James Doe v. Mount Vernon School District Board of Education, et al.*

United States District Court
Southern District of Ohio, Eastern Division
Case No.: 2:08 CV 575
Our File No. 08C053

Dear Doug:

In response to your correspondence of December 15, 2009, please be advised that Kelly Hamilton responded to the Plaintiffs' discovery requests. Regarding the documents you referenced, our office had no knowledge of their existence until they were produced at the Administrative Hearing by Mr. Hamilton. Our office only has copies of some of those documents, to the extent they were marked as exhibits at the Administrative Hearing.

In your letter, you have requested to have John Freshwater submit to an additional deposition. As you are aware, the Federal Rules allow for seven hours of deposition time for one deponent. You have already met that limit. While we do not necessarily object to another deposition of John Freshwater, please advise how much additional time you will need to depose John Freshwater.

Please contact our office with any further questions you may have. Thank you.

Very truly yours,

MAZANEC, RASKIN, RYDER & KELLER CO., L.P.A.

s/ Jason R. Deschler

Jason R. Deschler

JRD/jlg

cc: R. Kelly Hamilton, Esq. (Via Email)
OCG-08C053/Response to 121509 Correspondence

Thomas S. Mazanec
Todd M. Raskin
Edward M. Ryder
Stanley S. Keller
John T. McLandrich
James A. Climer
Joseph F. Nicholas Jr.
Robert H. Stoffers
Patrick W. Winslow
Walter H. Krohngold
David K. Frank
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Michael S. Loughry
Jeffery S. Maynard
Frank H. Scialdone
John D. Pinzone
Tami Z. Hannon
Julie A. Bickis
Jason R. Deschler
Mary Beth Klemencic
Roland J. De Monte
Elaine Tso
Shawn A. Romer
Cara M. Wright

Robert D. Kensey
(1960-1993)

Of Counsel
Eugene I. Selker

Reply to:

☐ Cleveland

100 FRANKLIN'S ROW, 34305 SOLON ROAD, CLEVELAND, OH 44139
PHONE 440.248.7906 FAX 440.248.8861 WEB MRRKLAW.COM

☒ Columbus

250 CIVIC CENTER DRIVE, SUITE 400, COLUMBUS, OH 43215
PHONE 614.228.5931 FAX 614.228.5934 WEB MRRKLAW.COM