

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CIVIL**

KAREN NEWSUAN

Appellee

v.

REPUBLIC SERVICES, INC., BFI
WASTE SERVICES OF
PENNSYLVANIA, LLC, BFI WASTE
SYSTEMS OF NORTH AMERICA, LLC,
JOSHUA WATSON, MILTON BAKER,
CHRISTOPHER GIOVETSIS, MARC
BUCKLEY, MIKE ROBERTS, and
CHRIS JOBSON

Appellants

AUGUST TERM 2017

No. 000528

1248 EDA 2018

FILED
2018 SEP 14 PM 1:17
CLERK OF COURT

RAU, J.

OPINION

I. Introduction

The issue presented in this appeal is whether this Court had the authority to direct Appellants' counsel to produce "all of the notes of the interviews and all written communications" between Appellants' counsel and certain fact witnesses and whether this Order can be appealed at this stage. (See Attachment A, April 11, 2018 Order). The Order concerned routine discovery of factual information and is not the proper subject for an appeal in the middle of the litigation. Shearer v. Hafer, 177 A.3d 850 (Pa. 2018) (affirming a protective order that barred plaintiff's counsel from attending plaintiff's neuropsychological evaluation because the order was rule-based, factually intensive, and capable of remedy by ordering a new trial on appeal). This appeal is also improper

Newsuan Vs Republic Services, Inc. Etal-OPFLD



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because Appellants waived their claims by failing to object in this Court. Finally, the appeal has no merit because the Court's Order did not require disclosure of any privileged attorney-client communications or attorney work product. The interviews occurred prior to the formation of any attorney-client relationship and are not privileged, nor has the witness client ever asserted the privilege. Appellants stand in violation of the Order and seek to obstruct Appellee's right to a fair discovery process.

II. Factual and Procedural Background

Plaintiff-Appellee Karen Newsuan was run over by a 46,000 pound front-end loader truck on August 17, 2015 at the recycling facility where she worked as a sorter in King of Prussia, Pennsylvania. She suffered an above-knee amputation of her right leg as a result of the incident. Plaintiff filed a lawsuit alleging negligence against Defendants Republic Services, Inc., BFI Waste Services of Pennsylvania, LLC, BRI Waste Services of North America, LLC (hereinafter collectively referred to as "Defendant Waste Services"), Joshua Watson, Milton Baker, Christopher Giovetsis, Marc Buckley, Mike Roberts, and Chris Jobson.

The matter currently on appeal arose when Plaintiff sought to get the names and contact information of current and former employees of Defendant Waste Services who were working at the facility around the time of the incident. Defendant Waste Services provided Plaintiff with the names of 16 potential fact witnesses who were working at the facility on the day of the incident but did not provide their contact information as required by the pretrial discovery rules. Instead, after Plaintiff's counsel requested the witnesses' contact information Appellants' counsel contacted most of these employees, interviewed them, and took their statements about the incident. After the interviews, Appellants' counsel then offered to represent the witnesses free of charge. Appellants' counsel

admitted in this Court that no attorney-client relationship existed with the witnesses at the time of the interviews. (See Attachment B, Disc. Ct. Hr'g Tr. 26:8-12, Mar. 20, 2018 ("THE COURT: So at the time you questioned them about what they knew there wasn't even an attorney-client privilege formed yet? MR. SCHWARTZ: No, Your Honor.")). Nevertheless, Appellants' counsel sought to shield the information they learned from the witnesses by claiming attorney-client privilege.

Plaintiff subsequently filed a Motion to Compel Witness Information, and a hearing was scheduled for March 20, 2018. Plaintiff was informed the day before the hearing that Appellants' counsel was now representing many of the fact witnesses, and that any attempt by Plaintiff's counsel to interview these witnesses would violate the Pennsylvania Rules of Professional Responsibility.¹ (See Appellee's Motion to Quash and/or Dismiss Appeal at 24). Appellants' counsel admitted on the record that no conflict of interest was disclosed when the offer was made to represent the witnesses. (See Attachment B, Disc. Ct. Hr'g Tr. 15:7-11, Mar. 20, 2018 (THE COURT: Did you explain the potential conflict? MR. SCHWARTZ: That was the extent of my conversation with them at this point, Your Honor.))).

This Court's Order required Appellants' counsel to turn over all notes and communications regarding the witness interviews. The Court found that the interviews did not constitute privileged attorney-client communications or attorney work product because they were conducted before Appellants' counsel offered to represent the witnesses. (See Attachment A, April 11, 2018 Order at 2). There is no indication that the non-party fact witnesses have asserted attorney-client privilege in this case, nor is

¹ Rule 4.2 prohibits attorneys from communicating with someone represented by another attorney in the matter without permission from the represented person's attorney. Rules of Prof. Conduct, Rule 4.2, 42 Pa.C.S.A.

there any indication that the witnesses are even aware of the current appeal or wished for it to be taken on their behalf. In addition, due to Appellants' counsels' efforts to obstruct the discovery process by failing to turn over the contact information about witnesses and then taking steps to foreclose Appellee's ability to even talk to potential witnesses, the Court ordered that the notes be turned over as a sanction for the wrongful conduct.

The Order also prohibited Appellants' counsel from forming attorney-client relationships for the improper purpose of obstructing Plaintiff's fair access to fact witnesses. The Court ordered Appellants' counsel to inform the witnesses of the inherent potential conflict of interest that occurs when a lawyer concurrently represents both an organization and individual employees whose interests may be adverse to the organization as a whole. The Order further required Appellants' counsel to notify the witnesses that they do not need a lawyer to represent them at any depositions in the case (though they were free to have one if they chose) and disqualified Appellants' counsel from representing any of the witnesses unless the witnesses signed a conflict waiver.

Finally, the Order prohibited Appellants' counsel from compromising the fairness of the discovery process by improperly influencing potential fact witnesses. The Court ordered that any future questioning of the witnesses not previously interviewed by Appellants' counsel must be conducted via deposition, and forbid Appellants' counsel from otherwise questioning these witnesses about the incident. The Court also ordered Appellants to provide the witnesses with a copy of the Order informing them that Appellants' counsel is prohibited from influencing witnesses or taking retaliatory action against witnesses who communicate with Plaintiff.

Appellants stand in violation of the Court's Order. Appellants' counsel has not turned over the witness statements and communications, nor disclosed to the fact witnesses the potential conflict of interest arising from Appellants' counsel's dual representation. Instead, Appellants filed the present appeal on April 20, 2018. Appellants claim in the Concise Statement of Errors Complained of on Appeal that this Court abused its discretion or erred as a matter of law by issuing the Order.² (See Concise Statement of Errors Complained of on Appeal). Specifically, Appellants claim that the interview notes and witness communications are privileged, and that the Superior Court has jurisdiction to hear an immediate appeal due to the alleged attorney-client privilege and attorney work product issues. Id at 2.

Appellants' counsel also claims that no conflict of interest exists between their organizational client and their witness clients because the witnesses "have no legal exposure in any way for any alleged wrongdoing; and...these witnesses do not need to have a lawyer represent them in a deposition." Id at 3. Additionally, Appellants state that "no conflict has been identified by any witness, or counsel." Id at 4.

Finally, Appellants claim that the Order "exceeds the authority to supervise discovery, and impermissibly impedes [Appellants'] ability to defend itself in this litigation" by limiting Appellants' access to the witnesses. Id at 3. Appellants argue that the Court erred by warning about retaliation toward the witnesses "because no record evidence supports a finding that any such influencing or retaliatory conduct has occurred." Id at 4.

² Appellants claim on appeal that this Court "abused its discretion or erred as a matter of law by ruling that counsel for [Appellants'] contact with current and former...employees [of Appellants] constitutes solicitation prohibited by the Pennsylvania Rules of Professional Conduct." (See Concise Statement of Errors Complained of on Appeal at 2, ¶ 4). This Court did not make any findings of fact or conclusions of law in the Order regarding solicitation, and the issue in no way factored into the Court's rulings.

A collateral appeal at this stage of the litigation is inconsistent with the modern discovery rules' emphasis on truth-finding and fundamental fairness to all parties. Appellants' actions in failing to provide contact information for the witnesses, coupled with the decision by Appellants' counsel to represent the witnesses, unfairly obstructed the discovery process by blocking off Appellee's access. Bringing an improper collateral appeal will unduly delay discovery and jeopardize the parties' ability to obtain basic factual information about a workplace injury because memories fade with time and information can become permanently lost.

III. Legal Analysis

A. The appeal is improper because the Court's Order is not collateral and Appellants waived their objections.

This appeal of a routine discovery order is premature because it does not meet the requirements of a final order, an interlocutory order, or a collateral order³ that is entitled to an appeal in the middle of litigation. The Order is not a final order under the Pennsylvania Rules of Appellate Procedure because it does not dispose of all claims and parties. Pa.R.A.P. 341(b)(1). An interlocutory appeal is not available in this case because Appellants can assert none of the grounds to appeal as of right listed in Rule 311, and because Appellants did not apply for permission to appeal the Order within 30 days as required by Rule 312. Pa.R.A.P. 312; 42 Pa.C.S. § 702(b). The order is

³ An appeal may be taken from: (1) a final order or an order certified as a final order (Pa. R.A.P. 341); (2) an interlocutory order as of right (Pa. R.A.P. 311); (3) an interlocutory order by permission (Pa. R.A.P. 312, 1211, 42 Pa. C.S.A. § 702(b)); or (4) a collateral order (Pa. R.A.P. 313). Berkeyheiser v. A-Plus Investigations, Inc., 936 A.2d 1117, 1123–24 (Pa. Super. 2007) (citing Stahl v. Redcay, 897 A.2d 478, 485 (Pa. Super. 2006)). Appellants never sought permission for an interlocutory appeal. Grounds (1), (2), and (3) are facially insufficient to support appeal here.

therefore not an appealable final or interlocutory order. Appellants nevertheless claim that the Order is appealable as a collateral order under Rule 313.

Appellants are unable to satisfy any of the requirements for a collateral appeal.

A collateral order is defined in Rule 313 as follows:

“(b) Definition: A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that review is postponed until final judgment in the case, the claim will be irreparably lost.”

Pa. R.A.P. 313(b).

To qualify as a collateral order under Rule 313, each prong of the doctrine must be met: (1) the order must be separate and distinct from the underlying cause of action (Ben v. Schwartz, 729 A.2d 547, 551-52 (Pa. 1999)), (2) the right involved must be too important to be denied review and “involve rights deeply rooted in public policy going beyond the particular litigation at hand” (Stahl v. Redcay, 897 A.2d 478, 485 (Pa. Super. 2006) (quoting Melvin v. Doe, 836 A.2d 42, 47 (Pa. 2003)), and (3) “there must be no effective means of review available after an Order...is reduced to judgment” (Feldman v. Ide, 915 A.2d 1208, 1211 (Pa. Super. 2007)). In short, the order must meet the requirements of separability, importance, and irreparability. Shearer v. Hafer, 177 A.3d 850 (Pa. 2018). The Supreme Court has stated in that “even...in cases where the propriety of an appeal involving the attorney-client privilege or the work product doctrine is contested, we have still required the appealing party to establish each of the three prongs of the collateral order test to ensure that Rule 313 has been satisfied.” Id at 858. None of the claims raised by Appellants in the Concise Statement of Errors Complained of on Appeal satisfy these requirements.

Orders disqualifying counsel due to conflicts of interest do not warrant collateral appeals. The Supreme Court has made clear that “[o]rders disqualifying counsel do not meet all three prongs of the collateral order doctrine.” Vacone v. Syken, 899 A.2d 1103, 1107 (Pa. 2006) (quashing a collateral appeal of an order that disqualified a party’s counsel because he was likely to be called as a witness in the case).

Disqualification orders do not qualify because they are often inseparable from the litigation, because the importance of the disqualification can be mitigated by finding new counsel, and because improper disqualifications can be remedied on appeal after a final judgment by ordering a new trial. Id. at 1107-08. This includes orders regarding possible disqualification of a party’s counsel due to conflicts of interest. See Commonwealth v. Wells, 719 A.2d 729, 730-31 (Pa. 1998) (quashing a collateral appeal of an order that denied a public defender’s petition to withdraw as counsel due to a conflict of interest because the order was reviewable upon appeal of the court’s final decision). These orders are reviewable after a final judgment, and the proper remedy is to order a new trial. Id.

Appellants claim that a collateral appeal is appropriate due to preserve attorney-client privileged communications and the attorney work product. (See Concise Statement of Errors Complained of on Appeal at 2). The Superior Court has said “[i]t is well-settled that preserving attorney-client privileged and attorney work-product privileged information are important rights justifying collateral appeals.” Law Office of Douglas T. Harris v. Phila. Waterfront Partners, 957 A.2d 1223, 1228 (Pa. Super. 2008) (upholding an order requiring production of computers containing materials allegedly covered by attorney-client privilege because any objections on the basis of privilege were waived at trial when the computers were produced). However, it is insufficient for

Appellants to “merely aver” that a privilege has been violated. Id. Appellants “must make a specific objection to the alleged error before the trial court in a timely fashion and at the appropriate stage of the proceedings....Failure to raise such an objection results in a waiver of the underlying issue. Id. at 1229; see also Irwin Union Nat’l Bank & Trust Co. v. Famous, 4 A.3d 1099, 1104 (Pa. Super. 2010) (“It is well settled that issues not raised below cannot be advanced for the first time in a 1925(b) statement or appeal.”). Appellants’ counsel admitted in this Court that they interviewed the witnesses and took their statements *before* entering into an attorney-client relationship. (See Attachment B, Disc. Ct. Hr’g Tr. 26:8-12, Mar. 20, 2018 (“THE COURT: So at the time you questioned them about what they knew there wasn’t even an attorney-client privilege formed yet? MR. SCHWARTZ: No, Your Honor.”)).

Attorney-client privilege and the attorney work product doctrine are not proper bases for a collateral appeal in this case because Appellants expressly waived these objections in this Court. Appellants’ initial objections on the basis of attorney-client privilege and attorney work product were withdrawn in a subsequent discovery filing regarding the witness statements. Compare Defendants’ Response to Plaintiff’s First Request for Production of Documents, pgs. 2-3, dated Oct. 2, 2017 (withdrawn by counsel by email dated Oct. 10, 2017) with Defendant’s Response to Plaintiff’s First Request for Production of Documents, pg. 8, dated Dec. 11, 2017. The objections were never reasserted.

Appellants also failed to assert any attorney-client privilege or work product objections in subsequent discovery filings regarding the witness interviews. See Defendants’ Response in Opposition to Plaintiff’s Motion to Compel Information about Potential Witnesses and Regarding Communication with Potential Witnesses.

Appellants again failed to raise any objections when this Court ordered Appellants' counsel to "[c]onfirm that no documents have been withheld from production on the basis of attorney-client privilege or the work product doctrine" in respect to Plaintiff's Motion to Compel Responses to Plaintiff's First Request for Production of Documents. See Order, Rau, J., Mar. 13, 2018. Appellants filed nothing in response to assert a privilege or work product objection.

Appellants' filing of a collateral appeal in the middle of the litigation runs contrary to the values of judicial efficiency underlying the Pennsylvania Rules of Appellate Procedure. The Supreme Court explained the importance of strictly enforcing the collateral order doctrine as follows:

"Preventing piecemeal litigation is often seen as a means of promoting judicial efficiency and respecting the traditional role of the trial judge. According to this rationale, the cost of a wrong decision by a trial judge is typically outweighed by either the benefit provided by uninterrupted trial proceedings or the assurance that the issue is adequately reviewable through alternatives to an immediate appeal."

Shearer v. Hafer, 177 A.3d 850, 856-57 (Pa. 2018).

This Court's Order should be affirmed to ensure judicial efficiency and the fair operation of the discovery process.

B. Appellant counsel's claims of attorney-client privilege and attorney work product misuse the Rules in an attempt to obstruct discovery.

The principle of fairness is central to the discovery process and the Rules of Professional Conduct. Rule 3.4, "Fairness to Opposing Party and Counsel," states, in relevant part, as follows:

"A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other

material having potential evidentiary value or assist another person to do any such act;

(d) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information and such conduct is not prohibited by Rule 4.2.

Rules of Prof. Conduct, Rule 3.4, 42 Pa.C.S.A. Comment 1 to Rule 3.4 explains that “the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.” Rule 3.4, Comment 1, 42 Pa.C.S.A.

Appellants’ counsel undermined the fairness of the discovery process and misapplied the doctrine of attorney-client privilege and the Rules of Professional Conduct by improperly asserting privilege on behalf of non-party fact witnesses in this case. The Superior Court has held that “[t]he party invoking a privilege must initially set forth facts showing that the privilege has been properly invoked.” Red Vision Sys. v. Nat’l Real Estate Info. Servs., L.P., 108 A.3d 54, 61 (Pa. Super. 2015) (quoting Custom Designs & Mfg. Co. v. Sherwin-Williams Co., 39 A.3d 372 (Pa. Super. 2012)) (upholding an order denying an attorney’s petition to quash a subpoena to testify on the grounds of attorney-client privilege because he did not prove that the relevant communications were made in the course of representing his corporate client, nor that the privilege had been asserted by the client, which had gone out of business before trial).

Only the client may invoke the privilege, not the attorney. See Knopick v. Boyle, 2018 WL 2423478, *6 (Pa. Super 2018). In this case the witnesses have not invoked the privilege and may not even know that their employer's, or former employer's, counsel is claiming to invoke it on their behalf. Appellants' counsel has only entered their appearance on the docket for the Appellants, not for the non-party fact witnesses that they purport to represent here.

The Superior Court held in Knopick that attorney-client privilege is held by the client alone and cannot be invoked by the attorney without the client's knowledge and permission. Id. Appellant's counsel in Knopick attempted to invoke privilege on behalf of a non-party fact witness who was a former client. Id. at *1. The discovery dispute arose when Appellee moved to subpoena an email that the witness, an employee of the Defendant law firm, had written and sent to himself while preparing to meet with a separate attorney about suspected misuse of trust funds by the law firm. Id. The Court found that the non-party fact witness was "the proper owner of any privilege" and had to assert it himself, even though Appellant's counsel had earlier represented the witness at a deposition in the case. Id. at *1,*6. The prior attorney-client relationship was irrelevant because the email was written before the deposition and the formation of the relationship, and because the email was shared with a different lawyer, not Appellant's counsel. Id. at *6.

Attorney-client privilege was not properly invoked in this case because the interviews happened prior to the agreement to represent the witnesses and because counsel improperly invoked the privilege on behalf of non-party fact witnesses. Appellants' counsel admitted in this Court that they interviewed the witnesses and took their statements before entering into an attorney-client relationship. (See Attachment B,

Disc. Ct. Hr'g Tr. 26:8-12, Mar. 20, 2018 ("THE COURT: So at the time you questioned them about what they knew there wasn't even an attorney-client privilege formed yet? MR. SCHWARTZ: No, Your Honor.")). The claim of privilege also fails because the privilege belongs to the non-party fact witnesses, not to Appellants or their counsel. Appellants' counsel cannot assert a claim of privilege on behalf of non-party fact witnesses who are not even aware of the issue and who have not asserted it on their own behalf. Appellants' counsel only entered an appearance in this Court as to the named Defendants, not to the fact witnesses. The Concise Statement of Errors Complained of on Appeal is the first instance wherein Appellants' counsel asserted that there is an attorney-client privilege with respect to the witnesses.

Appellants' claim of privilege is also in conflict with the Rules of Professional Conduct. The rules prohibit the inherent conflict of interest that arises when an attorney represents both a party to the litigation and an employee of that party who may be deposed or called as fact witness in the case. See Rules of Prof. Conduct, Rule 1.7(a), 42 Pa.C.S.A (prohibiting concurrent conflicts of interest where "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client"). Such a conflict is only permissible if the client gives informed consent. Id at § (b). Appellants' counsel admitted on the record that the conflict of interest was not disclosed when the offer was made to represent the witnesses. (See Attachment B, Disc. Ct. Hr'g Tr. 15:7-11, Mar. 20, 2018 (THE COURT: Did you explain the potential conflict? MR. SCHWRTZ: That was the extent of my conversation with them at this point, Your Honor.))). Informed consent was not given in this case because Appellants' counsel failed to disclose the potential conflict of interest

to the fact witnesses when they sought to represent them. Even after this Court directed Appellants' counsel to inform the non-party fact witnesses of the potential conflict, Appellants' counsel refused to comply with that specific written Order.

An additional conflict of interest arises from Appellants' counsel's concurrent representation of the organizational client and fact witness employees of the organization. Rule 1.13, "Organization as Client," requires the attorney to "explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." Rules of Prof. Conduct, Rule 1.13(d), 42 Pa.C.S.A. Rule 1.13 also states that the attorney must get consent to the dual representation as required by Rule 1.7. *Id.* at § (e). Comment 7 to Rule 1.13 explains the importance of explaining the lawyer's role to constituents of the organizational client as follows:

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer *cannot* represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization *cannot* provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Rules of Prof. Conduct, Rule 1.13, Comment 7, 42 Pa.C.S.A. (emphasis added).

Appellants' counsel's actions in asking fact witnesses if they wanted free counsel was an improper attempt to obstruct the discovery process by misusing the ethics rules. The witnesses did not give informed consent to waive Appellants' counsel's conflict of interest. There is no indication that the non-party fact witnesses are even aware of the

current appeal or wished for an appeal to be taken on their behalf. This disconnect highlights the inherent conflict that arises when an attorney represents both a corporate client and individual fact witness employees whose interests may be adverse to the corporation during the course of the litigation. Appellants' counsel cannot engage in dual representation to obstruct discovery where a conflict of interest exists.

This Court's Order was a reasonable attempt to address the unfairness of Appellants' skirting the discovery rules and attempting to create a privileged attorney-client relationship with fact witnesses, or cloak information as work product, to hide information from their opponents. Such information would ordinarily have been available to both parties in the case through proper use of discovery rules. Notwithstanding the Court's efforts to try to address that improper conduct, Appellants refused to comply with the Order, choosing instead to appeal.

IV. Conclusion

This Court's Order was necessary to preserve the fairness of the discovery process and to ensure compliance with the ethics Rules. The Order should be affirmed because Appellants cannot satisfy the elements of the collateral order doctrine and because no colorable claim of attorney-client privilege or attorney work product exists.

BY THE COURT:



LISA M. RAU, J.

DATED: September 14, 2018

ATTACHMENT A

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CIVIL

KAREN NEWSUAN	:	AUGUST TERM 2017
	:	
<i>Plaintiff</i>	:	
v.	:	No. 00528
	:	
REPUBLIC SERVICES, INC. et al.	:	
	:	
<i>Defendant</i>	:	

Newsuan Vs Republic Services, Inc. Etal-ORDER

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ORDER

AND NOW, this 11th day of **April, 2018**, upon consideration of Plaintiff's Motion to Compel Information about Potential Witnesses and for a Court Order Regarding Communications with Potential Witnesses, and Defendants Response, and a March 20, 2018 oral argument, this Court makes the following **FINDINGS OF FACT AND CONCLUSIONS OF LAW**:

1. Plaintiff Karen Newsuan was a recycling facility sorter and brought a lawsuit against Defendants Republic Services, Inc., BFI Waste Services of Pennsylvania, LLC, BRI Waste Services of North America, LLC, Joshua Watson, Milton Baker, Christopher Giovetsis, Marc Buckley, Mike Roberts and Chris Jobson for injuries she suffered on August 17, 2015 from a front-end loader at the recycling facility where she worked.
2. Plaintiff's counsel sought information from Defendants Republic Services, Inc., BFI Waste Services of Pennsylvania, LLC, BRI Waste Services of North America, LLC (hereafter collectively referred to as Defendants Waste Services) about current and former employees who were working at the facility at or around the time of the April 17, 2015 incident because they are potential fact witnesses who may have information that is relevant to the claims in the lawsuit.
3. **All parties agree that these current or former employees have no legal exposure in any way for any alleged wrongdoing. The parties are seeking to interview or depose (question under oath) these current or former employees simply to learn any factual information they may have relating to issues presented in the lawsuit. There is no necessity for any of these employees to have a lawyer to represent them.** However, a witness may be represented by a lawyer if the witness chooses.
4. Defendants Waste Services identified the following names of people working at the facility at the time of the August 17, 2015, incident):

1. Atcha Adjankara	7. Albert Boyd, II	13. Robert R Roehm III
2. Doh Afeli	8. Louis A Edme	14. Chek Sengsoursack

ATTACHMENT B

First Judicial District of Pennsylvania

170800528

Karen Newsuan Vs. Republic Services, Inc., Et Al

*Hearing Volume 1
March 20, 2018*



*First Judicial District of Pennsylvania
100 South Broad Street, Second Floor
Philadelphia, PA 19110
(215) 683-8000 FAX:(215) 683-8005*

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[1] IN THE COURT OF COMMON PLEAS
 [2] FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
 [3] CIVIL TRIAL DIVISION
 [4] -----
 [5] KAREN NEWSUAN : AUGUST TERM 2017
 [6] Plaintiff : No. 00528
 [7] :
 [8] vs. :
 [9] :
 [10] REPUBLIC SERVICES, INC., :
 [11] Et al. :
 [12] Defendant :
 [13] -----
 [14] MARCH 20, 2018
 [15] -----
 [16] Courtroom 646, City Hall
 [17] Philadelphia, Pennsylvania
 [18] -----
 [19] BEFORE: THE HONORABLE LISA M. RAU, J.
 [20] -----
 [21] DISCOVERY COURT HEARING
 [22] -----
 [23] LISA POSTIGLIONE
 [24] OFFICIAL COURT REPORTER - CITY OF PHILADELPHIA
 [25] 215-683-8009

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[1] [2] **APPEARANCES:**
 [3] DEREK E. JOKELSON, ESQ.
 [4] Attorney At Law
 [5] 230 South Broad Street, 10th Floor
 [6] Philadelphia, PA 19102
 [7] Counsel for Plaintiff
 [8] MICHAEL SCHWARTZ, ESQ.
 [9] Fowler Hirtzel McNulty & Spalding LLP
 [10] 2000 Market Street
 [11] Suite 550
 [12] Philadelphia, PA 19103
 [13] Counsel for Defendants

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
 [2] **THE COURT CRIER:** Case number 161.
 [3] Counsel, identify yourself for the
 [4] record, please.
 [5] **MR. JOKELSON:** Derek Jokelson for
 [6] the plaintiff, Karen Newsuan.
 [7] **MR. SCHWARTZ:** Michael Schwartz on
 [8] behalf of all defendants.
 [9] **THE COURT:** What kind of case is this,
 [10] counsel?
 [11] **MR. JOKELSON:** This is an industrial
 [12] accident. The plaintiff was a sorter at a
 [13] waste recycling facility and she was run over
 [14] by a front-end loader with an amputated right
 [15] leg.
 [16] **THE COURT:** I think I issued some
 [17] orders yesterday on this case.
 [18] **MR. JOKELSON:** There was a motion to
 [19] amend the defendant -- to add an additional
 [20] defendant --
 [21] **THE COURT:** Yes.
 [22] **MR. JOKELSON:** -- that was
 [23] outstanding. That might be the motion.
 [24] **THE COURT:** Yup. That's what it is.
 [25] Okay. What's the issue that brings

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
 [2] you here today?
 [3] **MR. JOKELSON:** The issue is --
 [4] **THE COURT:** This does look like a
 [5] long one. That's why Pete put it last.
 [6] We're standing in recess for five minutes.
 [7] (Brief recess.)
 [8] **THE COURT CRIER:** Your Honor, this
 [9] is case number 161.
 [10] Counsel, identify yourself for the
 [11] record again.
 [12] **MR. JOKELSON:** Derek Jokelson for the
 [13] plaintiff, Karen Newsuan.
 [14] **MR. SCHWARTZ:** Michael Schwartz on
 [15] behalf of all defendants.
 [16] **THE COURT:** Okay.
 [17] It's not a good sign when we have a
 [18] four-page proposed order. So what brings you
 [19] here today?
 [20] **MR. JOKELSON:** I'm seeking guidance
 [21] from the Court on contacting potential
 [22] witnesses who may or may not still be an
 [23] employee of one or more of the entity
 [24] defendants. I had asked for discovery asking
 [25] for the name of the employer, the job

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] responsibility, the contact information for
[3] everyone that was in the facility at the time
[4] of the accident. I have yet to get any
[5] discovery except for in December I got the
[6] time card reports for the employees.

[7] It does not explain their contact
[8] information, the names of their employer,
[9] their job title, their job responsibility, any
[10] of that kind of information.

[11] Several days after receiving it I
[12] wrote a letter to defense counsel. I noted
[13] in the letter that under rule 4.2 of the Rules
[14] of Professional Responsibility I -- my
[15] understanding was that I could contact any
[16] former employee and any current employee who's
[17] basically not in a managerial position
[18] speaking with lawyers.

[19] I noted that there was a case from the
[20] Superior Court called McCarthy versus SEPTA.
[21] And in the McCarthy case the Superior Court
[22] put the onus on counsel seeking to speak to
[23] such people to determine beforehand whether
[24] or not the requirements to the rule were met.
[25] And the McCarthy court said that the key

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] **THE COURT:** Number two looks pretty
[3] overbroad but -- okay. Keep going.

[4] Paragraph number three.

[5] **MR. JOKELSON:** Number two was just
[6] employees or people that were in the facility
[7] at -- close to midnight. So it would probably
[8] only be employees or people associated with
[9] them to identify them as well. Because of
[10] the 16 people on page one I know that
[11] there's people missing from that list, and I
[12] wanted to make sure I had everybody.

[13] **THE COURT:** But the facility, I assume
[14] it has a lot of people on shift at all times.
[15] Is that right, counsel?

[16] **MR. SCHWARTZ:** Yes.

[17] **THE COURT:** Okay.

[18] **MR. JOKELSON:** So in paragraph three
[19] it was to clarify that I could speak to
[20] anybody that's not currently employed.

[21] And paragraph four was that if
[22] there's some contention that they're currently
[23] employed for defense counsel to set forth,
[24] with some particularity, why I should not be
[25] able to speak to them.

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] information needed by the trial court to
[3] determine if an employee for protection
[4] -- qualifies for protection from ex parte
[5] communications with opposing counsel is what
[6] status that employee has within the employee's
[7] organization, i.e. whether by virtue of the
[8] employee's status a statement made by this
[9] employee could impute liability to the
[10] company.

[11] I hadn't had any responses. I wrote
[12] several follow-up e-mails. I didn't have any
[13] responses so I filed the order -- or I filed
[14] the motion rather.

[15] The order is lengthy because I listed
[16] the witnesses. And then there's a section in
[17] number 1 A through D, which would give me
[18] and the Court the information needed to
[19] determine whether or not I should be able to
[20] speak to them. And then paragraph two is to
[21] identify anybody else in the facility that
[22] wasn't identified to me. Because there were
[23] people obviously missing from the time card
[24] reports.

[25] Paragraph three says --

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] And then -- I'm sorry. That may be
[3] paragraph five -- four and five.

[4] **THE COURT:** Okay. I got it.

[5] **MR. JOKELSON:** And then I, you know,
[6] restricted myself from speaking to anybody
[7] until the Court ruled on it if they were
[8] legitimately within the scope of Rule 4.2.

[9] **THE COURT:** Okay. So the issue is
[10] that you're trying to find out information
[11] about perspective witnesses but also not get
[12] in trouble by having conversations that you're
[13] not permitted under the Rules of Professional
[14] Responsibility to have with people who might
[15] have a job title which puts them in a position
[16] of speaking for the employer as opposed to a
[17] general employee; is that correct?

[18] **MR. JOKELSON:** That is correct.

[19] I would just like to add that the
[20] scope of my desire to speak with these people
[21] is not just, did they witness the accident.
[22] But the complaint alleges not only that the
[23] driver was negligent but that the facility was
[24] constructed in such a way that it would force
[25] employees to cross a dangerous area called the

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] tipping floor, and that they didn't have
[3] rules, regulations, policies, and
[4] procedures in place to restrict people from
[5] going across the tipping floor.

[6] And I noted in the complaint that when
[7] OSHA did an investigation, that OSHA report
[8] that -- one interview E of OSHA revealed that
[9] although, quote, common sense, end quote, is
[10] discussed during training and people are,
[11] quote, told to make eye contact, stay close to
[12] the machinery, it was a routine occurrence for
[13] employees to walk across the tipping floor and
[14] management did not enforce, quote, the
[15] common sense stuff they talked about, end
[16] quote.

[17] So I also want to delve with them into
[18] the practice and procedure and what actually
[19] happened on a day-to-day basis in terms of
[20] ingress and egress walking past within the
[21] facility.

[22] **MR. SCHWARTZ:** Your Honor, there's a
[23] lot to unpack here. I think it might be
[24] worthwhile if we, maybe, start with number two
[25] on the order, which is asking for any and all

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] provided the names -- it was a log of all
[3] of the temporary employees that were working
[4] there as well, and the one individual, the
[5] supervisor, as a named defendant which we've
[6] identified to defense counsel. So there are
[7] no other employees, to the best of our
[8] knowledge, that were working that evening.

[9] **THE COURT:** So, is it your position,
[10] other than the named defendant, that all those
[11] other employees, the temporary employees and
[12] the other employees, would not constitute
[13] supervisory personnel for purposes of
[14] Professional Rule of Responsibility 4.2?

[15] **MR. SCHWARTZ:** Well, I would say,
[16] generally speaking, it's my understanding that
[17] all of the other individuals were not in any
[18] type of supervisory position, correct.

[19] **THE COURT:** Okay. So that it's
[20] permissible for plaintiff to make contact with
[21] those people without violating the Rules of
[22] Professional Responsibility; is that correct?

[23] **MR. SCHWARTZ:** Yes, Your Honor.
[24] Except for the fact that we have informed
[25] plaintiff's counsel that all of the current

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] persons who were at the facility. And I think
[3] by starting there we can narrow down what
[4] we're discussing here today.

[5] So if I may, Your Honor? This
[6] accident happened approximately 11 o'clock in
[7] the evening time at a facility -- a recycling
[8] facility that is owned and operated by
[9] Republic Services or other affiliated
[10] entities.

[11] **THE COURT:** How many people work
[12] there?

[13] **MR. SCHWARTZ:** At the time of the
[14] incident there were, according to my
[15] calculations, approximately 17 Republic
[16] Services employees, as well as approximately
[17] five or six temporary employees, as well as
[18] a night shift supervisor named Milton Baker,
[19] who is also named as a defendant in this case.

[20] So, during discovery, defendants
[21] have supplied plaintiff's counsel with the
[22] names of each and every individual who was
[23] working at the facility that evening. And
[24] that would consist of the 16 individuals
[25] listed on plaintiff's motion. We also

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] employees for Republic Services that were
[3] working that evening, including the
[4] non-supervisory positions, have agreed to be
[5] represented by Republic Services as their
[6] counsel. So for purposes of communication by
[7] plaintiff's counsel we would submit, under
[8] Rule 4.2, all communication must need to go
[9] through counsel for all current employees of
[10] Republic Services, including those that are
[11] non-supervisory.

[12] **THE COURT:** You're only representing
[13] them as fact witnesses?

[14] **MR. SCHWARTZ:** Correct.

[15] **MR. JOKELSON:** So that's new
[16] information to me as of late yesterday
[17] afternoon, that Republic is taking the
[18] position that it now represents all current
[19] employees. I have not been told who is a
[20] current employee and who is a noncurrent
[21] employee so I don't know who we're talking
[22] about.

[23] I did research last night -- which is
[24] my stack of case law -- and there's a raft of
[25] cases, mostly federal court cases, some in the

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] third circuit, which disavow a company to
[3] avoid rule 4.2 by unilaterally reaching out
[4] to employees and saying, We now represent you.

[5] The Rules of Professional
[6] Responsibility at 7.3 don't allow lawyers to
[7] solicit representation. And a lot of those
[8] cases go through the scenario which we have in
[9] this case, which is where there's a potential
[10] conflict of interest that has to be navigated
[11] very carefully and that the Court shouldn't
[12] allow a corporation entity to avoid Rule 4.2,
[13] especially where there's a situation as there
[14] is here, there's information that policies and
[15] procedures weren't followed.

[16] Those employees' knowledge and
[17] information might hurt the company at a
[18] deposition. It might create a conflict of
[19] interest between them. And, you know, it's
[20] not a basis to avoid the rule.

[21] **THE COURT:** Well, for those people who
[22] are no longer employees of the defendant --

[23] **MR. SCHWARTZ:** Yes, to address those
[24] employees --

[25] **THE COURT:** You haven't stepped in and

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] recollection of the incident. And I also
[3] discussed that Republic Services has hired me
[4] as counsel. And from there they -- Republic
[5] Services, for no cost, would be willing to
[6] represent them should they choose to.

[7] **THE COURT:** Did you explain the
[8] potential conflict?

[9] **MR. SCHWARTZ:** That was the extent of
[10] my conversation with them at this point, Your
[11] Honor.

[12] **THE COURT:** Okay. Let's go through
[13] the others. I mean, it's --

[14] **MR. SCHWARTZ:** And if I may, Your
[15] Honor, just to paint a picture of the
[16] scenario? The supervisor on duty at the time
[17] of the incident, Milton Baker, is a defendant
[18] in this case. The purposes of plaintiff
[19] counsel's motion is to understand, A, who was
[20] there that evening, B, what did they see and
[21] know about the incident. And then he added
[22] today the other background information about
[23] the facility and the layout of the facility.

[24] Because the list is vast, because
[25] there's 16 employees listed here, he doesn't

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] you're representing them too?

[3] **MR. SCHWARTZ:** Well, I would like to
[4] describe who those employees are so we can
[5] list them and discuss who I've been in contact
[6] with and who I have not spoken with to date.

[7] **THE COURT:** Okay.

[8] **MR. SCHWARTZ:** So of the list of 16
[9] employees on plaintiff counsel's order there
[10] is a total of seven employees listed here
[11] that are former employees. Of that list,
[12] three of those former employees would like
[13] Republic Services to represent them as fact
[14] witnesses in this matter.

[15] **THE COURT:** How did that -- how did
[16] that come about?

[17] **MR. SCHWARTZ:** Sure.

[18] **THE COURT:** Without waiving
[19] attorney-client privilege, how did you
[20] approach them and what did you say about
[21] the nature of your representation?

[22] **MR. SCHWARTZ:** Sure. Without waiving
[23] any attorney-client privilege, I spoke with
[24] each of those employees about generally the
[25] incident, whether they had any knowledge or

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] want to waste his time or our time by having
[3] 16 depositions. I've suggested to counsel
[4] that Milton Baker was the supervisor on duty.
[5] He was the one -- one of the individuals who
[6] responded to the incident. Certainly it
[7] would make practical sense to take Mr. Baker's
[8] deposition first, ask him who he saw was
[9] there, who responded --

[10] **THE COURT:** You don't get to decide
[11] how he's going to do his discovery.

[12] **MR. SCHWARTZ:** Certainly, Your Honor.
[13] It was just a recommendation from me.

[14] And for the remaining individuals who
[15] are former employees, at this point there are
[16] four that I have not spoken with at this
[17] time. At this time I do not represent any of
[18] those individuals. But I will say that, you
[19] know, these are individuals many of whom are
[20] not born in the United States. They may not
[21] fully understand the legal process. And they
[22] may not understand that they do have a right
[23] of representation when another attorney calls.

[24] **THE COURT:** They also -- I mean, how
[25] is that not soliciting, what you're doing,

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] Counsel?

[3] **MR. SCHWARTZ:** I'm simply just
[4] introducing myself just as plaintiff's
[5] counsel would do.

[6] **THE COURT:** And offering to represent
[7] them.

[8] **MR. SCHWARTZ:** I'm making myself
[9] available. I am not offering to represent
[10] them. I'm giving them the option.

[11] **THE COURT:** You're offering to
[12] represent them for free.

[13] **MR. SCHWARTZ:** They have the option --
[14] the right to say yes or no to me, Your Honor.
[15] That's all I'm doing. I'm not saying, Do you
[16] want me to represent you. I'm certainly not
[17] saying that.

[18] **THE COURT:** I don't want you
[19] approaching any of the other employees and
[20] offering to represent them, particularly
[21] given that you've said that they're non-U.S.
[22] citizens or people with language issues. A
[23] lot of people get very afraid. And if you're
[24] showing up and acting like there's a need that
[25] they have representation, that's not

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] is something very different. You're going out
[3] and saying, Hey, I'll represent you for free,
[4] you're going to be deposed in this case. And
[5] what it does to every citizen is it makes them
[6] afraid about what will happen and makes them
[7] think they need to have a lawyer. And there's
[8] a potential conflict there. And what you're
[9] doing is soliciting. So, no, you may not
[10] contact any former employees and offer to
[11] represent them for free.

[12] **MR. SCHWARTZ:** I understand, Your
[13] Honor. I would disagree with that assessment
[14] but...

[15] **THE COURT:** You're free to appeal it
[16] all the way up. I would love to get some
[17] clear case law on this.

[18] **MR. SCHWARTZ:** Absolutely, Your Honor.

[19] **THE COURT:** I think that given what he
[20] said so far though that we don't need to have
[21] answers -- I mean, he's basically said that
[22] everybody is an employee --

[23] **MR. JOKELSON:** Well --

[24] **THE COURT:** -- other than the
[25] supervisory person.

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] appropriate. I don't know what under the
[3] rules authorizes you to go out and solicit
[4] people who don't even work for you anymore and
[5] say you're going to represent them in a case.
[6] They can be afraid and think that they have to
[7] have a lawyer.

[8] **MR. SCHWARTZ:** That's not the case.
[9] That's not what I'm doing, and that's not
[10] what those conversations are. I'm having the
[11] same conversations that plaintiff's counsel
[12] would have about what they saw and what they
[13] know.

[14] **THE COURT:** No. You're actually
[15] offering to represent them for free and then
[16] making it impossible for plaintiff to have the
[17] same kind of conversations that you're having.
[18] So you're not going to approach those other
[19] four without leave of court with good cause
[20] shown because I think it's soliciting.

[21] **MR. SCHWARTZ:** Okay, Your Honor. And
[22] he has the right to make those phone calls as
[23] well.

[24] **THE COURT:** You both have the right to
[25] call them on the phone, but what you're doing

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] **MR. JOKELSON:** First of all, I don't
[3] know who they're an employee of, and that's
[4] important because Republic Services has over
[5] 100 subsidiaries. And that's going to be
[6] an issue in the case for a variety of reasons.
[7] And they only represent three entities.

[8] **THE COURT:** By the way, who are the
[9] four employees who you haven't -- former
[10] employees who you haven't gotten in contact
[11] with?

[12] **MR. SCHWARTZ:** Yes, Your Honor. They
[13] are number three, Bounthavy, last name
[14] Nodkeyo (ph); number four, Frank
[15] Bailey, Jr.; number 15, Erick, E-r-i-c-k, last
[16] name T-h-e-v-e-n-i-n; as well as Number 16,
[17] Diego R. Velazquez.

[18] **THE COURT:** V-e-l-a-z-q-u-e-z.

[19] So you should update the list,
[20] Counsel, to indicate who they actually work
[21] for -- not just give contact information --
[22] who they work for and whether or not they
[23] were in supervisory positions or not and the
[24] dates of employment.

[25] **MR. JOKELSON:** I think that's spelled

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] out in A through D.

[3] **THE COURT:** Yes.

[4] **MR. JOKELSON:** I'm a little -- I don't
[5] know if disheartened or frustrated
[6] is the right word. I think what's
[7] happened is -- I've been asking for this
[8] information since September. I got the list
[9] in December and made an issue out of it
[10] immediately. And it appears that over the
[11] last three months defense counsel has been
[12] contacting all of the current and former
[13] employees to offer their services, which is
[14] impeding my ability to obtain information from
[15] witnesses whether or not I call them for
[16] deposition, but just to obtain information as
[17] part of my investigation.

[18] I don't think it's proper not only
[19] with respect to the former employees but also
[20] with respect to the current employees because
[21] of the potential for the conflict. And
[22] there's been no -- and what I'm hearing is
[23] that the conflict hasn't been discussed
[24] either.

[25] **THE COURT:** Right.

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] witnesses, the four that we just listed,
[3] numbers three, four, 15, and 16 on the
[4] proposed order, are former employees who are
[5] not represented. I don't know who the former
[6] employees who are purported to be represented
[7] are. I don't know who the current
[8] employees are. And I don't know that each of
[9] the current employees have or have not agreed
[10] to representation. And I question, with
[11] regard to all of them, whether or not there
[12] was a proper formation of an attorney-client
[13] privilege. And overlying all of that is my
[14] concern with my ability to investigate the
[15] facts that I need to investigate that has been
[16] impeded.

[17] And just to add to the mix, that rule
[18] 3.4 is entitled Fairness to Opposing Party
[19] and Counsel. And it prohibits unlawful
[20] obstruction of another party's access to
[21] evidence. And the cases that I was
[22] researching last night also reference that
[23] rule as a concern that is in the mix in this
[24] kind of a situation.

[25] **THE COURT:** One of the problems is

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al

[2] **MR. JOKELSON:** So, you know, I'm
[3] certainly cognizant of, you know, the bounds
[4] of my role, and I don't want to intrude upon
[5] a represented party's representation. But
[6] with regard to the -- or rather the
[7] represented witnesses' representation. But
[8] with regard to the witnesses, both current and
[9] former, who are purportedly represented at
[10] this point, I don't think it was a proper
[11] procedure and it has frustrated plaintiff's
[12] ability to investigate.

[13] And I think it would be proper for
[14] defense counsel to either show that they've
[15] gotten waivers -- written waivers of conflict
[16] of interest from each one of them as of this
[17] point or to not contact or communicate with
[18] them.

[19] **THE COURT:** So what are you proposing?

[20] **MR. JOKELSON:** Well, first of all, I
[21] think there should be no more contact with any
[22] of them until we sort out who's current, who's
[23] former, who's represented, and who's not. At
[24] this point my knowledge, which was just
[25] supplemented by defense counsel, was that the

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] that the rules set forth very carefully how
[3] people should not be solicited, how there
[4] should be full disclosure in these kinds of
[5] situations where there's a potential conflict.
[6] Those rules kind of conflict with kind of a
[7] presumed okay practice that corporations
[8] frequently engage in by running around and
[9] asking every fact witness if they want to be
[10] represented by their employer or former
[11] employer. And, so, people think that that's
[12] okay because it's always been done. That's
[13] the problem.

[14] Now, when you reached out to these
[15] people did you do it by letter or phone?

[16] **MR. SCHWARTZ:** Phone, Your Honor.

[17] **THE COURT:** And that's another aspect
[18] that implicates the rule.

[19] And, so, what you're asking,
[20] Mr. Jokelson, is that there be no further
[21] contact until you find out who's a current
[22] employee and who's not and so forth; is that
[23] right?

[24] **MR. JOKELSON:** Correct. And I think
[25] I'm understanding that no -- none of the

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] witnesses were explained any potential
[3] conflict. And if that could be confirmed
[4] now -- I think it has been but we may have
[5] just been talking about the former employees
[6] before -- then for the Court to allow me to
[7] speak to those people as there is no valid
[8] attorney-client relationship that's been
[9] formed to date.

[10] **THE COURT:** You didn't say, Gosh,
[11] there's a potential conflict, I represent the
[12] employer, I'm volunteering to represent you in
[13] a deposition so you don't have to worry about
[14] it or something like that; is that right?

[15] **MR. SCHWARTZ:** Your Honor, without,
[16] again, revealing any type of attorney-client
[17] privilege, the extent of my conversation was
[18] who I am, who I represent. I
[19] explained to them that at this time I do not
[20] represent those individuals. I only represent
[21] the named defendants for -- which is the
[22] entities as well as the individuals. I
[23] explained who I am. I then proceeded to ask
[24] them if they witnessed anything from the
[25] accident. And from there I explained that if

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] that information to him in written form so
[3] that's he fully aware of who we're discussing.
[4] Because I understand he has a list of 16
[5] people. I wouldn't want him to not know each
[6] and every one of those. But prior to this
[7] motion there was obviously some disagreement
[8] as to my concern that he would be contacting
[9] employees of Republic Services.

[10] **THE COURT:** Employees who would have
[11] been free to talk to him until you created an
[12] attorney-client privilege.

[13] **MR. JOKELSON:** And I'll also note --

[14] **THE COURT:** He would have been free to
[15] talk to any of those people prior to your
[16] approaching them under the law. And, so, the
[17] delay in getting that information to him -- in
[18] that interim period you went around and
[19] created an attorney-client relationship,
[20] perhaps not following the required conflict
[21] rules with respect to that. But you created
[22] a barrier to his being able to talk to people
[23] who he ordinarily, under the law, would have
[24] been permitted to talk to. That's the
[25] problem.

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] they would -- if they would want I would be
[3] willing to represent them as well in this case
[4] only as a fact witness for, for instance, a
[5] deposition. That was the extent of my
[6] conversation without, you know, revealing
[7] any type of further attorney-client privilege.

[8] **THE COURT:** So at the time you
[9] questioned them about what they knew there
[10] wasn't even an attorney-client privilege
[11] formed yet?

[12] **MR. SCHWARTZ:** No, Your Honor.

[13] **MR. JOKELSON:** Glad we took a break?

[14] **THE COURT:** I want to think about what
[15] to order in this case. And I appreciate that
[16] this is kind of what some companies think is
[17] standard operating procedure. The problem is
[18] it's interjection with the Rules of
[19] Professional Responsibility.

[20] **MR. SCHWARTZ:** Your Honor, if I may
[21] offer one other possible suggestion slightly
[22] aside from this? If counsel is concerned
[23] of who these individuals are, meaning their
[24] positions, whether they're current or former
[25] employees, I'm certainly willing to provide

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] Well, there should be no further
[3] contact with former employees and current
[4] employees who aren't supervisors with an offer
[5] to represent them until further order of the
[6] court.

[7] And I will look at this and make a
[8] decision as to what should be supplied.
[9] Initially, what I would like supplied is --
[10] you had initially said that there were 17
[11] employees and five to six temporary employees
[12] and then the night shift supervisor; is that
[13] right?

[14] **MR. SCHWARTZ:** That's accurate, Your
[15] Honor.

[16] **THE COURT:** Have all those names been
[17] provided to plaintiff's counsel?

[18] **MR. SCHWARTZ:** Yes.

[19] **THE COURT:** So why is it -- what's the
[20] basis, Mr. Jokelson, for saying that you don't
[21] believe that you've gotten all the names of
[22] the people who were there?

[23] **MR. JOKELSON:** Because I had
[24] identified, prior to yesterday, that at least
[25] Milton Baker, who is the night shift

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] supervisor, wasn't on the list. And I asked
[3] for confirmation to see if there were any such
[4] persons who might not be hourly laborers not
[5] on the report. And I wasn't told until
[6] yesterday that the only other person in the
[7] building was Mr. Baker.

[8] **THE COURT:** This list is 16
[9] people on the proposed order, but what you
[10] said is that --

[11] **MR. SCHWARTZ:** Josh Watson is an
[12] actual defendant. He was the 17th person.

[13] **THE COURT:** Okay. But then you said
[14] there were five to six temporary employees and
[15] the night shift supervisor?

[16] **MR. SCHWARTZ:** Yes.

[17] **THE COURT:** So have you turned those
[18] names over yet?

[19] **MR. SCHWARTZ:** Yes.

[20] **MR. JOKELSON:** I have those names.
[21] And I never considered those five people to be
[22] employees of the defendants because they were
[23] employees of a company called Labor Ready.

[24] **THE COURT:** Let me look through this.
[25] I may be able to just do it now.

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] my only concern.

[3] **MR. JOKELSON:** I'll also note that way
[4] back in, maybe, December when we first spoke
[5] about it, I had told counsel that I wouldn't
[6] speak to anybody if they were telling me not
[7] to until we had enough information and we
[8] could have a court resolution --

[9] **THE COURT:** So let me just ask you
[10] this, if this were the information for anybody
[11] who was a current employee you wouldn't have
[12] to supply that, but for former or temporary
[13] employees you wouldn't have a problem with
[14] turning that over, correct?

[15] **MR. SCHWARTZ:** Yes, Your Honor.

[16] **THE COURT:** Okay.

[17] **MR. SCHWARTZ:** Can I make one other
[18] point on the record?

[19] **THE COURT:** Yes.

[20] **MR. SCHWARTZ:** Plaintiff's counsel,
[21] when we had that conversation -- whether that
[22] be back in December -- he asked me to get
[23] information from these individuals, meaning he
[24] didn't want to waste the time and money or
[25] expense to depose each and every one of these

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] (Brief pause.)

[3] **THE COURT:** Have you looked through
[4] this proposed order, Counsel?

[5] **MR. SCHWARTZ:** I have.

[6] **THE COURT:** And what objections do you
[7] have to it?

[8] **MR. SCHWARTZ:** So the first objection
[9] would be part of the basis of this argument,
[10] which is I-D, and that is present or last
[11] known home address, telephone numbers, e-mail
[12] addresses, and business addresses of --

[13] **THE COURT:** Why?

[14] **MR. SCHWARTZ:** -- all of the
[15] individuals. The contact information was the
[16] basis for our objection.

[17] **THE COURT:** Why?

[18] **MR. SCHWARTZ:** For the concern -- and
[19] I understand that your order is still pending,
[20] Your Honor -- the concern that individuals
[21] that are represented by counsel -- if
[22] plaintiff's counsel had their contact
[23] information -- could reach out to them. Now,
[24] I understand the order instructs him not to.
[25] I understand he would not do so. But that was

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] individuals. So it was actually a verbal
[3] agreement between us and plaintiff's counsel
[4] that I would speak to these individuals to
[5] get a sense of what information they knew and
[6] I could provide that to counsel. That was
[7] actually a conversation we had.

[8] **THE COURT:** Well, one conversation
[9] would have been, Hey, let's sit down and talk
[10] to them together. But what, in fact, you did
[11] was you approached them and said, Hey, I'll
[12] represent you, you tell me everything that
[13] happened --

[14] **MR. SCHWARTZ:** I just said you have
[15] a right to, Your Honor. That's all I said.

[16] **THE COURT:** I understand. But you
[17] know what you did. You created an unfair
[18] advantage so that you've got access to people
[19] that he could not get access to. You got the
[20] first shot at them and then come across as
[21] the white knight -- the white knight in
[22] shining armour by saying, I'll represent you
[23] for free.

[24] **MR. SCHWARTZ:** He did agree for me to
[25] speak to them. That was a verbal conversation

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] counsel and I absolutely had.

[3] **MR. JOKELSON:** That was not the
[4] conversation. He expressed hesitancy to give
[5] me contact information because he
[6] thought that I should not be able to speak to
[7] any of them. And I told him to give me the
[8] information and I would not speak to them
[9] until we had a court resolution. And he
[10] said --

[11] **THE COURT:** Okay. Got it. Let's keep
[12] going through the order. So I've changed
[13] paragraph D.

[14] **MR. SCHWARTZ:** Your Honor, I believe
[15] number two is irrelevant at this point because
[16] we've identified all persons who were working
[17] at the facility.

[18] **THE COURT:** You've got everything
[19] right now on number two, correct?

[20] **MR. JOKELSON:** Yes.

[21] **THE COURT:** You probably want it in
[22] writing though just so --

[23] **MR. JOKELSON:** I would like it
[24] verified.

[25] **THE COURT:** Yes. Even though you've

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] not in a supervisory position.

[3] **THE COURT:** Are you going back to
[4] number three or are you going to four?

[5] **MR. SCHWARTZ:** Number four.

[6] **THE COURT:** You have to -- I mean,
[7] under the rules they speak for the defendant
[8] when they're at a supervisory level but not
[9] just every single employee there. That's not
[10] kind of -- just because you're an employer
[11] doesn't mean you get to cloak everybody within
[12] your organization as being represented by the
[13] corporation.

[14] **MR. SCHWARTZ:** So number four would
[15] say we need to identify whether that
[16] individual is in a particular role?

[17] **THE COURT:** Right. And you kind of
[18] just did that on the record. So you can kind
[19] of do it the way you did it here, which is,
[20] other than the one you indicated here on the
[21] record, none of them has the authority to
[22] speak for the organization.

[23] **MR. SCHWARTZ:** Yes, Your Honor.

[24] For number five, Your Honor, our
[25] objection is to the fact -- a verified

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] given it to him, just give him a verified
[3] answer with the names of people.

[4] **MR. SCHWARTZ:** Okay.

[5] **THE COURT:** Paragraph number three,
[6] Counsel for plaintiff may communicate with
[7] each potential witness who's not presently
[8] employed by any of the entity defendants.

[9] Well, I think that you don't
[10] even have the ability to do that because you
[11] don't have your information -- their
[12] information.

[13] I do think you should be able to
[14] communicate with people who are not presently
[15] employed or presently represented by counsel
[16] after you get their contact information. The
[17] problem is how to do that because what's --
[18] because of what's happened so far. So let's
[19] come back to that.

[20] For number four, what problems do you
[21] have with that?

[22] **MR. SCHWARTZ:** Your Honor, that would
[23] also be based upon your ultimate ruling as to
[24] whether or not plaintiff's counsel has a
[25] right to contact current employees that are

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] statement of facts. I don't think that's
[3] necessary.

[4] **THE COURT:** I don't think so either.
[5] I think that's too far.

[6] You should supply information as to
[7] why -- you should supply information
[8] sufficient to support the contention so that
[9] there -- if there's a dispute about it the
[10] court can rule on it. So I've changed it in
[11] there.

[12] **MR. JOKELSON:** I think it may be moot
[13] in the sense that the only person that they
[14] claim may be a supervisory personnel is
[15] Mr. Baker.

[16] **THE COURT:** Who is a defendant.

[17] **MR. JOKELSON:** Who is a defendant and
[18] clearly represented, so I'm not going to call
[19] him.

[20] **THE COURT:** Right. Right.

[21] **MR. JOKELSON:** So if counsel agrees to
[22] that then the other 16 people on page one --

[23] **THE COURT:** You wouldn't have to do
[24] paragraph four and five.

[25] **MR. SCHWARTZ:** Rephrase that, Your

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] Honor. I'm sorry.

[3] **THE COURT:** You could just -- I mean,
[4] he can just say defendant -- for paragraph
[5] number four and paragraph five, That only
[6] applies to Defendant Baker.

[7] He can say under paragraph five --
[8] because I'm not interesting in people doing a
[9] bunch of make-work -- other than -- what's his
[10] name?

[11] **MR. SCHWARTZ:** Milton Baker.

[12] **THE COURT:** So for paragraph five, if
[13] there's nobody other than him you don't have
[14] to answer number five.

[15] I'm going to give you a copy of the
[16] order before you leave so you can interpret
[17] it. And you can come to me if it's unclear.
[18] Paragraph -- well, obviously, you shouldn't be
[19] communicating with Defendant Baker, which I'm
[20] sure you won't.

[21] **MR. JOKELSON:** That's correct, Your
[22] Honor.

[23] **THE COURT:** And B is irrelevant there.

[24] **MR. JOKELSON:** Why is B irrelevant?
[25] These are the current employees who he

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] the validity and the manner of formation.

[3] Would it make sense for me to hand up
[4] the rules and the case law that I have and for
[5] Your Honor to think through it?

[6] **THE COURT:** What do you have to say?
[7] You can hand it up. I've read most of that.
[8] That's part of the -- the problem is that it's
[9] sort of the practice that's undertaken by
[10] corporate counsel routinely and, so, people
[11] think it's fine. That's the problem.

[12] Why don't you hand up what case law
[13] you have. Have you provided it to your
[14] opposing counsel?

[15] **MR. JOKELSON:** I have copies for you
[16] and opposing counsel.

[17] Should I identify it as I hand it up
[18] or just make a pile?

[19] **THE COURT:** Make a pile.

[20] Do you know what I think should happen
[21] and -- what has your communication been like
[22] through this case? Have you been
[23] communicating well with each other?

[24] **MR. SCHWARTZ:** I think there's been
[25] some difficulty there.

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al
[2] solicited.

[3] **THE COURT:** Oh, right. That's the big
[4] problem.

[5] **MR. JOKELSON:** Right. The three and
[6] five B are the issues.

[7] **THE COURT:** Right.

[8] There is an argument that you
[9] shouldn't be permitted to represent them given
[10] the nature of how this came about.

[11] Are you planning on trying to depose
[12] all of these people, Counsel?

[13] **MR. JOKELSON:** I would plan on trying
[14] to speak to as many as possible and deposing
[15] the ones that I felt like I needed to
[16] depose. I didn't want to depose 17 people. I
[17] also think that a deposition with counsel for
[18] a current or former employee would yield
[19] different information potentially than a
[20] conversation.

[21] **THE COURT:** Well, he's now -- your
[22] opposing counsel has now managed to establish
[23] an attorney-client relationship with most of
[24] these people. That's the problem.

[25] **MR. JOKELSON:** Right. And I question

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[1] NEWSUAN V. REPUBLIC SERVICES, INC., et al

[2] **THE COURT:** Some stress?

[3] **MR. SCHWARTZ:** Yes. There's been a
[4] lot.

[5] **THE COURT:** Okay.
[6] I'll figure out what to do here.
[7] Okay.

[8] **MR. JOKELSON:** Thank you.

[9] **THE COURT:** Don't have any further
[10] contact with the people who are unrepresented.
[11] For those that you've approached, just don't
[12] do anything until there's a ruling from the
[13] court.

[14] **MR. SCHWARTZ:** Understood, Your Honor.

[15] **THE COURT:** Okay.

[16] **MR. SCHWARTZ:** Thank you for your
[17] time.

[18] **THE COURT:** See you all later.

[19] **THE COURT CRIER:** Case number 161 is
[20] held under advisement.
[21] (Hearing concluded.)
[22]
[23]
[24]
[25]

[1]
[2] CERTIFICATION

[3]
[4]
[5]
[6] I, LISA POSTIGLIONE, Registered Reporter,
[7] certify that the foregoing is a true and accurate
[8] transcript of the foregoing trial, that the witness
[9] was first sworn in my presence, at the time, place
[10] and on the date herein before set forth.

[11] I further certify that I am neither
[12] attorney nor counsel for, not related to nor
[13] employed by any of the parties to the action in
[14] which this trial was taken; further, that I am not a
[15] relative or employee of any attorney or counsel
[16] employed in this case, nor am I financially
[17] interested in this action.

[18]
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[21] Lisa Postiglione
[22] Registered Reporter

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Lawyer's Notes

