

BEFORE THE NORTH CAROLINA OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA, COMPLAINANT, v. BARNES FARMING CORP. and its successors, RESPONDENT. DOCKET NO. OSHANC NO: 2024-6635 INSPECTION NO.: 318273042 CSHO ID: S0709 ORDER ON MOTIONS TO REVOKE SUBPOENAS

THIS MATTER is before the undersigned on the motions of non-parties the North Carolina Justice Center, Ms. Leticia Zavala, and, Casa Azul de Wilson (collectively "non-parties" or "Deponents") to revoke the subpoenas duces tecum issued to them by Respondent Barnes Farming Corp. The first set of subpoenas was served upon the non-parties on or around August 9, 2024. The non-parties filed their original motions on August 19, 2024; Respondent filed its objections to the motions on August 23, 2024.

Following a prehearing conference amended subpoenas were served in October 2024. Two associated discovery motions were filed by Respondent on November 15, 2024 and December 6, 2024. The undersigned has reviewed the motions, legal memoranda and exhibits of Respondent and the non-parties in support of their respective positions regarding this motion. Because they are related subject matter, the undersigned has also reviewed the motions, legal memoranda and exhibits submitted by the parties in support of their positions regarding Respondent's motions to compel a Rule 30(b)(6) deposition (filed November 15, 2024) and to strike Complainant's Requests for Admission (filed December 6, 2024), as well as the amended pleadings in this matter.

On September 5, 2023 twenty-nine year-old Jose Arturo Gonzalez Mendoza, an employee of Respondent, died while harvesting sweet potatoes at Respondent's Spring Hope, NC worksite. Complainant issued one willful serious citation and one serious citation pursuant to N.C. Gen. Stat. §95-129(1). Respondent's subpoenas seek communication between the non-parties and "any current or former employee and/or contractor" of Respondent, as well as communication between the non-parties and the North Carolina Department of Labor, including the Division of Occupational Safety & Health, regarding the cause of Mr. Mendoza's death.

A prehearing conference in this matter was held on October 2, 2024. Oral arguments were heard regarding the non-parties' motions to revoke the subpoenas. Ms. Carol Brooke, Attorney for the N.C. Justice Center appeared on behalf of her clients, NC Justice Center, Leticia

Zavala and Casa Azul de Wilson. Mr. Travis Vance, Fisher & Phillips LLP, appeared on behalf of Respondent; Mr. Jonathan Jones and Mr. Rory Agan appeared on behalf of Complainant. The motions were held in abeyance in order to give the affected parties opportunities to address their respective interests by modifying the original subpoenas and in order to give Respondent an opportunity to pursue retrieval of the information it sought directly from the Complainant. Following the oral arguments, on October 3, 2024 a Docket Memorandum summarizing findings and verbal orders made by the undersigned was created. The October 3, 2024 Docket Memorandum is incorporated herein by reference.

On October 3, 2024 Respondent served amended subpoenas to non-parties Leticia Zavala and Casa Azul de Wilson. In pertinent part, the original subpoenas were amended to narrow the subject matter of the documents requested. On October 10, 2024 non-parties Leticia Zavala and Casa Azul de Wilson filed motions to revoke the amended subpoenas. On October 17, 2024 Respondent served non-party N.C. Justice Center with an amended subpoena also narrowing the subject matter of the documents sought, consistent with the October 3, 2024 subpoenas served on Zavala and Casa Azul. N.C. Justice Center submitted a privilege log for in-camera review on November 4, 2024.

In their various motions to revoke the subpoenas, the non-parties raise the following objections:

- (1) The subpoena issued to the N.C. Justice Center seeks communication that is protected by attorney-client confidentiality.
- (2) The subpoenas issued to all non-parties seek communication that makes employees vulnerable to retaliatory conduct and attempt to circumvent the statutory protections afforded such individuals under the discovery procedures memorialized in the rules of the North Carolina Occupational Safety and Health Commission.
- (3) The requests are overly broad and seek communication which the non-parties believe is obtainable from the Complainant.
- (4) The requests are burdensome to the non-parties.
- (5) The requests seek information that the non-parties deem irrelevant to the proceeding and unlikely to lead to the discovery of admissible evidence.

Attorney-Client Privilege

The North Carolina Justice Center ("Justice Center") is a non-profit organization whose mission is to eliminate poverty in North Carolina by ensuring that every household in the state has access to the resources, services, and fair treatment it needs to achieve economic security. The Justice Center's Workers' Rights Project litigates cases on behalf of low-income employees, with a particular focus on representing migrant and seasonal farmworkers. Item #4 of the amended subpoena for production of documents requests the production of documents reflecting "all communications between any current or former employee, and/or contractor of Barnes Farming Corporation and The North Carolina Justice Center, its employees, or representatives."

In its original subpoena, the "subject matter" was defined as "the death" of Mr. Mendoza. In its Amended Subpoena Respondent modified its requests for production of documents to

content concerning "the cause of Mr. Mendoza's death." The modification makes no difference in addressing non-party N.C. Justice Center's objection that such material is privileged attorney-client communication.

Rule 1.6 of the North Carolina Rules of Professional Conduct prohibits the N.C. Justice Center from revealing information it received as a result of the attorney-client relationship. Professional Conduct Rule 1.18 makes it clear that prospective clients' communication with an attorney are included within the overall prohibition against disclosure. During oral argument counsel for the Justice Center stated that all communication from current or former employees and/or contractors of Barnes Farming Corporation regarding any aspect of the citations issued against Respondent or the death of Mr. Mendoza would only have occurred in the context of seeking or using the legal services provided by the Justice Center. Following the October 3, 2024 prehearing conference in this matter the Justice Center's attorney produced to the undersigned a privilege log supporting its claim of privilege. Respondent has not refuted the N.C. Justice Center's claim that all communication with current or former employees and/or contractors of Barnes Farming Corporation would be attorney-client privileged communication. The undersigned agrees that all such communication is prohibited from disclosure by the North Carolina Rules of Professional Conduct. Thus, the NC Justice Center is not required to respond to subpoena items requesting communication with its current or potential clients.

Potential for Retaliation and Statutory Protections of N.C. Gen. Stat. §95-136(e1)

Respondent's subpoena to the non-parties seeks communication that is otherwise prohibited under the discovery rules governing contested cases between employers and the North Carolina Department of Labor. The North Carolina Occupational Safety and Health Act explicitly restricts the information that the Complainant must share with a cited employer. Upon written request the Complainant must make available to the cited employer a redacted copy of its "official inspection report." N.C. Gen. Stat. §95-136(e1). Furthermore, the statute provides:

The names of witnesses or complainants, and any information within statements taken from witnesses or complainants during the course of inspections conducted pursuant to this Article that would name or otherwise identify the witnesses or complainants, shall not be released to any employer or third party and shall be redacted from any copy of the official inspection report provided to the employer or third party. . . .

Id. Unredacted information pertaining to a witness may be provided if the witness consents, or, absent consent, no sooner than ten days prior to a scheduled enforcement hearing when the employer makes a timely request. *Id.* The public policy of protecting witnesses and complainants from potential retaliatory acts by cited employers is necessary to ensure the free flow of information about safety and health violations to the NC OSH Division. *Comm'r v. Donohoe Constr. Co.*, OSHANC 93-2995 (3/22/96) (permitting discovery subject to a protective order limiting disclosures and use of information). For additional analysis of the public policy see *Comm'r v. Lennar Carolinas, LLC*, OSHANC 2020-6131 (01/07/22) (Order denying motion regarding production of unredacted inspection file). Furthermore, a Respondent is also not

permitted to use the Commission's discovery rules to obtain the identities of witnesses absent a showing of good cause. *Id. Comm'r v. Donohoe Constr. Co.*, OSHA NC 93-2995 (3/22/96).

Though this Respondent does not seek information about witnesses from the Complainant, the subpoenas issued to the third parties must, nevertheless, be considered part of the discovery rules. North Carolina courts are required to read Rule 45 in conjunction with Rule 26 of the North Carolina Rules of Civil Procedure. *Hall v. Cumberland Cty. Hosp. Sys., Inc.*, 21 N.C. App. 425, 430, 466 S.E.2d 317, 320 (1996), *disc. rev. denied*, 468 S.E.2d (Apr. 3, 1996). A trial court must prevent the production of documents that would otherwise be protected under Rule 26(b). *Id.* See also *Wing v. Goldman Sachs Trust Co., N.A.*, 280 N.C. App. 550, 556, 868 S.E.2d 321, 325 (2021) (holding that N.C. Gen. Stat. §1A-1, N.C. R. Civ. P. 45 does not automatically entitle a party to review documents subpoenaed from a non-party if the party against whom the information is to be used would otherwise be privileged to withhold the information).

Respondent did not seek leave of the Court to conduct discovery that is otherwise foreclosed by the Commission's rules. In oral argument, Respondent's counsel contended that there is information that is routinely withheld by NC OSH investigators, in that the investigators are not required to retain their original notes from witness interviews and Respondent believes that relevant information is routinely excluded from the investigative file. While this contention, if accurate, may constitute good cause to seek additional information from the Complainant, this reason is not good cause for obtaining material that is otherwise privileged pursuant to the statute.

Therefore, where information regarding the identity of witnesses is prohibited from disclosure either through the Commission's informal discovery procedures or pursuant to the discovery rules adopted by the Commission, that information may not be obtained through a subpoena to a non-party.

Non-Parties' Concerns Regarding Undue Burdens Of The Subpoenas

The question remains as to whether the production of redacted, nonprivileged communication responsive to the subpoenas would still be consistent with other provisions of N.C. Civ. P. Rule 26 and Rule 45. Specifically, Respondent seeks documents evincing communication between the non-parties and the North Carolina Department of Labor, including the Compliance Safety & Health Officer ("CSHO").

The non-parties object to the subpoenas on the grounds that production would be burdensome given the small staffing resources and the tedious methods they believe are required to search the applications where responsive documents may be located. The non-parties' concerns are not *de minimis*. Both Ms. Zavala and Ms. Herrera-Picasso, Executive Director at Casa Azul de Wilson, believe that they have communicated with "dozens of employees"¹ over a period of one year and that the communication has been exchanged on "WhatsApp," Facebook, and, via text messages. Thus, three databases would need to be searched. Next, both deponents

¹ Not that there are "dozens of messages" as Respondent argues.

describe a process for retrieving each message that involves multiple steps. Finally, the messages, once retrieved, would need to be redacted to comply with N.C. Gen. Stat. §95-136(e1). The non-parties also assert that once witness identities are redacted the documents sought would not be relevant to contested matters at the hearing and they further contend that the information sought is otherwise obtainable directly from the Complainant.

Respondent contends that it seeks information that is routinely excluded from NC OSH's investigative files and points the undersigned to other matters where they have learned of Compliance Officers' practices that are consistent with the argument they advance. Respondent also asserts that the substance of the communication, without witness' identities, may be relevant though they cannot determine if it is because of Complainant's alleged practice of discarding that which the Compliance Officers do not find to be relevant. Respondent has made attempts to obtain the information it seeks through other means but has not been successful.²

The undersigned is empathetic to the positions advanced both by Respondent and the non-parties. However, the path forward is governed by the relevant provisions of N.C. R. Civ. P. Rule 26 and Rule 45. As noted, *supra*, where a subpoena is for the production of documents, North Carolina courts are required to apply Rule 45 in a manner consistent with the provisions of Rule 26. Pertinent to the concerns expressed by the non-parties, Rule 45(c)(6) requires that when a court enters an order regarding the production of subpoenaed documents "the order *shall* protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena." *Emphasis supplied*. A court considering objections to a subpoena is required to enforce the limits of Rule 26(b)(1a) when electronically stored information is sought. *Kelly v. Agnoli*, 205 N.C. App. 84, 96, 695 S.E.2d 137, 145 (2010). Rule 26(b)(1a) provides, in pertinent part, that discovery methods

shall be limited by the court if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; . . . or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Rule 45(d)(4) addresses the inaccessibility of electronically stored information and provides that "The person responding [to a subpoena] need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost." Once a showing is made that the electronic data is not reasonably accessible, a court may, nonetheless, order that the information be produced "if the requesting party shows good cause after considering the limitations of Rule 26(b)(1a)." If the requesting party makes this showing, the court may then "specify conditions for discovery, including requiring the party

² Respondent's attempts to obtain the information via public records' requests is discussed in more detail in the Order on Respondent's Motion to Compel a Rule 30(b)(6) Deposition. There, the undersigned has determined that Respondent's lack of success is attributable to its own conduct.

that seeks discovery from a nonparty to bear the costs of locating, preserving, collecting, and producing the electronically stored information involved."

The deponents have made an adequate showing that the electronically stored information is not reasonably accessible. Deponents lack the expertise and other resources to retrieve the information with any degree of efficiency, making the subpoena request time consuming, costly in terms of labor required, and burdensome because it will result in the neglect of other primary duties. On the other hand, Respondent has not made a showing that good cause exists when weighed against the limitations of Rule 26(b)(1a). Respondent's argument, thus far, is grounded in a general assumption that if NC OSH Compliance officers do not include all hand-written notes and emails exchanged with third parties in their investigative files the Compliance officers must necessarily be excluding relevant information, including relevant information that is exculpatory to the employer. This position is both overly generalized and speculative.

Nevertheless, it is foreseeable that ending the inquiry based upon Respondent's arguments in support of this motion would only lead to another round of motions and briefing as Respondent will undoubtedly attempt to make a more focused argument pertaining to this case and the discovery rules discussed herein. The undersigned believes that it is important to consider both whether the record could support a finding of good cause while not undermining the Commission's policy that contested matters be moved expeditiously to a hearing. See, e.g., *Comm'r v. Donohoe Constr. Co.*, OSHA NC 93-2995 (3/22/96), p 5 (collecting cases). Therefore, the undersigned has reviewed the complete record in this matter that has been compiled thus far, including as noted *supra*, the parties' submissions in related motions and the pleadings in this matter.

The record reveals:

- Complainant's Amended Complaint contains very specific details about what it alleges happened to Mr. Mendoza on September 5, 2023. Am. Compl. ¶ 7 (including subparts 7(a) - 7(n)).
- Twenty-four hourly farm workers were presented to the CSHO to be interviewed on September 6, 2023. Four statements were obtained on September 6, 2023. The remaining hourly employees were interviewed by telephone in the weeks following. Resp. Mot. to Strike, Ex. 4, pp 78-81.
- Respondent's attorney was present when the twenty-four hourly employees presented themselves for the interviews. The attorney spoke to the employees prior to any employee sitting for an interview and made a written record of the employees' names. Resp. Mot. to Strike, Ex. 4, p 81.
- The CSHO reported that the interaction described above seemed to have an impact on the employees' disposition and stated that the employees "told CSHOs that they were afraid of losing their jobs if they attested to the events." *Id.*
- Respondent would not permit Complainant to interview managers who were at the worksite and potentially eye witnesses to the detailed events alleged to have occurred on September 5, 2023. *Id.*
- When the CSHO requested to interview hourly employees who were not on the field where Mr. Mendoza died, the CSHO received the following response: "Barnes objects


to this request as it is overly broad, unduly burdensome, and beyond the reasonable needs of NC OSHA to complete this inspection" and noting that twenty-four employees had already been interviewed. *Id.*

- A news media outlet reported that "[John] Barnes said the company conducted its own investigation by interviewing everyone present and found no wrongdoing." Resp. Mot. to Strike, Ex. 10 (Ex. C to Requests for Admission), p 191.
- The details contained in the Amended Complaint could only have come from the twenty-four hourly employees that Respondent allowed the CSHO to interview, which it appears the Respondent also interviewed.
- Whether intentional or not, Respondent's conduct has already caused witnesses to fear retaliation.

Thus, the record in the case contains no suggestion that Complainant obtained information (including witness identities) which the Respondent does not have and there is no suggestion that Respondent's speculation regarding information contained in the non-parties' communication with Respondent's hourly employees would produce any information that Respondent does not have or could not have had through its own investigation. Furthermore, the record suggests that the potential for witnesses to feel intimidated by allowing their communication with the non-parties to be disclosed to Respondent is plausible and a genuine concern for the enforcement hearing.

Respondent's subpoenas must be treated as subject to the Commission's Rules and the North Carolina Rules of Civil Procedure governing discovery. Weighing the factors delineated in N.C. R. Civ. P Rule 26 and Rule 45, as the undersigned must, it is concluded that Respondent does not have good cause to compel the production of the information it has subpoenaed from the non-parties. At the same time, the Respondent seeks privileged information, information that may disrupt the enforcement hearing because of its impact on potential witnesses, and information that is not easily accessible and is burdensome for the non-parties to produce. Therefore, the non-parties' Motions to Revoke the Subpoenas / Amended Subpoenas ARE ALLOWED.

SO ORDERED, this the 30th day of December 2024.



Mary-Ann Leon
Hearing Examiner
maleon@leonlaw.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

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CAROL BROOKE
NC JUSTICE CENTER
PO BOX 28068
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By depositing a copy of the same in the United States Mail, by certified mail, return receipt requested, postage prepaid at Raleigh, North Carolina, and upon:

JONATHAN D JONES
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LABOR SECTION
PO BOX 629
RALEIGH NC 27602

By depositing a copy of the same in the United States Mail, first class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
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via email.

THIS THE 30 DAY OF December 2024.

PAUL E. SMITH
CHAIRMAN



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