

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
Civil Action No. 02-01159A

MARCIA RHODES; HAROLD RHODES,)
 Individually; HAROLD RHODES, on)
 Behalf of His Minor Child and Next)
 Friend, REBECCA RHODES,)
)
 Plaintiffs,)
)
 v.)
)
 CARLO ZALEWSKI, DRIVER LOGISTICS,)
 PENSKE TRUCK LEASING CORP. and)
 BUILDING MATERIALS CORP. OF)
 AMERICA d/b/a GAF MATERIALS CORP.,)
)
 Defendants.)

**PLAINTIFF MARCIA RHODES’ MOTION TO COMPEL
PRODUCTION OF DOCUMENTS BY DEFENDANT,
BUILDING MATERIALS CORP. OF AMERICA D/B/A
GAF MATERIALS CORPORATION**

Pursuant to Mass. R. Civ. P. 37, Plaintiff, Marcia Rhodes (“Rhodes”), moves this Court for an order compelling the Defendant, Building Materials Corp. of America d/b/a GAF Materials Corp. (“GAF”), to respond to numerous discovery requests propounded by Rhodes. More specifically, Rhodes seeks responses to the following discovery requests:

- Request Nos. 9, 10, 16, and 20 of Marcia Rhodes’ First Request for Production of Documents and Things to Defendant GAF Materials Corp.; and
- Request Nos. 22, 23 and 28 of Marcia Rhodes’ Second Set of Requests for Production of Documents to Defendant GAF Building Materials Corp.

Copies of GAF’s responses (which include Rhodes’ requests) are attached hereto as Exhibits A and B, respectively.

In accordance with Superior Court Rule 9C, the undersigned counsel certifies that counsel for Rhodes and GAF conferred via telephone numerous times, including on the afternoon of February 20, 2003, and the morning of April 9, 2003, in an attempt to narrow the areas of disagreement with respect to GAF's responses to Rhodes' document requests. Defendant has shown no reason that it should not produce the documents requested as they are all clearly relevant. Moreover, there is no reason why such production would be difficult or unduly burdensome. In further support of this Motion, Rhodes states as follows:

1. This is an action to recover for the catastrophic injuries Rhodes suffered when a fully loaded tractor-trailer, weighing 70,000 pounds crashed into Rhodes' car while it was stopped at a worksite on Route 109 in Medway, Massachusetts. The driver of the tractor-trailer, Carlo Zalewski ("Zalewski"), is purported to be an employee of Driver Logistics Services ("Driver Logistics"). Zalewski's services were leased to GAF who controlled his daily driving activities. Both Zalewski and Driver Logistics are named defendants. Plaintiff contends that GAF is liable for negligence in hiring, retaining, supervising and entrusting Zalewski with a large tractor-trailer. The tractor-trailer is owned by Penske Truck Leasing Corporation ("Penske"), also a named defendant.

2. Rhodes has propounded numerous discovery requests upon GAF, many of which have not been responded to appropriately. More specifically, GAF has failed to respond properly to the following four document requests contained in Rhodes' First Request for Production of Documents dated September 27, 2002:

Request No. 9:

All documents referring or relating to GAF [BMCA]'s control over the daily activities of any employee of Driver Logistics.

Response No. 9:

BMCA objects to this Request on the grounds that the term 'control over the daily activities of any employee' is vague, ambiguous and over broad.

Request No. 10:

All Documents referring or relating to Driver Logistics' control over the daily activities of its employees, including but not limited to, Carlo Zalewski.

Response No. 10:

BMCA objects to this Request on the grounds that the term 'control over the daily activities of its employees' is vague, ambiguous and over broad. Subject to and without waiving its objections, BMCA states that it will produce the documents within its possession, custody or control that are responsive to the Request.

Request No. 16:

All documents referring or relating to GAF [BMCA] employee policies, procedures and discipline guidelines.

Response No. 16:

BMCA objects to this Request on the grounds that it is vague, ambiguous, over broad, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 20:

All Documents referring or relating to traffic, operational or speeding violations of all Driver Logistics employees who drove routes for GAF [BMCA].

Response No. 20:

BMCA objects to this Request on the grounds that it is vague, ambiguous, over broad and not reasonably calculated to lead to the discovery of admissible evidence. BMCA further objects to this Request on the grounds that it is [sic] seeks irrelevant and confidential documents concerning Driver Logistics employees other than the employees at issue in this action. Subject to and without waiving its objections, BMCA states that it will produce the documents within its possession, custody, or control that are responsive to this Request.

GAF also failed to respond appropriately to the following three document requests

contained in Rhodes' Second Request for Production of Documents dated January 23, 2003:

Request No. 22 (sic):

Any and all documents referring or relating to reports furnished to Rollins/Penske for any accident or collision involving vehicle [sic] leased to GAF/BMCA.

Response No. 22 (sic):

BMCA objects to this Request on the grounds that it is vague, ambiguous, and over broad. BMCA further objects to this Request on the grounds it is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents that do not relate to the accident or vehicle at issue in this action. Subject to and without waiving its objections, BMCA states that it will produce documents relating to the vehicle at issue in this case.

Request No. 23:

Any and all documents referring or relating to GAF's payment to or reimbursement of damages to vehicles leased from Rollins/Penske.

Response No. 23:

BMCA objects to this Request on the grounds that it is vague, ambiguous, and over broad. BMCA further objects to this Request on the grounds it is not reasonably calculated to lead to the discovery of admissible evidence because it seeks documents that do not relate to the accident or vehicle at issue in this action. Subject to and without waiving its objections, BMCA states that it will produce documents relating to the vehicle at issue in this case.

Request No. 28:

All documents referring or relating to safety meetings at GAF locations conducted by DL.

Response No. 28:

BMCA objects to this Request on the grounds that it is vague, ambiguous, over broad and not reasonably calculated to lead to the discovery of admissible evidence. BMCA further objects to this Request on the grounds it is unduly burdensome inasmuch as it seeks documents from all BMCA locations. Subject to and without waiving its objections, BMCA states that it will produce responsive documents from its Linden and/or Wayne, New Jersey, location.

3. On February 20, 2003, counsel conducted a Superior Court Rule 9C conference in which, with respect to Request Nos. 9 and 10, GAF agreed to produce responsive documents contained at their Millis, Massachusetts facility only. GAF subsequently agreed to produce responsive documents contained at their Linden and/or Wayne, New Jersey facilities. GAF,

however, has failed to produce documents from any of GAF's other facilities that evidence "GAF's control over the daily activities of any employer of Driver Logistics" (Request No. 9) or "Driver Logistics' control over the daily activities of its employees, including but not limited to, Carlo Zalewski" (Request No. 10).

4. GAF cannot choose to dictate a self-imposed geographical limitation on Request Nos. 9 and 10 when those requests seek documents otherwise relevant to the litigation. Each of the three corporate defendants have disclaimed liability for this tragic accident. GAF claims that it is not liable because Zalewski was not its employee, but rather only an independent contractor. Thus, GAF argues, it did not have control over Zalewski although GAF admits that Zalewski drove GAF routes exclusively for Driver Logistics.

5. The issue of control over Zalewski is central to this litigation and, more specifically, to the liability of each of the three corporate defendants: GAF, Driver Logistics and Penske. E.g., Dias v. Brigham Med. Assoc., Inc., 438 Mass. 317, 322 (2002) (when the employment relationship is contested, control must be established); Hohenleitner v. Quorum Healthcare Res., Inc., 435 Mass. 424, 431, 437 (2001) (the right to control is necessary to impose vicarious liability); Konick v. Berke, Moore Co., Inc., 355 Mass. 463, 467 (1969) (showing of right to control the general activities of an employee is necessary for vicarious liability); Smith v. Law, No. 93-0514, 1994 Mass. Super. LEXIS 137, at *10-12 (Mass. Super. Aug. 1, 1994) (denying summary judgment in negligence case where question of whether snow plow driver was controlled by any of the three other corporate defendants was disputed). Indeed, Request Nos. 9 and 10 seek documents pertaining to the central inquiry in the matter: the right to control the "daily activities" of Zalewski or other Driver Logistics employees or, stated another way, the manner in which Zalewski or other Driver Logistics employees performed their duties. See

Hohenleitner, 435 Mass. at 436, 438 & n.11 (key is the right to control the physical conduct of the employee or the manner in which the employee treated patients).

6. In addition to evidence of control over Zalewski, GAF's control over all of Driver Logistics' employees is relevant because it will tend to show any differences or similarities between the employees and which employees, including Zalewski, are under the control of GAF, Driver Logistics or both. These documents will provide information regarding who specifically directed employee actions and will also show the scope of the agreement between GAF and Driver Logistics. See, e.g., Hohenleitner, 435 Mass. at 437-38 (the issue of liability may be influenced by the agreement between the parties); Smith, 1994 Mass. Super. LEXIS 137, at *11-12 (contracts between the different parties were relevant to the issue of control).

7. GAF also has failed to produce any documents responsive to Request No. 16. Moreover, GAF contends that the only relevant documents are those policies, procedures and guidelines that GAF provides to employees of Driver Logistics. Again, GAF's self-imposed limitation on the scope of Rhodes' discovery is improper.

8. GAF claims that it does not control the activities of Driver Logistics' employees; Rhodes claims that it does. Indeed, Rhodes' theory of liability against GAF is that GAF failed to use reasonable care in exercising control over the contractors to whom they entrusted the tractor-trailer in this case. Second Am. Compl., ¶¶ 30-32; see Smith, 1994 Mass. Super. LEXIS 137, at *10-11 (to the extent the employer of an independent contractor retains control over the work to be performed, that employer may be liable for the contractor's negligence) (citing Corsetti v. Stone Co., 396 Mass. 1, 9-10 (1985)). Thus, Rhodes should be entitled to review policies and procedures that GAF gives to its own employees and to employees of Driver Logistics in order to compare the control (or lack thereof) that GAF exhibits over each. Without comparing the

different policies and procedures, the Plaintiffs would be denied the right to properly investigate an issue central to their claim, that of control.

9. With respect to Request No. 20, GAF has taken the position that producing records of driving violations in their possession is unduly burdensome, despite not pointing to any reason why this would be burdensome. GAF also maintains the position that these documents are irrelevant and confidential. Thus, GAF has not produced any documents in response to Request No. 20.

10. Again, GAF's position lacks merit. This case involves GAF's investigation into, and knowledge of, the qualifications of certain independent contractors who were entrusted with driving large tractor-trailers for GAF. Records of driving violations are clearly relevant to the claim that GAF failed in its duty to ensure it had safe drivers on its fleet. See Foster v. The Loft, Inc., 26 Mass. App. Ct. 289, 290-91 (1988) (employer has duty of reasonable care in selection and retention of employees and can be held liable if the employer is or should be aware of problems showing unfitness); Ellingsgard v. Silver, 352 Mass. 34, 39 (1967) (negligent hiring constitutes failing to make an adequate investigation into unfitness of employee); see also Mitchell v. Hastings & Koch Enter., Inc., 38 Mass. App. Ct. 271, 277 (1995) (driving record violations are relevant to negligent entrustment claim).

11. GAF's contention that these documents are confidential employee records is, quite simply, disingenuous. On the one hand, GAF denies all control over Driver Logistics' employees, claiming they are only independent contractors. On the other hand, GAF claims ultimate control over the records of those same employees of Driver Logistics by claiming such

records pertaining to driving violations of those Driver Logistics employees are confidential.

GAF cannot have it both ways.¹

12. With respect to Request No. 22 (sic) (documents given to Penske regarding accidents involving Penske trucks leased to GAF) and Request No. 23 (documents relating to GAF's payment for damage to vehicles leased from Penske), GAF has only agreed to produce documents regarding (1) the tractor-trailer involved in this particular accident and (2) the January 9, 2002 accident only. GAF cannot be allowed to limit production to exclude otherwise relevant documents referring to other trucks leased by GAF. These documents are relevant because, like information on other employees, these would show the level of control over all Penske trucks leased by GAF and control over those hired to drive them, which is a key point in this litigation. Additionally, these documents will tend to show the understanding and agreement between the parties, specifically with respect to control over employees and equipment, which is clearly relevant to Rhodes' claims and the issue of control. Hohenleitner, 435 Mass. at 437-38; Smith, 1994 Mass. Super. LEXIS 137, at *11-12.

13. Finally, with respect to GAF's response to Request No. 28 (safety meetings conducted by Driver Logistics at GAF), GAF's attempt to dictate a geographical limitation again fails. First, all documents referring to safety meetings at GAF conducted by Driver Logistics are clearly relevant, again to the key issue of control. Specifically, these documents will tend to show which company could set safety policies and supervise, which is an important factor in the control analysis. Hohenleitner, 435 Mass. at 438 (setting of policies and quality control programs is highly relevant to issue for control of vicarious liability).

¹ GAF's particular objection to producing "confidential" documents for employees other than Zalewski also fails because the issue of GAF's control extends to all employees of Driver Logistics and not just Zalewski. See Paragraphs 5 and 6, supra.

14. These documents are also relevant to the claims against GAF because they will tend to show the efforts taken by GAF in evaluating the fitness of drivers, including Zalewski, and efforts it took to ensure it had safe drivers on its fleet. See Foster, 26 Mass. App. Ct. at 290-91; see also Ellingsgard, 352 Mass. at 39.

15. GAF further objects to this request as unduly burdensome, but in no way explains why production of documents regarding safety meetings at GAF locations conducted by Driver Logistics would be difficult, let alone unduly burdensome. GAF has already agreed to produce documents from its Linden and Wayne, New Jersey locations, but again, does not state why production of similar documents from its other facilities would be burdensome. Furthermore, GAF has not even produced any responsive documents from either of the New Jersey facilities. Because these documents are relevant to the issue of control and policy making, as well as to GAF's duty to maintain a safe fleet of drivers, GAF must produce them.

16. Because it is clear that GAF is obligated to produce these obviously relevant documents that cannot be said to be confidential or unduly burdensome to provide, Rhodes requests that GAF be required to pay the costs of this motion pursuant to Mass. R. Civ. P. 37(a)(4) to deter GAF from further attempting to withhold clearly discoverable documents. See Corsetti, 396 Mass. at 26 (“The sanctions provided by rule 37 are designed not only to compel compliance with discovery requests; they also act as a deterrent to unwarranted evasions of discovery.”)

WHEREFORE, Plaintiff, Marcia Rhodes respectfully requests that this Court order GAF to produce all documents responsive to Request Nos. 9, 10, 16, 20, 22 (sic), 23 and 28 and to pay the costs of bringing this motion.

Respectfully submitted,

MARCIA RHODES; HAROLD RHODES,
Individually; HAROLD RHODES, on
Behalf of His Minor Child and Next
Friend, REBECCA RHODES

By their attorneys,



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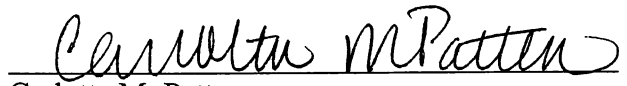
CERTIFICATE OF SERVICE

I, Carlotta M. Patten, counsel for the plaintiffs, hereby certify that I have this 5 day of May, 2003 served a copy of the foregoing Plaintiff Marcia Rhodes' Motion to Compel Defendant GAF Materials Corporation to Produce Documents upon all counsel of record by mailing a copy of same by first-class mail, postage pre-paid, to:

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