

Control No. 13045195

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

CANDICE BURKS	:	OCTOBER TERM 2010	
	:		
<b>Plaintiff</b>	:	NO. 1848	
vs.	:		
	:		
JOHN TOMASZEWSKI, COACH USA, INC. and MEGABUS NORTHEAST, LLC d/b/a MEGABUS.COM	:		DOCKETED MAY 21 2013
	:		
<b>Defendants</b>	:		R. POSTELL DAY FORWARD

ORDER

AND NOW, this 21<sup>st</sup> day of May, 2013, upon consideration of the Motion for Recusal of Defendants, Coach USA, Inc. and Megabus Northeast, LLC d/b/a Megabus.com (collectively referred to as “Megabus”) (the “Motion”), and Plaintiff’s Response thereto, it is hereby ORDERED and DECREED that the Motion is DENIED.<sup>1</sup> Nonetheless, to avoid

<sup>1</sup>The Motion is baseless and was brought to deflect attention from the outrageous misconduct of Megabus and their counsel, as described below, which transpired in the course of this litigation. On September 10, 2012, Judge Nitza Quinones Alejandro of this Court entered a Discovery Order to compel Megabus to produce certain documents to the Plaintiff-Burks as follows:

Production of all documents referencing or relating to any investigation of the subject incident by you or anyone, including but not limited to, any defendant, police, fire, and/or governmental agency. To the extent that such documents are withheld from production on the basis of a claimed privilege, defendants shall furnish to Plaintiff a privilege log describing each withheld document and the



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basis for withholding it...

Megabus and their counsel disregarded the Court's Order. By failing to timely comply with the Court's Order, Megabus waived any objection based upon the attorney/client privilege and/or work product doctrine. In this regard, "[t]he party asserting the privilege has the initial burden to prove that it is properly invoked, and the party seeking to overcome the privilege has the burden to prove an applicable exception to the privilege." Joe v. Prison Health Servs., 782 A.2d 24, 31 (Pa. Commw. Ct. 2001) citing Joyner v. Southeastern Pennsylvania Transportation Authority, 736 A.2d 35 (Pa. Cmmw. 1999); Law Office of Douglas T. Harris v. Phila. Waterfront Partners, LP, 957 A.2d 1223, 1232 (Pa. Super. 2008) ("The party who has asserted the attorney-client privilege must initially set forth facts showing that the privilege has been properly invoked.").

In the instant case, Megabus frustrated the administration of justice by failing to produce documents and a privilege log responsive to the Order of September 10, 2012 until March 18, 2013, after the jury was selected and sworn, and more than 6 months after the entry of the Court's discovery Order. Such late delivery was inexcusable.

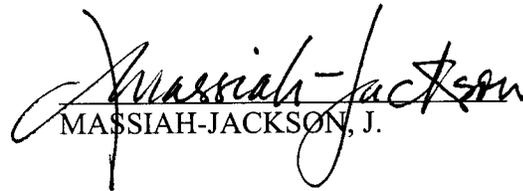
Megabus' then and present counsel Zarwin Baum, on September 11, 2010, the day of the accident in question, was among the first responders on the accident scene and interviewed the Megabus driver and co-defendant, John Tomaszewski. At this time, Megabus and its counsel learned details explaining why Mr. Tomaszewski did not observe the flashing lights or warning signs on the New York Highway — the bus driver was looking at the screen on his personal Magellan Roadmate 1440 GPS:

"It is believed he was 'looking' at his personal GPS in order to determine his location and proper direction." (Quotation in original).

Notwithstanding Tomaszewski's admission to Megabus and counsel at Zarwin Baum, statements were made to the media and police, as well as at the deposition on October 4, 2012, that Tomaszewski was not looking at his GPS, but instead was listening to a GPS device for directions. Although counsel for Megabus from Zarwin Baum (Mr. Schaer) had possession of the "**looking**" statement and was present at and participated in the deposition, he nonetheless maintained his silence as counsel for Defendant Tomaszewski (Mr. Paessler) repeatedly insisted on the record that "there is no testimony that he was watching his GPS or looking at his GPS at any time...it's clear he didn't look at - - you said any time during the ride. He said he doesn't look at it. He doesn't need to look at it." (Mr. Paessler at NT 140). Indeed, Mr. Paessler foreclosed further interrogation on this point by stating "He is not answering the question. He's answered all questions. He answered it that he never looks at it." To like effect, when asked again by Plaintiff's counsel "Did you ever look down at the GPS?", Mr. Paessler responded "Asked and answered. He told you at no point did he ever look at the GPS...he's not answering the question. He's asked and answered the question." (NT 174 of deposition of October 4, 2012). It is not

any prospective appearance of impropriety, the Court hereby voluntarily recuses itself effective upon the entry of this Order on the docket, and directs Court Administration to assign this matter to another judge.

BY THE COURT:

  
MASSIAH-JACKSON, J.

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clear to this Court whether Mr. Paessler had access to the documents withheld by Megabus prior to the deposition. It is, however, clear that Zarwin Baum and Mr. Schaer had within their possession the document collected on the date of the accident reflecting the bus driver's account that he was "looking" at the GPS and accordingly would have been distracted. Nonetheless, Mr. Schaer kept his silence and allowed a distortion of the facts to be maintained by Mr. Paessler and by the witness, Mr. Tomaszewski. The concealment of the document gathered by Zarwin Baum on the date of the accident continued and allowed for Mr. Tomaszewski's attorney to tell the jury at the trial on April 8, 2013 that "Mr. Tomaszewski wasn't distracted."

No reasonable explanation has been furnished to this Court as to why 3000 pages of documents were withheld from production and no privilege log was produced prior to trial in violation the Court's discovery Order entered September 10, 2012. This Court finds that the conduct of counsel for Megabus, as described above, was outrageous and prejudiced the administration of justice.