Relevance as an Objection to Discovery Requests in Civil Cases

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I. Introduction

Civil discovery necessarily implicates two diametrically opposed interests: one party wants to obtain information that the other party has that may help win the case, while the other party has information only it knows about that it wants to avoid providing to its opponent. Both sides are understandably motivated by their interest in prevailing in the litigation but the resulting disputes often require intervention from the court. Our judicial system has very clearly taken sides in this context. To serve the foundational policy in favor of decisions on the merits,[2] New Hampshire applies a strong preference for broad discovery, subject only to common sense protections for obvious instances of overreach.

Consistent with this preference for liberal discovery, the New Hampshire Supreme Court has held that materiality, not relevance, is the proper test for determining whether information requested in discovery should be produced. Nevertheless, defense attorneys routinely object to plaintiffs' discovery requests on the basis of relevance. It is our view that judges should be wary of these objections based solely on relevance to ensure that such blanket objections do not interfere with the production of material evidence. This article will review the New Hampshire law favoring broad civil discovery and it will discuss how our Supreme Court has handled relevance as an objection to discovery requests in civil cases.

II. A Review of Civil Discovery in New Hampshire

More than a century ago, our Supreme Court explained that "[i]t is now universally recognized that the object of a trial is to ascertain the truth by rational means."[3] The court has supported this overarching principle by consistently endorsing the broad, liberal use of pretrial discovery. For example, in *Reynolds v. Burgess Sulphite Fibre Co.*,[4] the court declared, "[w]hen the plaintiff has any case to make out, he has a right to discovery of anything that may assist him in proving his case, or even the smallest tittle of it."[5]

By 1967, the court summarized its view of discovery as follows:

> Traditionally our courts have subscribed to the principle that it is essential to the achievement of justice that evidence be brought to light by discovery and other pre-trial procedures in time for both parties to evaluate it and adequately prepare for trial. On the

> other hand we recognize that these procedures can produce abuses and must be limited to obviate them. However, instead of this court placing arbitrary crippling limitations on the use of discovery, we are of the opinion that abuses can be prevented by exercise of discretion by the Trial Court. Thereon rests in great measure the success of pre-trial procedures.[6]

While acknowledging the trial court's discretion in resolving discovery disputes, the court emphasized that "[d]iscretion should be exercised . . . in a manner consonant with the concept that the orderly dispatch of judicial business is accomplished more efficiently when the parties are given adequate opportunity to properly prepare their case in advance of trial."[7]

Two years later, the court explained precisely why broad discovery is necessary:

> It is the philosophy of the adversary system that the truth will more likely be reached if both sides of the issue are fully presented and that this is more likely to occur if the sides are presented by partisan advocates. To permit the system to have maximum effectiveness, therefore, each of the advocates must be fully informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one which has been raised by him or by his opponent, and whether the evidence is in the possession of his opponent or someone else. If a party is surprised by the introduction of evidence or an issue or the presentation of a witness previously unknown to him, the trier of fact is likely to be deprived of having that party's side of the issue fully presented, and the system becomes less effective as a means of discovering the truth.[8]

Once again, the court cautioned trial judges to resolve discovery disputes by erring on the side of full discovery.[9] This view has persisted into modern times and, in this century, the court has reiterated that:

> New Hampshire law favors liberal discovery. We have long recognized that justice is best served by a system that reduces surprise at trial by giving both parties ***the maximum amount of information***. If a party is surprised by the introduction of evidence or the presentation of a witness previously unknown to it, the trier of fact is likely to be deprived of having both sides

> of an issue fully presented, and the system becomes less effective as a means of discovering the truth.[10]

Most recently, the court endorsed Chief Justice MacDonald's view that the important benefits of broad pretrial discovery include: (a) facilitating preparation for trial through access to information, (b) narrowing the issues that must be tried, thereby shortening trial, (c) avoiding surprise at trial, and (d) improving the chances of settlement.[11]

Interrogatories and document requests represent the first step in the discovery process. Our Supreme Court has recognized that:

> The purpose of interrogatories is to narrow the issues of the litigation and prevent unfair surprise by making evidence available in time for both parties to evaluate it and adequately prepare for trial. In order to prevent unfair surprise, a party may be precluded from presenting evidence that he fails to disclose during discovery.[12]

In order to achieve the important goals of interrogatories and document requests, the court has held that "a party must fully disclose all requested information which he has at the time of the demand. Although the duty to investigate is not unlimited, ***a party must find out what is in his own records and what is within the knowledge of his agents and employees concerning the occurrence or transaction***."[13] Thus, under current New Hampshire law as articulated by Chief Justice MacDonald:

> A party is obligated to respond to requests for discovery honestly, "fully and responsively." A party must refresh his or her recollection, find out what information is in his or her records and what is known to his or her agents and employees, and, in general, attempt in good faith to give the opponent the information requested. A party need not volunteer information which has not been requested, but neither should a party be evasive and rely upon technicalities of semantics or defects in the request to avoid producing information which the party knows that the opponent is seeking and is entitled to receive. The fact that the agents from whom answers are sought or the documents or other property to which access is sought are out of state does not insulate them from discovery so long as the party from whom discovery is sought has access to them and is subject to the in personam jurisdiction of the court.[14]

III. Relevance as an Objection to Discovery Requests

While our judicial system undoubtedly gives the trial court discretion to prevent parties from overreaching with their discovery requests, the court has repeatedly warned that the proper focus should be on full disclosure. For example, trial judges should be skeptical of claims by a party that information sought by its opponent is irrelevant.

Even before the adoption of the current superior court rules, our Supreme Court emphasized that legal relevance is not the proper test for admissibility. Instead, discovery of information was allowed "if the court can fairly find that it may in any way be material to the plaintiff's cause."[15] According to the court, "the phrase, material to the plaintiff's case, may mean simply to the proper preparation of his case."[16] The court further instructed that materiality need not be definitively established.[17] Applying this view, the court in *McDuffey v. Bos. & M. R.R.*[18] held that the plaintiff was entitled to discovery of the tort defendant's other unrelated accidents, even though this may include evidence of accidents which will not be admissible at trial because of dissimilarity in time or conditions, or because it would involve an undue confusion of collateral issues.[19]

New Hampshire's traditionally liberal view of materiality is based in large part on the court's common-sense recognition that no harm is done when a party produces information that is ultimately inadmissible, while withholding important information can unfairly change the outcome of a case. As the court stated in *Lefebvre*, "[i]f the information favors the defendant, no harm is done; if it is the other way and negligence and causation are determined, justice is accomplished."[20] This is precisely why trial judges should be especially skeptical of discovery objections based entirely on relevance. If the information is truly irrelevant, and therefore harmless, then it stands to reason that the disclosing party would have very little incentive to waste the time, effort, and money to fight production. On the other hand, there is no incentive for a party to seek information that cannot possibly help prove its case and the requesting party is clearly in the best position to know what information may be helpful.

In the rare event that a party seeks discovery purely for the purposes of intentional harassment, such efforts are readily palpable in the context of the litigation and can be dealt with by the court appropriately. But, in the absence of such obvious overreaching, the requesting party should not have to disclose its mental impressions and strategies to justify a facially plausible request.

Our procedural rules support this view. Under Superior Court Rule 21(b), a party must produce all requested information that is "relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other

party . . ."[21] And "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[22] Although the New Hampshire Supreme Court has not construed this language, the United States Supreme Court has interpreted identical language:

> The key phrase in this definition – 'relevant to the subject matter involved in the pending action' -- has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. . . . [D]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.[23]

This expansive articulation of the relevance standard—applicable to the same language currently used in Superior Court Rule 21(b)—is entirely consistent with our Supreme Court's pre-rules direction that discovery should be allowed if the trial judge can fairly find that the information sought may in any way be material to the requesting party's cause.[24] The bottom line is that, given the high stakes and the obvious incentive to withhold harmful evidence, a party's claim that responsive information is irrelevant or immaterial is properly characterized as an *ipse dixit* assertion that cannot be accepted at face value otherwise "any such spurious claims could never be exposed."[25]

IV. Conclusion

As the foregoing cases demonstrate, New Hampshire law strongly endorses full disclosure by parties in civil discovery. By exercising healthy skepticism of a party's relevance objections in discovery disputes, courts ensure that information material to the litigation is disclosed early in the case, they uphold New Hampshire's long tradition of allowing broad discovery, and, most importantly, they facilitate the search for the truth and the fair resolution of matters on the merits, which should always be the primary goals of the judicial system.

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Elie joined Abramson, Brown & Dugan in 2017 after graduating from Suffolk University Law School, where he served as an editor on the Suffolk University Law Review. Since then, Elie has represented numerous medical negligence victims and their families in cases involving catastrophic injuries and wrongful death. In addition to his practice, Elie serves on the New Hampshire Association for Justice's Board of Governors and Publications Committee. He is also the editor of the Verdicts and Settlements Report in the New Hampshire Trial Lawyer's Quarterly.

[2] *Krainewood Shores Ass'n v. Town of Moultonborough*, 174 N.H. 103, 111 (2021) (citing *see In re Proposed Rules of Civil Procedure*, 139 N.H. 512, 515-17, 659 A.2d 420 (1995)); *State v. Hess Corp.*, 159 N.H. 256, 266 (2009); *French v. R.S. Audley, Inc.*, 123 N.H. 476, 480 (1983).
[3] *Taylor v. Thomas*, 77 N.H. 410, 411 (1914). According to the court, this meant that:

> The sporting theory--the theory that a judicial trial is a game to be played according to certain rules—has no more place in the present conception of the administration of justice than has the wager of battle. *Id.*

[4] 71 N.H. 332 (1902).
[5] *Id.* at 339 (quoting *Jenkins v. Bushby*, 35 L. J. Ch. 400).
[6] *Hartford Accident & Indem. Co. v. Cutter*, 108 N.H. 112, 115 (1967) (citations omitted).
[7] *Id.*
[8] *Scontsas v. Citizens Ins. Co.*, 109 N.H. 386, 388 (1969) (citations omitted).
[9] *Id.* The Court explained that discovery should be

> Subject only to the limitations of full or qualified privileges full discovery, under the discretionary control of the Trial Judge to prevent harassment, has supplanted the older notion of the right of each party to keep from disclosure the facts which he intended to show at trial and those which he intended not to show." Id. (quotations omitted).

See also Yancey v. Yancey, 119 N.H. 197, 198 (1979) ("This State takes a liberal view of discovery. Absent some privilege and subject to control to prevent harassment, full discovery is favored . . .").
[10] *Murray v. Developmental Servs.*, 149 N.H. 264, 267 (2003) (citations omitted and emphasis added). *See also State v. Quintero*, 162 N.H. 526, 536 (2011) (quoting *State v. Nadeau*, 126 N.H. 120, 124 (1985) ("Our liberal discovery rules came about in recognition of the concept that 'the ends of justice are best served by a system which gives both parties ***the maximum amount of information available***, thus reducing the possibility of surprise at trial.'") (emphasis added).
[11] *Kurowski v. Town of Chester*, 170 N.H. 307, 315 (2017) (citing 4 G. J. MACDONALD, WIEBUSCH ON NEW HAMPSHIRE CIVIL PRACTICE AND PROCEDURE § 22.03, at 22-6 to 22-7 (4th ed. 2014)).
[12] *Bursey v. Bursey*, 145 N.H. 283, 286 (2000) (citation omitted).
[13] *Kearsarge Comput. v. Acme Staple Co.*, 116 N.H. 705, 707 (1976) (citations omitted) (emphasis added).
[14] G.J. MacDonald, 4 WIEBUSCH ON NEW HAMPSHIRE CIVIL PRACTICE AND PROCEDURE § 22.25 (2023) (footnote omitted).
[15] *Lefebvre v. Somersworth Shoe Co.*, 93 N.H. 354, 356 (1945) (quoting *Ingram v. Railroad*, 89 N.H. 277, 279).

[16] *Id.*
[17] *Ingram*, 89 N.H. at 279.
[18] 102 N.H. 179 (1959).
[19] *Id.*, at 182.
[20] *Lefebvre v. Somersworth Shoe Co.*, 93 N.H. 354, 358 (1945).
[21] Superior Court Rule 21(b).
[22] *Id.*
[23] *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 351 (1978) (citation omitted).
[24] *See Lefebvre*, 93 N.H. at 356.
[25] *McCabe v. Arcidy*, 138 N.H. 20, 25 (1993).