

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

FILED

CITY OF ROCKY RIVER, et al. )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
CITY OF LAKEWOOD, et al. )  
 )  
Defendants. )

CASE NO. 07 630510

2010 FEB 26 P 12:21

GERALD E. FUERST  
CLERK OF COURTS  
CUYAHOGA COUNTY

RESPONSE TO MOTION TO  
STRIKE PRETRIAL STATEMENT

CV07630510  
61945617

Now come Plaintiffs, and hereby respectfully submit their brief in opposition to the Motion to Strike Plaintiff's Pretrial Statement (the "Motion to Strike"). The Motion to Strike should be summarily overruled for the following reasons.

First, the "law" referred to the Motion to Strike is very misplaced. The Goodyear Tire and Rubber Co. V. Chiles Power Supply, Inc. (2003), 332 F.3d 976, involved an already issued unique confidentiality order by a federal court, which the moving party attempted to dissolve to get confidential information covered by that order. It also involved the federal rules of evidence. It did not open and ongoing settlement discussions which were not covered by a court gag order. A copy of that case is attached hereto and made a part hereof for a full reading.

Second, Local Rule 21 Part III(E) specifically mandates the filing of a pretrial statement which contains the information contained in Plaintiff's pretrial statement. Further, anyone who regularly participates in pretrial conferences knows that often the

trial court judge actually separates the parties and has single party discussions in order to ferret out settlement positions and history. Plaintiffs' Pretrial statement actually lets Defendant Lakewood know just exactly what Plaintiffs' counsel would say in that regard - so it really is a procedural boon to Defendant Lakewood. Plaintiffs' counsel requested Defendant Lakewood to specifically identify what statements or information in the Pretrial Statement were inaccurate, misleading, omitted or taken out of context over one week ago, and Defendant Lakewood still has not responded to that invitation.<sup>1</sup>

Third, it should be noted that Defendant Lakewood has openly ignored the pretrial statement requirement altogether - thus directly violating the Local Rules. Defendant Lakewood was reminded of that violation one week ago, and still there is no pretrial statement on file for Defendant Lakewood.

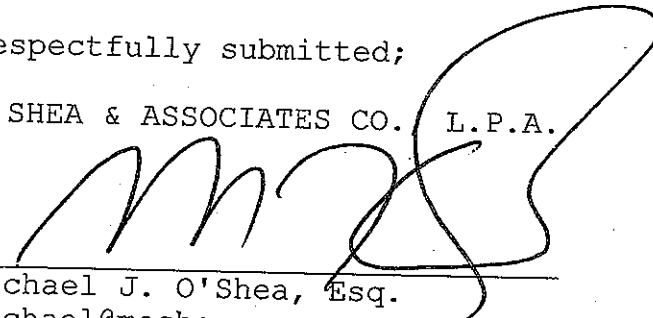
For all of the foregoing reasons, the Plaintiffs respectfully request that this Court overrule the Motion to Strike, order Defendant to file its own pretrial statement - and then order Defendant Lakewood to attend the final pretrial with a meaningful settlement authority and strategy.

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<sup>1</sup> See February 19, 2010 email from Plaintiffs' counsel to Defendant Lakewood attached hereto and made a part hereof.

Respectfully submitted;

O'SHEA & ASSOCIATES CO. L.P.A.



Michael J. O'Shea, Esq.

[michael@moshea.com](mailto:michael@moshea.com)

(0039330)

Beachcliff Market Square

19300 Detroit Road - Suite 202

Rocky River, Ohio 4116

(440) 356-2700

(440) 331-5401 - fax

Andrew D. Bemer, (0015281)

[abemer@rrcity.com](mailto:abemer@rrcity.com)

Rocky River Law Department

21012 Hilliard Blvd.

Rocky River, Ohio 44116

(440) 895-3374 - phone

(440) 895-3381 - fax

Rocky River Law Director

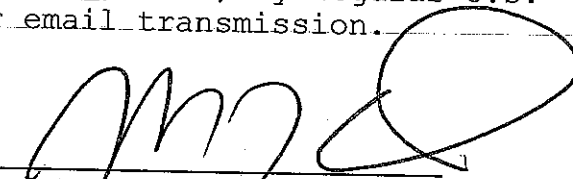
**Attorneys for the Plaintiffs**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon:

Nora Hurley, Esq.  
Scott Claussen, Esq.  
law@lakewoodoh.net  
Lakewood Law Department  
City of Lakewood  
12650 Detroit Avenue  
Lakewood, Ohio 44107  
(216) 228-2514 - fax

this 25 day of Feb, 2010, by regular U.S.  
mail and/or fax transmission and/or email transmission.

  
\_\_\_\_\_  
Michael J. O'Shea



LEXSEE 332 F.3D 976

**THE GOODYEAR TIRE & RUBBER COMPANY, Plaintiff-Appellee, v. CHILES POWER SUPPLY, INC., d/b/a Heatway Systems, Defendant, ROBERT S. JULIAN, et al., Petitioners-Appellants.**

No. 01-3873

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

*332 F.3d 976; 2003 U.S. App. LEXIS 11790; 2003 FED App. 0197P (6th Cir.); 61 Fed. R. Evid. Serv. (Callaghan) 949; 55 Fed. R. Serv. 3d (Callaghan) 1104*

March 28, 2003, Argued

June 16, 2003, Decided

June 16, 2003, Filed

**PRIOR HISTORY:** **[\*\*1]** Appeal from the United States District Court for the Northern District of Ohio at Akron. No. 97-00335. Dan A. Polster, District Judge. *Goodyear Tire & Rubber Co. v. Chiles Power Supply*, 7 *F. Supp. 2d* 954, 1998 U.S. Dist. LEXIS 10905 (N.D. Ohio, 1998)

**DISPOSITION:** Judgment of the district court affirmed.

**COUNSEL: ARGUED:** William W. Maywhort, HOLLAND & HART, Greenwood Village, Colorado, for Appellants.

G. Jack Donson, TAFT, STETTINIUS & HOLLISTER, Cincinnati, Ohio, for Appellee.

**ON BRIEF:** William W. Maywhort, HOLLAND & HART, Greenwood Village, Colorado, David L. Black, Joseph W. Halpern, HOLLAND & HART, Denver, Colorado, for Appellants.

G. Jack Donson, John B. Nalbandian, TAFT, STETTINIUS & HOLLISTER, Cincinnati, Ohio, James K. Archibald, VENABLE, BAETJER, HOWARD & CIVILETTI, Washington, D.C., Kenneth C. Bass III, STERNE, KESSLER, GOLDSTEIN & FOX, P.L.L.C., Washington, D.C., for Appellee.

**JUDGES:** Before: BOGGS, SUHRHEINRICH, and SILER, Circuit Judges.

**OPINION BY: SUHRHEINRICH****OPINION**

**[\*977]** **[\*\*\*2]** SUHRHEINRICH, Circuit Judge. Appellants Robert S. Julian and fifteen other Colorado homeowners ("Julian") intervened in this action and moved the district court to vacate or modify a confidentiality order. Julian now appeals from the district court's June 29, 2001, denial of his petition to vacate the order which prevents either of the named parties in the case of **[\*\*2]** *Goodyear Tire & Rubber Co. v. Chiles Power Supply Co.*, 7 *F. Supp. 2d* 954 (N.D. Ohio 1998) ("*Goodyear I*"), from discussing the contents of settlement negotiations. The issue presented on appeal is whether statements made in furtherance of settlement are privileged and protected from third-party discovery. We affirm the decision of the district court and find that they are.

## I.

Defendant Chiles Power Supply, Inc. d/b/a Heatway Radiant Floors and Snowmelting ("*Heatway*") is a national **[\*\*\*3]** manufacturer of heating and snowmelt systems. Sometime prior to 1995, Heatway purchased a significant amount of "Entran II" rubber hose from Plaintiff-Appellee Goodyear Tire & Rubber Co. ("*Goodyear*"). Heatway subsequently incorporated the hose into a hydronic radiant heating and snowmelt system, which it then sold to Julian and other homeowners in and around Vail, Colorado.

In 1998, Julian filed suit in federal district court in Colorado against both Goodyear and Heatway after the "Entran II" hose used in Heatway's system failed and caused damage to Julian's property. See *Loughridge v. Goodyear Tire & Rubber Co.*, No. 98-CV-1302 (D. Col. filed June 15, 1998). In that action, [\*\*3] Goodyear defends on the ground that the failure of the hose is due to negligent installation and maintenance of the system by the homeowners. Conversely, Heatway argues that the failure is due to a defect in Goodyear's design for the hose. Significantly, Heatway co-founder Daniel Chiles gave a sworn deposition to that effect on October 29, 1997.

Between May 1995 and June 1996, prior to the Colorado lawsuit, Heatway entered into a second contract with Goodyear to obtain Goodyear's newest model rubber hose, presumably for use by Heatway in the same or a similar heating system. [\*978] However, Heatway refused to pay the \$ 2,093,000 contract price after the "Entran II" failures in Colorado began to surface. On January 21, 1997, Goodyear filed suit against Heatway in Ohio state court for non-payment on the second contract. Heatway removed the case on the basis of diversity jurisdiction to the United States District Court in Akron, Ohio; and counterclaimed, alleging, *inter alia*, breach of implied warranty of merchantability regarding the hose that had failed in Colorado. The district court granted Goodyear summary judgment on the contract, but denied summary judgment on Heatway's counterclaims, [\*\*4] and scheduled the case for jury trial. *Goodyear I*, 7 F. Supp. 2d 954. The district court presided over settlement negotiations for the counterclaims, and admonished that all talks were to remain confidential. [\*\*\*4] The negotiations ultimately proved unsuccessful. On February 4, 2000, the jury returned a verdict for Goodyear on Heatway's counterclaims. Heatway subsequently filed for bankruptcy and did not appeal the decision.

In March 2000, Chiles gave an interview to *Contractor*, a Cleveland, Ohio trade paper. The subsequent article quotes Chiles as saying, in regard to the Ohio litigation:

The day before this trial began, Goodyear made us an offer. They said, we'll do away with this litigation, we'll give you cash, we'll indemnify you against lawsuits from homeowners and all you have to do is sign this paper and agree that the fault is with homeowners and contractors.

Robert P. Mader, *Goodyear Stunner*, *Contractor Magazine*, Mar. 1, 2000, at 1. On March 14, 2000, after a hearing, the Ohio district court determined that Chiles had

improperly disclosed confidential statements made during the course of negotiations, and ordered Chiles not [\*\*5] to make any more statements about the settlement discussions. In a written order, the court noted that "the content of settlement discussions are always confidential" and may never be disseminated, even after a case is closed. Moreover, to correct Chiles' misstep, the district court gave Goodyear permission to make a statement "in whatever form or fashion it chooses, in response to the statement of Dan Chiles published in *Contractor Magazine*." On May 1, 2000, *Contractor* published Goodyear's response:

Dan Chiles' statement was false. Heatway knows that where systems using Entran II as a component part had problems, those problems invariably are the result of improper system design, installation, operation or maintenance -- not the result of any defect in the hose. Heatway failed to get sufficient information on system installation, operation or maintenance to installers and system users, leading directly to the limited problems that [\*\*\*5] have occurred with systems in the field. Heatway's attacks on the hose are a cynical effort to misdirect installers, users and the public away from the real problems -- problems that Heatway itself in large part created. In settlement [\*\*6] negotiations, Heatway indicated it was willing to begin telling system installers and users the truth about the real cause of the problems -- but only if Goodyear would make payments to Heatway. Goodyear refused to pay Heatway to tell the truth -- something Heatway should have done (and should do) regardless.

*Goodyear Responds to Chiles' Comments*, *Contractor Magazine*, May 1, 2000, at 23.

The Colorado case, *Loughridge*, was by then, and is now still, pending. On May 1, 2001, having learned about Chiles' accusations, Julian filed a motion with the Colorado district court seeking to compel Chiles to testify about Goodyear's alleged offer to "buy" Chiles' testimony. On May 15, 2001, without addressing whether settlement [\*979] communications are always confidential, the Colorado court denied the motion to compel. The court simply held that it lacked jurisdiction to overrule another court's order.

On June 25, 2001, pursuant to *Fed. R. Civ. P. 24*, Julian joined the instant Ohio case and petitioned the Ohio district court to vacate or modify its confidentiality

order and to permit discovery of any statements Good-year made during settlement talks. Julian argued that any communications [\*\*7] should be discoverable, notwithstanding the confidentiality order, because the communications are not privileged and are relevant to Julian's Colorado claim. On June 29, the district court denied the motion, and again found that the content of settlement talks are always confidential. The court relied on the prevailing public policy favoring secrecy in negotiations:

Public policy favors the settlement of lawsuits, a policy embodied in *Rule 408 of the Federal Rules of Evidence*. [\*\*6] See, e.g., [Fed. R. Evid. 408, advisory committee note]; *Affiliated Mfrs., Inc. v. Aluminum Co. of Am.*, 56 F.3d 521, 526 (3d Cir. 1995) ("the policy behind *Rule 408* is to encourage freedom of discussion with regard to compromise"). The integrity of the mediation process depends on the confidentiality of discussions and offers made therein. Because parties are generally entrenched in their adversarial roles, negotiations often include specific, creative recommendations by the Court on how to resolve disputes.

Order Re: Denying Petition to Vacate or Modify Confidentiality Order, at 3. Julian filed a notice of appeal on July 30, 2001, and this matter is timely [\*\*8] before this Court under *Fed. R. App. P. 4(a)(1)(A)*.

## II.

We review the district court's decision on Julian's motion to vacate the confidentiality order for an abuse of discretion. See, e.g., *First Tech. Safety Sys. v. Depinet*, 11 F.3d 641, 647 (6th Cir. 1993). The question of whether communications made in furtherance of settlement negotiations are discoverable by litigants in another action is a matter of first impression in this Circuit.

*Rule 408 of the Federal Rules of Evidence* provides that "evidence of conduct or statements made in compromise negotiations is . . . not admissible." *Fed. R. Evid. 408*. However, *Rule 408* "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." *Id.* Julian argues that the proscriptive portions of *Fed. R. Evid. 408* apply only to admissibility at trial, and that statements made in furtherance of settlement negotiations are necessarily discoverable because *Rule 408* provides for their use in some aspects of trial.

[\*\*7] *Rule 26(b)(1)* of [\*\*9] the Federal Rules of Civil Procedure provides that "parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . ." *Fed. R. Civ. P. 26(b)(1)* (emphasis added). Accordingly, the right to discovery is not absolute. We must therefore first address whether settlement communications are privileged.

In *Jaffee v. Redmond*, 518 U.S. 1, 135 L. Ed. 2d 337, 116 S. Ct. 1923 (1996), the Supreme Court discussed at length the parameters of any recognizable privilege. *Rule 501 of the Federal Rules of Evidence* authorizes the federal courts to determine new privileges by examining "common law principles . . . in the light of reason and experience." *Fed. R. Evid. 501*; *Jaffee*, 518 U.S. at 8; see also *Wolfe v. United States*, 291 U.S. 7, 12, 78 L. Ed. 617, 54 S. Ct. 279 (1934). However, the *Jaffee* Court noted that, although *Rule 501* references the common law, the rule "did not [\*980] freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges. [\*\*10]'" *Jaffee*, 518 U.S. at 8-9 (quoting *Trammel v. United States*, 445 U.S. 40, 47, 63 L. Ed. 2d 186, 100 S. Ct. 906 (1980)). To be recognized, the asserted privilege must serve some public interest "transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel*, 445 U.S. at 50 (quoting *Elkins v. United States*, 364 U.S. 206, 234, 4 L. Ed. 2d 1669, 80 S. Ct. 1437 (1960) (Frankfurter, J., dissenting)). Moreover, the proposed privilege must promote a public interest that is "sufficiently important . . . to outweigh the need for probative evidence . . ." *Id.* at 51; see also *Jaffee*, 518 U.S. at 11 (justifying need for psychotherapist privilege); *Upjohn Co. v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981) (discussing policy reasons for attorney-client privilege); *Trammel*, 445 U.S. at 53 (discussing reasons for spousal privilege). Thus, the recognition of a privilege should be judged on a case-by-case basis and weighed against the public interest. *Jaffee*, 518 U.S. at 8; see also [\*\*11] S. Rep. No. 93-1277, at 13 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7059. Viewed "in the light of reason and experience," we [\*\*8] believe a settlement privilege serves a sufficiently important public interest, and therefore should be recognized.

There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties. The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. In order for settlement talks to be effective, parties must

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2003 FED App. 0197P (6th Cir.), \*\*\*; 61 Fed. R. Evid. Serv. (Callaghan) 949

feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of "impeachment evidence," by some future third party. Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative *quid pro quos*, and generally make [\*\*12] statements that would otherwise belie their litigation efforts. Without a privilege, parties would more often forego negotiations for the relative formality of trial. Then, the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost.

Moreover, confidential settlement communications are a tradition in this country. *See, e.g., Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir. 1985) (citing *In re Franklin Nat'l Bank*, 92 F.R.D. 468, 472 (E.D.N.Y. 1981)) (stating that "secrecy of settlement terms . . . is a well-established American litigation practice "). This Court has always recognized the need for, and the constitutionality of, secrecy in settlement proceedings. In *In re the Cincinnati Enquirer*, 94 F.3d 198, 199 (6th Cir. 1996), and *Cincinnati Gas & Elec. Co. v. GE*, 854 F.2d 900, 903-04 (6th Cir. 1988), we denied members of the press access to pre-trial settlement procedures, relying on the historical secrecy in settlement talks. Although not recognizing a privilege as such, we stated that the need for privacy in settlement talks [\*\*\*9] outweighed any First Amendment [\*\*13] right of access to the proceedings. In each case, we addressed whether there exists a right of access to summary jury trials. In *Cincinnati Enquirer*, we found that summary jury trials are essentially settlement proceedings, and that no "tradition of accessibility" exists [\*981] because "settlement proceedings are historically closed procedures." *Cincinnati Enquirer*, 94 F.3d at 199. In *Cincinnati Gas & Elec.*, we found likewise, stating that "historically settlement techniques are closed procedures rather than open." *Cincinnati Gas & Elec.*, 854 F.2d at 903-04.

Other courts have gone further and recognized the existence of some sort of formal settlement privilege. In *Allen Cty. v. Reilly Indus., Inc.*, 197 F.R.D. 352 (N.D. Ohio 2000), the defendant filed a motion to compel discovery and sought to obtain the content of settlement negotiations between the plaintiff county and another defendant. The district court denied the request, noting the "well-established privilege relating to settlement discussions." *Id.* at 353 (citing *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548 (E.D.Cal. 1990), [\*\*14] overruled on other grounds by *Jaffee*, 518 U.S. 1, 135 L. Ed. 2d 337, 116 S. Ct. 1923). Likewise, in *Cook*, the court denied a third party's motion to compel discovery. The court found that not only are statements made in settle-

ment negotiations privileged, but such statements come with no guarantee of veracity. As the *Cook* court stated:

Settlement negotiations are typically punctuated with numerous instances of puffing and posturing since they are "motivated by a desire for peace rather than from a concession of the merits of the claim." *United States v. Contra Costa County Water Dist.*, 678 F.2d [90, 92 (9th Cir. 1982)]. What is stated as fact on the record could very well not be the sort of evidence which the parties would otherwise actually contend to be wholly true. That is, the parties may assume disputed facts to be true for the unique purpose of settlement negotiations. The discovery of these sort of "facts" would be highly [\*\*\*10] misleading if allowed to be used for purposes other than settlement. *See Wyatt v. Sec. Inn Food & Bev., Inc.*, 819 F.2d 69, 71 (4th Cir. 1987).

*Cook*, 132 F.R.D. at 554. [\*\*15] We agree with the reasoning of these lower courts. The public policy favoring secret negotiations, combined with the inherent questionability of the truthfulness of any statements made therein, leads us to conclude that a settlement privilege should exist, and that the district court did not abuse its discretion in refusing to allow discovery.

The fact that *Rule 408* provides for exceptions to inadmissibility does not disprove the concept of a settlement privilege. Julian has not presented evidence of any case where the *Rule 408* exceptions have been used to allow settlement communications into evidence for any purpose. Rather, the exceptions have been used only to admit the occurrence of settlement talks or the settlement agreement itself for "another purpose." *See, e.g., Breuer Elec. Mfg. Co. v. Toronado Sys. of Am., Inc.*, 687 F.2d 182, 185 (7th Cir. 1982) (holding existence of settlement negotiations admissible to rebut claim that party had no knowledge of suit); *Prudential Ins. Co. of Am. v. Curt Bullock Builders, Inc.*, 626 F. Supp. 159, 165 (N.D.Ill. 1985) (holding occurrence of settlement talks admissible to establish agency relationship); [\*\*16] *see also Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, 1996 U.S. Dist. LEXIS 1790, Nos. 93 Civ. 5298 and 93 Civ. 8270, 1996 WL 71507, at \*6 (S.D.N.Y. Feb. 20, 1996) (compelling discovery of terms of agreement only); *Small v. Hunt*, 152 F.R.D. 509, 511 (E.D.N.C. 1994) (allowing discovery of settlement materials to show a "change in circumstances"). The confidentiality order does not prevent Julian from using the existence of *Goodyear I* settlement talks for "another purpose." For

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2003 FED App. 0197P (6th Cir.), \*\*\*; 61 Fed. R. Evid. Serv. (Callaghan) 949

example, if a Goodyear representative claimed he had never met Chiles, Julian could rebut this contention, if it were relevant, by introducing evidence from the settlement talks as proof that each had negotiated with the other in Ohio. Thus, as with [\*982] other privileges, the relationship itself is not [\*\*\*11] privileged, but only the underlying communications. See *Jaffee*, 518 U.S. at 15 (recognizing psychotherapist privilege only for "communications"); *Upjohn Co.*, 449 U.S. at 395-96 (stating that attorney-client privilege extends only to communications); *In re Grand Jury Proceedings*, 517 F.2d 666, 670-71 (5th Cir. 1975) (stating that identity [\*\*17] of client and amount of fees is normally not privileged); *United States v. Goldfarb*, 328 F.2d 280, 282 (6th Cir. 1964) (implying that only communications are privileged); *Vinson v. Humana, Inc.*, 190 F.R.D. 624, 627 (M.D. Fla. 1999) (stating that information not pertaining to substance of communications is outside scope of privilege); *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 230 (D. Mass. 1997) (stating that "facts regarding the very occurrence of psychotherapy, such as the dates of treatment, are not privileged"); *Kiermeier v. Woodfield Nissan, Inc.*, 1999 U.S. Dist. LEXIS 15434, 1999 WL 759485, at \*1 (N.D. Ill. Sept. 8, 1999) (holding identity of psychotherapist and dates of treatment not privileged).

The settlement privilege is also necessary because permitting third-party discovery of negotiation communications would lead to other undesirable results. In general, and in this case, there is no transcript of the settlement talks. And it is unlikely that there exist any written notes reflecting Goodyear's alleged attempt to bribe Chiles. Thus, in order to obtain or refute any evidence, the parties would have to depose each of the persons [\*\*18] present at the negotiations. In this instance, that includes not only the representatives of Heatway and Goodyear, but the parties' lawyers and the district court judge himself.

The district court characterized Chiles' accusations as "out-of-turn comments made to the media shortly after his company lost a high-stakes trial," and therefore lacking in credibility. And although *Rule 26* provides that discovery is permissible where it "appears reasonably calculated to lead to the discovery of admissible evidence," *Fed. R. Civ. P. 26(b)(1)*, we have no reason to believe that Chiles' statement, itself of questionable credibility and not usable for any [\*\*\*12] substantive purpose, would lead to the discovery of any evidence that would be admissible.

In any event, even if negotiation communications were not privileged, Julian has not presented any evidence that the alleged statements are *relevant* to his Colorado case. Julian argues that evidence that might surface regarding Goodyear's alleged bribe attempt can be used to "impeach the credibility and demonstrate the

bias or prejudice of those Goodyear witnesses who are put on the stand to 'toe the company line' concerning the supposed [\*\*19] cause of the Entran II hose failure." Brief for Appellant, at 14. First, there is no point in introducing bias evidence against a party-opponent. Any Goodyear executive who takes the stand on Goodyear's behalf will be presumed biased in favor of the company position. See, e.g., *Davis v. Rowe*, 1993 U.S. Dist. LEXIS 1453, No. 91 C 2254, 1993 WL 34867, at \*5 (N.D.Ill. Feb. 10, 1993) (stating that bias by party-opponent in favor of his own cause is assumed by the jury).

Second, Julian contends that he could use Chiles' statement as impeachment evidence against Goodyear executives who claim that the malfunctioning hoses were the fault of the homeowners. Although Julian is correct that questions of admissibility ultimately are decided by the trial court, see *Fed. R. Evid. 104(a)*, it appears that this use would constitute an attempt to circumvent the Rules of Evidence and to utilize the statement for the substantive purpose of proving the exact question at issue, to wit, whether the hoses were defectively designed. Hence, the statement would likely be inadmissible under *Rules* [\*983] 403<sup>1</sup> and 408. At best, the statement could have been used as impeachment evidence against Chiles had he accepted the [\*\*20] alleged bribe and perjured himself in the Colorado case. But, even then, the evidence would merely be cumulative because Chiles' own deposition testimony, as well [\*\*\*13] as the basis of Heatway's counterclaims in the Ohio case, would impeach Chiles' new story.

<sup>1</sup> *Fed. R. Evid. 403* provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ."

Moreover, one of the proposed rationales for the enactment of *Fed. R. Evid. 408* was that statements made in furtherance of settlement are *never* relevant. The advisory committee note to *Rule 408* states that "exclusion may be based on" the fact that "the evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position." See also *Contra Costa County Water Dist.*, 678 F.2d at 92. Even if Goodyear representatives had offered Chiles the alleged deal, any statements made in the course of negotiation are irrelevant [\*\*21] for the purpose of impeaching a witness, because the offer of compromise does not reflect that Goodyear's hoses were defective.

In sum, any communications made in furtherance of settlement are privileged. Moreover, any such statement is likely not relevant to Julian's case. Julian has not demonstrated a legitimate, admissible use. Therefore, we find

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no abuse of discretion in the district court's denial of Julian's motion to vacate or modify the order.

For the foregoing reasons, we **AFFIRM** the decision of the United States District Court for the Northern District of Ohio.

III.

## Michael O'Shea

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**From:** Michael O'Shea [michael@moshea.com]  
**Sent:** Friday, February 19, 2010 6:12 PM  
**To:** 'Claussen, Scott'  
**Cc:** abemer@rrcity.com; mayor@rrcity.com  
**Subject:** RE: Rocky River v. Lakewood

Scott:

Couple things here.

First, of course the Plaintiffs want to settle this case – indeed the High Parkway Plaintiffs have been trying to resolve this issue for what is now essentially two administrations in Lakewood – all in vain. They have suffered the nuisance effects of this park for over 5 years, and Lakewood has essentially done nothing to even try to prevent the nuisance – even after this lawsuit was filed. Further, as you know, some Dog Park supporters have openly harassed and intimidated the High Parkway Plaintiffs by putting photos of their homes on the internet and posting flyers in their neighborhood – and Lakewood did nothing to investigate this clear case of intimidation (please feel free to read the witness intimidation statute – it uses the term “innuendo” when referring to actions which are illegal under the statute). My Mayor and Law Director have bent over backwards in efforts to get the parties together to work out a resolution – all to no avail. Your Mayor was clearly told about the great offer made by Mr. Buddie, so I find it somewhat disingenuous that you (or your Mayor) claim (or seem to claim) that the Plaintiffs had actively ratified the idea of key cars (which do not prevent barking) and tentative sound fence barriers (which we had to initially investigate ourselves because Lakewood would not do it) which in the end may not even work at all. And to think that you or your Mayor suggested that Rocky River would bear \$47,000.00 of the costs of your suggested improvements was both surprising and rather insulting. Please also feel free to fax over the missing page from the settlement

Second, you can file whatever motion you want. Every pretrial statement that I have ever filed contained an outline of the case and the status of settlement discussions – and Lakewood would be the first party in any litigation to object to the presentation of settlement facts and issues. Please feel free to identify any false statements or omissions that were contained in the document. If the document is accurate but nevertheless makes Lakewood feel frustrated or embarrassed, that is not our fault. I suggest that you file your own pretrial statement (which indeed the local rules require you to do – Lakewood's is long overdue at this point). Feel free to point out any facts or issues that I may have omitted.

Scott: I do not want to get into a big finger pointing fight here – I really don't. But something has to get the settlement discussions moving in the right direction – now. Your Mayor can pick up the phone and call my Mayor to discuss these issues. As he knows, she is very approachable and will take whatever reasonable time is necessary to fully discuss reasonable resolutions.

Please also feel free to call me at the office or on the cell if you would like to discuss these issues as well.

Thanks. Have a nice weekend.

**Michael J. O'Shea, Esq.**

**O'Shea & Associates Co., L.P.A.**

Beachcliff Market Square

19300 Detroit Road - Suite 202

Rocky River, Ohio 44116

(440) 356-2700 - office

(216) 470-8098 - cell

(440) 331-5401 - fax

[michael@moshea.com](mailto:michael@moshea.com)

[www.moshea.com](http://www.moshea.com)

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**From:** Claussen, Scott [mailto:Scott.Claussen@lakewoodoh.net]

**Sent:** Friday, February 19, 2010 3:38 PM

**To:** michael@moshea.com

**Cc:** abemer@rrcity.com; mayor@rrcity.com

**Subject:** RE: Rocky River v. Lakewood

Mike,

The proper response to a settlement proposal is rejection, acceptance or a counter proposal. If Rocky River is willing to continue to attempt to settle this matter, we would like to continue down that road. Secondly, in the future if I fail to attach a document in a letter, please just contact me and I will remedy the situation. I don't think it is very professional for me to find out in a motion filed with the court. I will fax you the proposal we received if you believe it is still relevant.

Attached please find a motion to strike your pretrial statement that I plan on filing with the court today. We were quite surprised by the language in the pretrial statement. It was my understanding from our meetings that we were in agreement about potentially settling the matter by using a sound barrier (positioned in a way that Mr. Nugent suggested), implementing a key card system and limiting the hours at the park. If this was not acceptable I wish you would have indicated this prior to us getting proposals and researching this solution. Prior to reading your pre-trial statement I believed that settlement was very promising. I hope this is still the case. Please feel free to contact me regarding any of the above topics.

Scott Claussen

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**From:** Michael O'Shea [mailto:michael@moshea.com]

**Sent:** Wednesday, February 10, 2010 6:00 PM

**To:** Claussen, Scott

**Cc:** abemer@rrcity.com; Law Dept

**Subject:** Rocky River v. Lakewood

Scott:

Attached please find our pretrial statement. As you know, the Court moved the PT date to February 26, 2010 at 1:30pm.

Please ask your Mayor if he would like us to officially respond to your January 26, 2010 letter or just ready this matter for further discovery and trial. I have narrowed the deposition list I had previously sent to you, and will forward that revised list soon.

I am working on the responses to your written discovery and will get those responses to you by the end of next week.

Thanks.

**Michael J. O'Shea, Esq.**  
**O'Shea & Associates Co., L.P.A.**

Beachcliff Market Square  
19300 Detroit Road - Suite 202  
Rocky River, Ohio 44116  
(440) 356-2700 - office  
(216) 470-8098 - cell  
(440) 331-5401 - fax  
[michael@moshea.com](mailto:michael@moshea.com)  
[www.moshea.com](http://www.moshea.com)

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