

# Discovery and Depositions can be Fun!

Wilma J. Gray

# Complaint

- ▶ Identifies Parties
  1. Plaintiff
  2. Defendant
- ▶ Claims/Causes of Action
- ▶ Damages that plaintiff wants

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SUPERIOR COURT OF WYOMING, COUNTY OF TETON  
CIVIL

AMY KUSHMAN and JOHN KUSHMAN,  
as successor-in-Interest to the Estate of  
JOHNNY KUSHMAN,

Plaintiffs,

vs.

ALGONQUIN TRAILS CAMP;  
and DOES 1 to 100, inclusive,,  
Defendants.

Case No. 388961

COMPLAINT

Action Filed: March 25, 2007

– Written  
Discovery

– eDiscovery

– Deposition

“Cold feet”

# DISCOVERY

## Purposes:

- ▶ Find out what opponents case is about
- ▶ Build support for your case (Assertions/ Defenses)
- ▶ Develop collateral information helpful to evaluation of case

# Types of Discovery

- ▶ Interrogatories (written questions)
- ▶ Form Interrogatories
- ▶ Special Interrogatories

# Interrogatories

... (2) **INCIDENT** means (insert your definition here or on a separate, attached sheet labeled "Sec. 4(e)(2)");

(b) **YOU OR ANYONE ACTING ON YOUR BEHALF** includes you, your agents, your employees, your insurance companies, their agents, their employees, your attorneys, your accountants, your investigators, and anyone else acting on your behalf.

(c) **PERSON** includes a natural person, firm, association, organization, partnership, business, trust, limited liability company, corporation, or public entity.

(d) **DOCUMENT** means a writing, as defined in Evidence Code section 250, and includes the original or a copy of handwriting, typewriting, printing, photostats, photographs, electronically stored information, and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them.

(e) **HEALTH CARE PROVIDER** includes any **PERSON** referred to in Code of Civil Procedure section 657.1(e)(3).

(f) **ADDRESS** means the street address, including the city, state, and zip code.

## Sec. 5. Interrogatories

The following Interrogatories have been approved by the Judicial Council under Code of Civil Procedure section 2033.710:

### CONTENTS

- 1.0 Identity of Persons Answering These Interrogatories
- 2.0 General Background Information—Individual
- 3.0 General Background Information—Business Entity
- 4.0 Insurance
- 5.0 *[Reserved]*
- 6.0 Physical, Mental, or Emotional Injuries
- 7.0 Property Damage
- 8.0 Loss of Income or Earning Capacity
- 9.0 Other Damages
- 10.0 Medical History
- 11.0 Other Claims and Previous Claims
- 12.0 Investigation—General
- 13.0 Investigation—Surveillance
- 14.0 Statutory or Regulatory Violations
- 15.0 Denials and Special or Affirmative Defenses
- 16.0 Defendant's Contentions Personal Injury
- 17.0 Responses to Request for Admissions
- 18.0 *[Reserved]*
- 19.0 *[Reserved]*
- 20.0 How the Incident Occurred—Motor Vehicle
- 25.0 *[Reserved]*
- 30.0 *[Reserved]*
- 40.0 *[Reserved]*
- 50.0 Contract
- 60.0 *[Reserved]*
- 70.0 Unlawful Detainer *[See separate form DISC-003]*
- 101.0 Economic Litigation *[See separate form DISC-004]*
- 200.0 Employment Law *[See separate form DISC-002]*
- Family Law *[See separate form FL-145]*

DISC-001

## 1.0 Identity of Persons Answering These Interrogatories

1.1 State the name, **ADDRESS**, telephone number, and relationship to you of each **PERSON** who prepared or assisted in the preparation of the responses to these Interrogatories. (Do not identify anyone who simply typed or reproduced the responses.)

## 2.0 General Background Information—Individual

2.1 State:  
(a) your name;  
(b) every name you have used in the past; and  
(c) the dates you used each name.

2.2 State the date and place of your birth.

2.3 At the time of the **INCIDENT**, did you have a driver's license? If so, state:  
(a) the state or other issuing entity;  
(b) the license number and type;  
(c) the date of issuance; and  
(d) all restrictions.

2.4 At the time of the **INCIDENT**, did you have any other permit or license for the operation of a motor vehicle? If so, state:  
(a) the state or other issuing entity;  
(b) the license number and type;  
(c) the date of issuance; and  
(d) all restrictions.

2.5 State:  
(a) your present residence **ADDRESS**;  
(b) your residence **ADDRESSES** for the past five years; and  
(c) the dates you lived at each **ADDRESS**.

2.6 State:  
(a) the name, **ADDRESS**, and telephone number of your present employer or place of self-employment; and  
(b) the name, **ADDRESS**, dates of employment, job title, and nature of work for each employer or self-employment you have had from five years before the **INCIDENT** until today.

2.7 State:  
(a) the name and **ADDRESS** of each school or other academic or vocational institution you have attended, beginning with high school;  
(b) the dates you attended;  
(c) the highest grade level you have completed; and  
(d) the degrees received.

2.8 Have you ever been convicted of a felony? If so, for each conviction state:  
(a) the city and state where you were convicted;  
(b) the date of conviction;  
(c) the offense; and  
(d) the court and case number.

2.9 Can you speak English with ease? If not, what language and dialect do you normally use?

2.10 Can you read and write English with ease? If not, what language and dialect do you normally use?

# Requests for Admissions

- ▶ Genuineness of document
- ▶ Truth of facts



# Requests to produce/Inspection Demand

- ▶ Documents
- ▶ Things
- ▶ Places to be inspected

## DOCUMENTS TO BE PRODUCED

1. Any and all photographs or videotapes relating to the alleged incident or alleged damages involving Johnny Kushman who is the subject of this lawsuit, including but not limited to photographs or videotapes of the accident scene, of the accident scene, involved vehicles and alleged injuries.
2. All medical bills, invoices, receipts or other evidence of charges which you claim were incurred as a result of the injuries sustained in the alleged incident giving rise to this proceeding.
3. If you claim wage loss or loss of earning capacity, any and all documents, including but not limited to records, statements, reports, disability slips and/or other documents from or prepared by medical providers indicating the length of disability, which you contend support your claim for loss of income
7. Any and all statements, either written or recorded, from witnesses to the alleged incident.
8. Any all statements obtained by you, or anyone acting on your behalf, from any person regarding the alleged incident.

# OBJECTIONS

## Purpose:

- ▶ Preserve legal rights at time of Trial, if these written discovery responses are used;
- ▶ Hurdle or obstacle for the other side;

# Discovery Standard

- ▶ Everything is discoverable!!
- ▶ Everything that is relevant is admissible at trial (admissibility determined by judge)
- ▶ Everything that is reasonably calculated to lead to the discovery of admissible evidence must be produced in discovery

# Documents

- ▶ Photographs
- ▶ Diagrams
- ▶ Maps
- ▶ Witness Statements
- ▶ Witness Interviews
- ▶ Trip Logs
- ▶ Incident Report

- ▶ Field Resource Guide/Manual
- ▶ Policy and Procedures
- ▶ Qualifications of Staff; resumes, job applications, payroll, evaluations, etc.
- ▶ Records of internal training
- ▶ Certification Levels
- ▶ Clinics
- ▶ Outside training

- ▶ Equipment instructions, warning labels, etc.
- ▶ Procedures for Incident reporting
- ▶ Staff training manuals, materials, handouts, etc.
- ▶ Post accident review documents and reports
- ▶ Emergency response procedures
- ▶ Therapeutic incident stress debriefs

- ▶ Correspondence, memorandum, emails, telephone messages, notes, journal/log entries
- ▶ Facebook, My Space, blogs, etc.
- ▶ Marketing Material — website, brochures, etc.
- ▶ Participant Agreements / Release
- ▶ Application form
- ▶ Medical History Form



# E-Discovery

- ▶ ESI = Electronically Stored Information
- ▶ Electronic = relating to technology having electrical, digital, magnetic, wireless, optical, or similar capabilities
- ▶ Rules of Civil Procedure mandate accountability for ESI

# Electronic Discovery Act

- ▶ Party to civil action permitted to obtain discovery of electronically stored information kept in the usual course of business, to be produced in the form that is reasonably usable

# How demanded

- ▶ Interrogatory
- ▶ Request for production
- ▶ Subpoena ESI from a third party

# Request for Documents

- ▶ **REQUEST TO PRODUCE NO. 1:**
- ▶ Please produce copies of any and all written policies for the retention of document(s) for the time period of 2007 to present inclusive.
- ▶ **REQUEST TO PRODUCE NO. 2:**
- ▶ Please produce copies of any and all written policies for the destruction of documents, for the time period of 2007 to present inclusive.
- ▶ **REQUEST TO PRODUCE NO. 3:**
- ▶ Please produce all documents referenced in the immediately preceding interrogatory.
- ▶ **REQUEST TO PRODUCE NO. 4:**
- ▶ Produce any and all company computer organizational information (defined to include but not limited to organizational charts, corporate policy and procedure manuals, policy memoranda, system schematic, network topology, system restart procedures, e-mail retention policies, Year 2000 Plan, Disaster Recovery Plan and any related item) in its entirety.

- ▶ **REQUEST TO PRODUCE NO. 5:**
- ▶ Produce all formal and informal contact lists and duty rosters for personnel in Information Technology (IT) and Information Services (IS), or equivalent divisions within your organization. Specifically include rosters for groups such as Incident Response Teams, Data Recovery Units, Audit/Investigation Teams, etc.
- ▶ **REQUEST TO PRODUCE NO. 6:**
- ▶ Produce all formal job descriptions, assignments and personnel lists for IT and IS personnel, including revisions, from 2007 to present.
- ▶ **REQUEST TO PRODUCE NO. 7:**
- ▶ Produce any and all devices used to place information on loose or removable storage media, including but not limited to hard drives, floppy drives, CD-ROM drives, tape drives, recordable DVD-ROM drives, and removable drives (e.g., Jaz, Syjet, Zip, SuperDisk). Include all instructions for use and maintenance of those drives.
- ▶ **REQUEST TO PRODUCE NO. 8:**
- ▶ Produce any and all loose or removable media used to store data, including but not limited to floppy disks, CD-ROM discs and tape drive cartridges, that have been used by personnel or contractors to perform work for your organization.

- ▶ **REQUEST TO PRODUCE NO. 9:**
- ▶ Provide any and all documentation of software and hardware modifications to the PC(s) used by employees during 2007 to present, including but not limited to modification dates, software/hardware titles and version number, names of persons performing modifications, location of any backup of the data on the computer performed prior to modification, and disposition of replaced software and hardware.
- ▶ **REQUEST TO PRODUCE NO. 10:**
- ▶ Produce all phone use records for your organization including but not limited to logs of incoming and outgoing calls, invoices and contact management records, manually or automatically created or generated for the period from 2007 to present, inclusive.
- ▶ **REQUEST TO PRODUCE NO. 11:**
- ▶ Produce any and all portable devices not backed up or archived, including but not limited to handheld devices, set-top boxes, notebook devices, CE devices, digital recorders, digital cameras and external storage devices.

- ▶ **REQUEST TO PRODUCE NO. 10:**
- ▶ Produce any and all documents and things related to networks or groups of connected computers that allow people to share information and equipment, including but not limited to local area networks (LAN's), wide area networks (WAN's), metropolitan area networks (MAN's), storage area networks (SAN's), peer-to-peer networks, client-server networks, integrated services digital networks and VPN's.
- ▶ **REQUEST TO PRODUCE NO. 12:**
- ▶ Produce any and all information related to e-mail, including but not limited to current, backed-up and archived programs, accounts, unified messaging, server-based e-mail, web-based e-mail, dial-up e-mail, user names and addresses, domain names and addresses, e-mail messages, attachments, manual and automated mailing lists and mailing list addresses.

▶ **REQUEST TO PRODUCE NO. 13:**

Produce any and all backup and/or archive or archived for your organization from 2007 to present.

▶ **REQUEST TO PRODUCE NO. 14:**

Please produce your computers, including their magnetic or optical storage media, for inspection and copying, on or before October 15, 2013, at the offices of ABC Law Firm.



# Examples of ESI

- ▶ Social Media, e-mails, website, Intranet, office documents stored electronically, HTML files, Metadata, computer file backups, blogs, FaceBook, U-Tube, Twitter, Cell phone, I-pod, I-phone, Blackberry, Treo, Spot, Wikis,.....

# Privacy/Privilege

- ▶ Computer hard drive can be requested and must be produced.
- ▶ No privacy
- ▶ Privilege waived if produced

# Know your ESI

- ▶ Where is the ESI?
- ▶ What are your record management policies?
- ▶ Do you have access to the ESI?
- ▶ What is your collection plan for ESI?
- ▶ Stop automatic deletion programs to avoid destroying ESI (Litigation hold)
- ▶ Is ESI reasonably accessible?

# How to Produce ESI

- ▶ Plan ahead
- ▶ Inspection on site of computers, etc.
- ▶ Produce electronic copy.
- ▶ Testing of ESI
- ▶ Sampling of ESI

# ▶ The “We blew it” email...

# Privileges

- ▶ Attorney–Client Privilege
- ▶ Work Product Doctrine Privilege
- ▶ Privilege Log
- ▶ Motion to Compel Discovery

# DEPOSITIONS

- ▶ Oral testimony of party or witness under oath before trial
- ▶ Court reporter present to record testimony

# Deposition

- Explore and obtain information from the other side through prepared and spontaneous, flexible follow-up questions;
- Determine what a deponent knows and does not know;
- Pin down a deponent to a particular story;
- Assess the witness's demeanor to determine what type of trial witness that person would be (words, body language, bias, motive);
- Confront an adversary deponent with damaging information or probe the deponent about weaknesses in the case before trial to prepare for cross-examination; and
- Preserve testimony to be used later as admissions, **impeachment** evidence, or for other evidentiary or cross-examination purposes at a hearing or trial.



## ▶ Taking deposition

1. Questions – Who, what, when, where, how, (but never why)

## ▶ Defending deposition

1. Prepare your witness

2. Objections – only as to the form of the question.

Ask yourself this question:

- ▶ What will this sound like when I am the witness telling this story or repeating what I said?

# Expert Discovery

- ▶ An Expert is someone with special skill, knowledge, education, training and experience can render opinions
- ▶ –Standard of Care experts
- ▶ –Medical experts
- ▶ –Damages experts
- ▶ Non-retained experts

# Scenario: My Feet are Cold

- ▶ Summer backpacking trip
- ▶ Unexpected snowstorm
- ▶ Trip leader provides cold weather training
- ▶ Student gets cold feet
- ▶ Medical treatment and evacuation delayed
- ▶ Trip Leader deposition – training, organization policies, information provided to students.

# Stay tuned....Mock Trial at 1 p.m.

## “MY FEET ARE COLD”

Staring:

- ▶ Reb Gregg
- ▶ Catherine Hansen–Stamp
- ▶ Jed Williamson
- ▶ Molly Hampton
- ▶ Tod Schimelpfenig