

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS : MDL DOCKET NO. 1203
(PHENTERMINE, FENFLURAMINE, :
DEXFENFLURAMINE) PRODUCTS :
LIABILITY LITIGATION :
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: :
: :
: :
ANNETTE KERR, et al. :
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: :
v. :
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ED R. STEWART, et al. : CIVIL ACTION NO. 03-20014

MEMORANDUM AND PRETRIAL ORDER NO. 3514

Bartle, J.

May 11, 2004

The question before the court is whether a November 1, 2002 letter from Patrick J. Mulligan, Esquire to one of his clients is still subject to the attorney-client privilege now that it has been disclosed.

Mr. Mulligan, on behalf of his presently unknown client, is seeking a protective order to seal Exhibit "H," the designation given to the letter as an exhibit supporting a motion filed by Wyeth in connection with the multi-district litigation involving Wyeth's diet drugs Pondimin and Redux. Wyeth opposes the pending motion for a protective order.

The copy of the six page letter on Mr. Mulligan's letterhead which is before the court has the name and address of the client blacked out. As a result, Mr. Mulligan states that he is not able to identify the client. From what can be gleaned

from the record before us, the letter first surfaced in this redacted form as an exhibit to a brief filed in June or July, 2003 in support of a motion to compel discovery in a Utah state court lawsuit captioned Mobile Echocardiography, Inc. v. Keith Barton, Esq., (Case No. 020905599, Third Judicial Dist. Court, Salt Lake County, State of Utah).¹ The plaintiff in that suit, Mobile Echocardiography, Inc. ("MEI"), contends that the defendant attorneys failed to pay it for echocardiograms performed on persons who ingested Pondimin and/or Redux, Wyeth's diet drugs that were removed from the market in September, 1997. It was counsel for MEI who attached the letter to his brief. Wyeth obtained a copy of it from the court file in the Utah action.

Mr. Mulligan contends that MEI filed the letter under seal in the Utah state court. Wyeth disputes this. In the lawsuit in Utah, the parties agreed to a "Stipulated Protective Order" in January, 2003. By its terms, any document that was to be confidential had to be marked "CONFIDENTIAL" or otherwise designated as such as set forth in the Stipulated Protective Order. The letter was not stamped confidential or otherwise designated as confidential in accordance with the order. Nor did the Utah state court docket indicate that it was filed under seal. Pursuant to a routine request for a copy of the court file

1. Plaintiff contends that Mobile Echocardiography, Inc. filed the letter under seal on June 3, 2003. According to Wyeth, the document was filed on July 22, 2003 as Exhibit "N" to the reply memorandum in support of plaintiff's motion to compel discovery responses.

in the MEI matter, the court clerk copied the letter and provided it to Wyeth together with other MEI case papers.

On March 3, 2004, Wyeth attached the letter as Exhibit "H" to its response to various amicus briefs that had been filed in this court in connection with Wyeth's motion challenging the eligibility of class members Annette Kerr and Roberta Raines to exercise an intermediate opt-out right under the nationwide diet drug Class Action Settlement Agreement.² The court decided that motion on March 26, 2004. See Pretrial Order ("PTO") No. 3376. On March 9, 2004, the Utah state court, without Wyeth's participation, entered an order, "based upon the stipulation of the parties" placing the brief relating to the discovery issues, together with "all attached exhibits," under seal. Mr. Mulligan (and his unknown client) now seek to have this same Exhibit "H" protected from further use and disclosure in this court.

How the letter came into the possession of the attorney for MEI in the Utah state court action, of course, is highly relevant. According to the affidavit of Camille Neddo Johnson, Esquire, an attorney for Wyeth in Utah, Paxton Guyman, Esquire, the attorney for MEI, obtained the letter from one of the principals of MEI who had in turn received it from one of the persons on whom he had performed an echocardiogram. This person, who was a client of Mr. Mulligan, had shown the MEI principal the

2. The docket spells her last name as "Raines." In the briefs before us, the parties refer to her as Roberta "Rains." Not knowing which is correct and with apologies if we are in error, we will continue to use the spelling as it appears on the docket.

letter around November 1, 2002. The MEI principal asked for a copy which the person provided after blacking out his or her name and address. At this late date, the MEI principal cannot recall or reconstruct from his records the name of the individual providing the letter. All the events described concerning the disclosure of the letter and MEI's possession of it occurred in the state of Utah. Mr. Mulligan, who seeks a protective order here, has not come forward with any evidence disputing the specific contents of the Johnson affidavit.

The issue of attorney-client privilege present here is a matter of state law since no federal questions are involved. Rule 501 of the Federal Rules of Evidence provides in relevant part:

in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501.

Since we are a federal court sitting in Pennsylvania, we will look to its choice of law rule. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). We believe that the state courts of the Commonwealth would apply the most significant relationship test with regard to attorney-client privilege. See Restatement (Second) Conflict of Laws §§ 6, 139(1), 145 (1971). It is conceded that all the significant acts regarding the letter and

its initial disclosure took place in Utah. Thus, we will apply Utah law.

The attorney-client privilege, of course, is designed to foster unfettered communication between the attorney and client. Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981). It is a privilege belonging to the client who has the right to waive it and make known to a third party or to the public letters or other communications with his or her attorney.

Under Utah law, the proponent of the privilege has the burden of establishing not only that the privilege exists but that it has not been waived. Lifewise Master Funding v. Telebank, 206 F.R.D. 298, 303 (D. Utah 2002). Whether the privilege has been waived must be considered under Rule 507(a) of the Utah Rules of Evidence which provides:

A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or a predecessor while holder of the privilege voluntarily discloses or consents to the disclosure of any significant part of the matter or communication, or fails to take reasonable precautions against inadvertent disclosure.

U.R.E. 507(a). See Doe v. Maret, 984 P.2d 980, 982-83 (Utah 1999).

Waiver of the privilege under Utah law does not require proof that the client intended to do so, only that he or she intended to make the disclosure. Id. at 986-87. Here, Mr. Mulligan's client voluntarily provided a copy of the letter to the MEI principal and by doing so gave up the right to maintain

its confidentiality. There was nothing inadvertent or accidental about what the client did. Indeed, the client took the deliberate step of blacking out his or her name and address before turning over the copy in issue. The MEI principal was free to make the letter in his possession available to third parties. The fact that the letter was later filed with the Utah state court by MEI's attorney, who was neither the addressor or the addressee, confirms that any attorney-client privilege had by that time disappeared. Even now, Mr. Mulligan does not contend that MEI's possession of it is wrongful. Further, there is no evidence that Wyeth acted improperly in securing a copy from the Utah court record.³ Because the client of Mr. Mulligan clearly waived the attorney-client privilege, Wyeth may publish the letter as it sees fit.⁴

The pending motion for a protective order to seal Exhibit "H" will be DENIED.⁵

3. The fact that the letter contained the words "attorney-client privilege" on each page is of no moment. A client has the authority to waive the privilege, regardless of what the attorney addressor said, since the privilege belongs to the client.

4. The court is not bound by the rules of evidence, except those with respect to privileges, in deciding preliminary questions concerning the existence of a privilege. See Fed. R. Evid. 104(a); U.S. v. Zolin, 491 U.S. 554, 565 (1989); Brosius v. Warden, 278 F.3d 246 n.4 (3d Cir. 2002); U.S. v. Campbell, 73 F.3d 44, 48 (5th Cir. 1996). Thus, the court may rely on the hearsay in the affidavit of Camille Neddo Johnson.

5. Even if Wyeth has the burden to prove waiver, as Mr. Mulligan contends, the result here would be no different.

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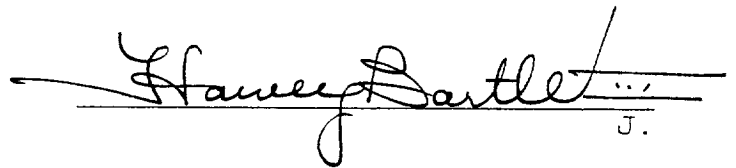
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PRETRIAL ORDER NO. 3514

AND NOW, this 11th day of May, 2004, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of Patrick J. Mulligan and his unknown client for a protective order to seal Exhibit "H" is DENIED.

BY THE COURT:



J.