

DISTRICT COURT, BOULDER COUNTY, COLORADO Boulder County Justice Center 1777 6 th Street P.O. Box 4249 Boulder, CO 80306	Court Use Only Case No. 89 CV 2000 Div: 6 Ctrm: K
IN RE: ASBESTOS CASES	
RULING AND ORDER ON UNION CARBIDE PRIVILEGE CLAIMS	

The above captioned matter is filed in the omnibus civil action number assigned by this Court to general asbestos disease litigation discovery, and other matters relating to general asbestos disease litigation.

On June 13, 2003, the Court heard argument on two motions regarding Defendant, Union Carbide's, claims of privilege as to various documents. First, Plaintiffs' verified Motion for Summary Judgment arguing that there is no genuine issue of material fact that Union Carbide has waived the attorney-client privilege, if any, as to numerous documents. Second, Union Carbide's Motion for Protective Order as to various documents it claims are subject to the attorney-client privilege. The documents at which Union Carbide's Motion for Protective Order is directed are included in the documents at which Plaintiff's Summary Judgment motion is directed.

I. INTRODUCTION

Plaintiff filed a verified Motion for Summary Judgment asking the Court to determine that Union Carbide has waived the attorney-client privilege as to two groups of documents. One group of documents is identified by Bates number on a list attached to the affidavit of Dr. David Egilman, submitted by Plaintiff in support of the Summary Judgment motion. The list attached to Dr. Egilman's affidavit is incorporated herein by reference. The other group of documents is identified by exhibit number on Plaintiff's exhibit list filed with this Court in 1992. Plaintiff's verified Motion for Summary Judgment is supported by the affidavits of David Egilman, M.D., and Aaron DeLuca, a Pennsylvania attorney. These affidavits describe how the documents came into the possession of DeLuca, Egilman, and the Plaintiffs in this case. The affidavits of DeLuca and Egilman,

and the factual statements in Plaintiff's verified Motion for Summary Judgment are not contradicted.

After Plaintiff filed the Motion for Summary Judgment, counsel for Union Carbide filed a Motion for Protective Order requesting the Court to determine that certain documents are privileged and to order Plaintiff to deliver the documents to counsel for Union Carbide. The Defendant's Motion for Protective Order is directed at the same documents that are the subject of Plaintiff's Motion for Summary Judgment. Therefore, if Plaintiff's Motion for Summary Judgment is granted, then Union Carbide's motion for protective order must be denied.

Union Carbide requested that its Motion for Protective Order be heard by the discovery magistrate. Because the Court would of necessity hear the motion for summary judgment, the importance of the issues raised by the parties, and considerations of judicial efficiency, the Court heard both the Summary Judgment motion and the Motion for Protective Order.

II. STANDARD OF REVIEW

The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and to save the time and expense connected with trial. Summary judgment is a drastic remedy that is warranted only upon a clear showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Camacho v. Honda Motor Company, Ltd., 741 P.2d 1240 (Colo. 1987). In determining whether summary judgment is proper, the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party. Casebolt v. Cowan, 829 P.2d 352 (Colo. 1992); Jones v. Dressel, 623 P.2d 370 (Colo. 1981). Even where it is extremely doubtful that genuine issue of material fact exist, summary judgment is not appropriate. Mancuso v. United Bank of Pueblo, 818 P.2d 732 (Colo. 1991).

The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party. C.R.C.P. 56(c); Continental Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo. 1987). The movant may satisfy this burden by demonstrating that there is an absence of evidence in the record to support the nonmoving party's case. *Id.*; Civil Service Comm'n v. Pinder, 812 P.2d 645 (Colo. 1991). Once the movant makes a convincing showing that genuine issues of fact are lacking, the opposing party cannot rest upon the mere allegations or denials in his or her pleadings, but must demonstrate by specific facts that a controversy exists. Sullivan v. Davis, 474 P.2d 2218 (Colo. 1970). Where the facts are so certain as not to be subject to dispute, a court is in a position to determine the issue strictly as a matter of law. Morlan v. Durland Trust Co., 252 P.2d 98 (Colo. 1952).

III. FACTUAL FINDINGS

A. Goldberg Persky Document Production

In 2001, Union Carbide, through its New York counsel, the Kelly Drye law firm, produced to the Pittsburgh law firm of Goldberg Persky Jennings & White, P.C, 55 boxes of documents. Goldberg Persky represents people who have filed lawsuits against Union Carbide seeking damages for asbestos related disease. The document production occurred when Union Carbide's counsel invited Goldberg Persky to visit the Union Carbide document depository in New York City, maintained by the Kelly Drye law firm, to examine documents, and mark the documents to be copied. Goldberg Persky accepted the invitation, reviewed documents at the Kelly Drye law firm, marked what amounted to 55 boxes of documents, and arranged to have a copy service scan the documents and put them on CD ROM. Thereafter, the CD ROMs containing the documents were delivered to Goldberg Persky. Goldberg Persky then provided the documents on CD ROM to Dr. David Egilman, a physician previously known to this Court as an expert witness in asbestos litigation.

In 2001, Dr. Egilman posted the documents from the Goldberg Persky production on his website, where they were publicly accessible for over three months, until Dr. Egilman removed them to make room for other materials. The Plaintiffs obtained the documents from Dr. Egilman's website. Union Carbide did not object in 2001 to Dr. Egilman's posting the documents on his website. Union Carbide has never requested that Goldberg Persky return any of the documents obtained in 2001 from the Union Carbide document depository. There is no evidence that the production of Union Carbide documents to Goldberg Persky was in any way qualified or subject to any limitation on their dissemination.

In Plaintiff's verified Motion for Summary Judgment, Plaintiff's counsel states that he has further disseminated the documents from the Goldberg Persky document production by providing them to hundreds of other attorneys.

The day before the hearing in this matter, Union Carbide submitted two affidavits of Union Carbide attorneys who had some responsibility for maintaining the Union Carbide document depository, as well as the affidavit of one of Union Carbide's counsel in this Court. The Court has considered these affidavits and finds them to be unhelpful. The affidavits are couched in broad, general terms and do not address the factual aspects of the Egilman and DeLuca affidavits. Further, the affidavits submitted by Union Carbide fail to address important issues, including the lack of restriction or limitation placed on the documents produced to Goldberg Persky, in an effort to preserve any privilege; the failure of Union Carbide to attempt to recover the documents from Goldberg Persky; Union Carbide's silence in 2001 and 2002 regarding Dr. Egilman's posting of the documents on the internet; any explanation about why it took Union Carbide 11 years to raise privilege issues concerning documents on Plaintiff's exhibit list;

whether, in fact, Union Carbide claims that any of the documents produced to Goldberg Persky are privileged; whether Union Carbide, before turning the documents over to Goldberg Persky did, or did not, review them for a claim of privilege. Neither affidavit submitted by Union Carbide asserts that there were any time constraints or any urgency in producing the documents to Goldberg Persky, or makes any other statement about why Union Carbide, and its attorneys, could not have reviewed the documents selected by Goldberg Persky before producing them. While the affidavits submitted by Union Carbide both say that documents were periodically added to the document depository, neither affidavit says what documents were added and when the documents were added, or how many documents were added. Without answers to these questions it is difficult to see the relevance of the simple fact that at some unspecified time some unspecified number of unidentified documents were added to the depository.

B. Plaintiffs' 1992 Exhibit List

In 1992, Plaintiffs filed a supplemental exhibit list in this Court listing documents to be used as exhibits against Union Carbide. Some of the documents on the 1992 exhibit list are included in the list of Bates stamped documents on the list attached to Dr. Egilman's affidavit. However, the exhibit list and the Egilman list are by no means co-extensive. Included on the 1992 exhibit list are documents that in 2003, Union Carbide claims, for the first time in this Court, are privileged. In other words, the documents on Plaintiff's Union Carbide exhibit list filed in 1992 were disclosed to Union Carbide for over 11 years before Union Carbide thought to assert any privilege claim as to those documents. The Court also notes that Plaintiff's 1992 exhibit list is apparently identical to a Union Carbide exhibit list filed by a South Carolina law firm, Ness Motley, and therefore the disclosure of the documents on that exhibit to Union Carbide extends beyond the Colorado disclosure.

Plaintiff's 1992 Exhibit List, filed with this Court, is incorporated herein by reference.

As a result of the above discussion, this Court finds that there is no genuine issue of material fact in this case. Therefore, the Court is in a position to decide this case as a matter of law.

IV. **MERITS**

Plaintiff argues that this Court need not review each disputed document to determine if it is, or is not, in fact privileged. Rather, argues Plaintiff, because of the above facts, this Court need only determine if there has been a waiver of the attorney-client privilege as to the documents that are the subject of the Summary Judgment motion. If the privilege has been waived, then it is not necessary to

conduct a document-by-document review of 55 boxes of documents to determine if a particular document is privileged. The Court agrees.

The essence of the attorney client privilege is confidentiality. Once confidentiality has been lost, the reason for the privilege is gone. The privilege can be waived either expressly or by implication. Clark v. District Court, 668 P.2d 3, 8 (Colo. 1983); Miller v. District Court, 737 P.2d 834, 838 (Colo. 1987). "Furthermore, statements made initially in confidence to an attorney lose the shield of the attorney-client privilege if the statements are subsequently disclosed to third parties." Lanari v. People, 827 P.2d 495 (Colo. 1992).

Courts have struggled with the waiver of the attorney-client privilege in cases where the disclosure to third parties was arguably inadvertent. Floyd v. Coors Brewing Co. sets forth the factors Colorado courts are to consider in such a situation. 952 P.2d 797, 808 – 809 (Colo. Ct. App. 1997), *reversed on other grounds*. Those factors are: (1) the extent to which reasonable precautions were taken to prevent the disclosure of privileged information; (2) the number of inadvertent disclosures made in relation to the total number of documents produced; (3) the extent to which the disclosure, albeit inadvertent has, nevertheless, caused such a lack of confidentiality that no meaningful confidentiality can be restored; (4) the extent to which the disclosing party has sought remedial measures in a timely fashion; and (5) considerations of fairness to both parties under the circumstances. *Id.* at 809.

As to the first prong, reasonable precautions taken by the Defendant, there is no evidence in the record to show that Union Carbide took reasonable precautions to protect privileged material. The documents were voluntarily disclosed by Union Carbide to Goldberg Persky for the purpose of preparing for litigation. Because the documents were produced in the course of litigation, it must have been clear that the documents would potentially be introduced into evidence in public trials, disclosed to consultants and experts, and disseminated to other attorneys. Further, there is no claim that the document production to Goldberg Persky was in any way qualified, limited or subject to any conditions as to the use or distribution of the produced documents.

There is no suggestion that the production of documents to Goldberg Persky was done under stringent time limits, such as an imminent trial, that would have made it difficult for Union Carbide to adequately review its own documents before producing them to opposing counsel. In fact, based on the Plaintiff's 1992 filing of an exhibit list against Union Carbide, which lists numerous Union Carbide documents, it appears that Union Carbide has been a Defendant in asbestos disease litigation for over a decade. This is more than sufficient time for Union Carbide to have carefully reviewed its documents before producing them to opposing counsel in 2001.

As to the third prong, the extent of the disclosure, there has been a massive and widespread disclosure of the documents at issue here. First, there is the disclosure by Union Carbide to Goldberg Persky. Goldberg Persky then shared the information with Dr. Egilman, who posted the documents on his internet Web site in 2001. At that point, the document became available to millions of internet users. In fact, the Plaintiffs in this case obtained the documents from Dr. Egilman's website. Any number of other internet users could have, and may have, obtained the same documents. Plaintiff's counsel, in turn, disseminate the documents to hundreds of other lawyers involved in asbestos litigation. As a result of the widespread dissemination, the core quality of the attorney-client privilege, confidentiality, no longer exists as to these documents.

With respect to the fourth prong, timely remedial measures, the Court finds that there is no evidence that Union Carbide made a timely objection to Goldberg Persky or to Dr. Egilman concerning disclosure of the documents. The Defendant did not object to the use of these documents until 2003, when they had already been widely disseminated.

As a matter of law, this Court finds that Union Carbide has waived the attorney-client privilege with respect to those documents produced to Goldberg Persky in 2001 and identified by Bates number as attached to Plaintiff's Motion for Summary Judgment. Further, the privilege, if any, has been waived as to the Union Carbide exhibit list filed by Plaintiffs in this court in 1992.

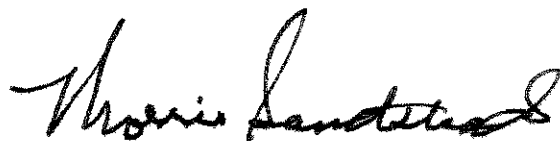
Finally, having found that Union Carbide waived the attorney-client privilege with respect to the documents at issue, the Defendant's request for a protective order is denied.

V. CONCLUSION

The Court, having read the parties' motions, briefs and affidavits and attachments, makes the above findings of fact and conclusions of law. The Court hereby GRANTS Plaintiff's Motion for Summary Judgment, and DENIES Defendant's Motion for Protective Order.

BY THE COURT:

This 21st Day of August, 2003,



Morris W. Sandstead, Jr.
District Judge

CERTIFICATE OF SERVICE:
I certify that I electronically served the

AUG 21 2003