

FILE NAME: Philip Carey (PC)

DATE: 1989-1990

DOC#: PC051

DOCUMENT DESCRIPTION: Legal - Plaintiff's 2nd Request for Production and Related Documents Including Court Order from 1990

SHERMAN A. SEARLS, JR.	§	IN THE DISTRICT COURT OF
	§	
VS.	§	BRAZORIA COUNTY, TEXAS
	§	
OWENS-CORNING FIBERGLAS	§	
CORPORATION, ET AL	§	23RD JUDICIAL DISTRICT

PLAINTIFFS' SECOND REQUEST FOR PRODUCTION

TO: CELOTEX CORPORATION and its attorney of record,
Ms. Elizabeth M. Thompson, Butler & Binon, 1600 First
Interstate Bank Plaza, 1000 Louisiana, Houston, Texas
77002-5008.

Pursuant to Rule 167 of the Texas Rules of Civil Procedure, the Plaintiffs request this Defendant, CELOTEX CORPORATION to produce for inspection and/or copying by Plaintiffs' attorneys in Houston, Texas, all documentation in possession or custody of this Defendant, or subject to its control, concerning the items hereinafter listed within thirty (30) days after the service of Plaintiff's Second Request for Production. Notice is given to this Defendant that failure to comply with this request may subject this Defendant to appropriate sanctions under the Texas Rules of Civil Procedure. The original of Plaintiff's Second Request for Production is not being filed with the District Clerk's office pursuant to the Texas Rules of Civil Procedure. Notice is further provided this Request for Production includes any documents and records on microfilm or any other device used for copying and storage of records.

EXHIBIT "A"-



The items, subjects, and categories covered by this Second Request for Production are as follows:

1) Complete copies of Celotex's History of Insulation Products and Phillip Carey's History of Asbestos Products. See Exhibit "A" for additional reference.

Respectfully submitted,

LAW OFFICES OF LAWRENCE MADEKSHO

BY 

LAWRENCE MADEKSHO
8320 Gulf Freeway
Suite 218
Houston, Texas 77017
(713) 641-0251
Bar Card No. 12797500

AND

ROBERT E. BALLARD
ABRAHAM, WATKINS, NICHOLS,
BALLARD, ONSTAD & FRIEND
800 Commerce Street
Houston, Texas 77002
(713) 222-7211
Bar Card No. 01651000

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Request for Production has been forwarded to Ms. Elizabeth M. Thompson, Butler & Binion, 1600 First Interstate Bank Plaza, 1000 Louisiana, Houston, Texas 77002-5008, and to other interested counsel, on this the 14th day of January, 1989.


LAWRENCE MADEKSHO

Walter Corporation
POST OFFICE BOX 77601 • 1500 NORTH DALE MAEY
TAMPA, FLORIDA 33672

LEGAL DEPARTMENT

December 26, 1978

Mr. Lipscomb Norvell, Jr., Esquire
BENCKENSTEIN & NORVELL
Post Office Box 551
Beaumont, Texas 77704

Re: Beaumont Asbestosis Cases

Dear Mr. Norvell:

Our insurance carriers, Aetna Life & Casualty and Kemper Insurance Company, have advised us that you have been retained to represent The Celotex Corporation in the above styled cases. From time to time you will need information pertaining to these cases, some of which may be of a confidential and privileged nature. We have found that if this is handled between the lawyers, there is less chance of this information being subpoenaed or subject for production. Accordingly, I will be your contact for information pertaining to this litigation.

It is also necessary for me to report periodically to management and others on the status of litigation which will include these cases. It would eliminate unnecessary communication and correspondence between us if you will place me on your mailing list for copies of all Pleadings filed by the parties, Orders of the Court, and any other significant or important memoranda or correspondence.

Issues regarding the effectiveness of service of process, the applicability of an appropriate statute of limitations, and any defense based upon suit of an improper entity, often arise in these type lawsuits and therefore, we are requesting that you preserve each of these issues by appropriate responses from the very beginning of the lawsuit. If any affidavits are required to substantiate these type defenses, please contact me.

Enclosed herewith is a copy of Celotex' History of Insulation Products, a copy of Philip Carey's History of Asbestos Products and a Policy Statement for the disposition of the asbestosis cases. In the meantime, if I can be of any assistance, please advise.

Sincerely,

Carolyn J. House
Litigation Counsel

CJH/ma
Encl:

P.S., Also enclosed please find a set of first and second suggested interrogatories.

Exhibit "A"

FILED
at 10:40 AM

FEB 21 1990

NO. 88-C-0615

FRANCES DENNETT
Clerk of District Court Brazoria Co., Texas

SHERMAN A. SEARLS, JR. * IN THE DISTRICT COURT OF
VS. * BRAZORIA COUNTY, TEXAS
OWENS-CORNING, ET AL * 23 rd JUDICIAL DISTRICT

293 / 412
a2
✓

DISCOVERY ORDER

ON THIS THE 14 day of February, 1990, came on to be heard Plaintiff's Motion to Compel discovery from Defendant CELOTEX and Defendant's Motion for Protection, and having considered the pleadings and motions on file, the documents submitted for in camera review, and the Memorandum of Authorities filed by the Master in Chancery, the Court makes the following findings:

- (1) The two documents sought by Plaintiffs' Request for Production are relevant or reasonably calculated to lead to the discovery of relevant evidence in this case.
- (2) The underlying facts contained within the two documents are not privileged.
- (3) The privilege, if any, which attached to the actual documents, per se, which were submitted for in camera review, has been waived through obscured and misleading discovery responses which have effected a fraud upon the Plaintiffs and this Court.
- (4) This discovery is necessary in order to insure the full development of the facts and issues in this case, and
- (5) Plaintiffs' Motion to Compel should be GRANTED.

It is THEREFORE, ORDERED, ADJUDGED and DECREED that Defendant CELOTEX shall produce to the Plaintiffs, through Counsel, Robert E. Ballard, Abraham, Watkins, Nichols, Ballard, Onstad & Friend, 800 Commerce Street, Houston, Texas 77002-1776, copies of the two documents made the subject of Plaintiffs' Motion to Compel, which is hereby

EXHIBIT "G"

GRANTED, and that such production shall be complete on or before 10 a.m. o'clock on the date which is 45 days from the date this ORDER is signed.

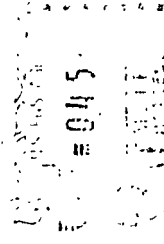
It is FURTHER ORDERED that nothing herein shall be interpreted to infringe upon nor limit the said Defendant's right to seek limitations upon the use of such evidence at the time of trial or to seek appropriate review, and it is THEREFORE FURTHER ORDERED that upon notice to the Court that a review has been filed for before the appropriate Appellate Court, then and in that event, the effect of this ORDER is automatically stayed pending resolution of that review.

SIGNED AND ENTERED this 14 day of Feb., 1990.


JUDGE PRESIDING

Court of Appeals
First Supreme Judicial District
1307 San Jacinto, 10th Floor
Houston, Texas 77002

Official Business
State of Texas
State Penalty
For Private Use



Mr. Lawrence Madeksho
Attorney at Law
8320 Gulf Freeway
Houston, TX 77087



Opinion

In The

Court of Appeals

For The

First District of Texas

NO. 01-90-00220-CV

CELOTEX CORPORATION, Relator

V.

**THE HONORABLE NEIL CALDWELL, JUDGE OF THE 23RD DISTRICT COURT OF
BRAZORIA COUNTY, TEXAS, Respondent**

Original Proceeding on Motion for Leave to File Petition for Writ of Mandamus

This is an original mandamus action. Celotex Corporation asks this Court to cancel an order entered by Judge Neil Caldwell on February 14, 1990, which requires Celotex to produce two documents. We refuse leave to file.

In 1988, Sherman A. Searls, Jr., plaintiff in the underlying lawsuit, sued Celotex and other companies, alleging that he suffered asbestos-related diseases from exposure to defendants' asbestos products. During discovery, plaintiff filed a request that Celotex produce two specific documents, titled "Celotex Insulation Products" and "Philip Carey's History of Asbestos Products." In response, Celotex said the documents were

prepared by in-house counsel for Celotex. These documents were provided to employees of Celotex, to assist in the defense of Celotex in asbestos-related litigation. Therefore, these documents are privileged pursuant to the attorney-client privilege and work product set out in TEX. R. CIV. EVID. 166b(3)(a).

Attached to its response, Celotex filed an affidavit of its attorney:

The [two documents] were prepared by an attorney representing Celotex, utilizing information obtained from retired employees of Celotex, in order to assist in the defense of Celotex in asbestos-related litigation. These documents were prepared solely for the use of Celotex's attorneys in this type of litigation and are therefore protected by the attorney-client privilege as well as the attorney work product.

Plaintiff filed a motion to compel production on the grounds that Celotex's answer to the request for production was inconsistent with its answers to interrogatories. Celotex then filed a motion for protection, again stating that its attorney prepared the documents to aid in the defense of the asbestos-related litigation.

Judge Caldwell appointed a master to review plaintiff's discovery request and Celotex's claims of privilege. The master filed a proposed order with a memorandum, stating the reasons for her recommendations. Judge Caldwell adopted the master's report and signed the order she proposed. The court's order contained the following relevant findings:

1. The facts in the documents are not privileged; and
2. if privileged, Celotex waived the privilege through obscure and misleading discovery responses which effected a fraud upon plaintiff and the court.

Celotex filed this application for leave to file a mandamus, asserting that the attorney work product exemption and the attorney-client privilege protect the two documents from discovery.

I. Mandamus review of discovery orders.

The trial court has great latitude to order or deny discovery. Ginsberg v. Fifth Court of Appeals, 686 S.W.2d 105, 108 (Tex. 1985). We will not set aside a trial court's discovery order unless it is clear the trial court abused its discretion. Id.; Victoria Lloyds Ins. Co. v. Gayle, 717 S.W.2d 166, 167 (Tex.App.--Houston [1st Dist.] 1986, orig. proceeding). A trial court abuses its discretion when it reaches a decision that is so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law. Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex.1985); Boring & Tunneling Co. v. Salazar, No. 01-89-00868-CV (Tex.App.--Houston [1st Dist.], Nov. 30, 1989, orig. proceeding)(not yet reported). The party who attacks the trial court's discretionary ruling must show that the facts and the law do not permit the trial court to make the decision it made. Boring & Tunneling Co., No. 01-89-00868-CV, slip op. at 3. We will not issue a mandamus to direct the trial court in its discretionary rulings. Johnson, 700 S.W.2d at 917.

The courts will recognize only those privileges that are in the Texas Constitution, statutes, rules of evidence, or other rules prescribed by the supreme court. TEX.R.CIV.EVID. 501. Article V of the Texas Rules of Civil Evidence lists many of those privileges. The Rules of Civil Procedure list certain privileged documents that are exempt from discovery. TEX.R.CIV.P. 166b(3).

The party who wants to limit discovery by claiming a privilege must allege and prove the privilege applies to the document the party wants to protect. Jordan v. Fourth Court of Appeals, 701 S.W.2d 644, 648-49 (Tex. 1985); Boring &

Tunneling Co., No. 01-89-00868-CV, slip op. at 4.

We must determine whether Celotex has proved that it was entitled to the privileges it claims.

II. Attorney-client privilege.

Celotex first claims the documents are immune from discovery under the attorney-client privilege. TEX.R.CIV.EVID. 503. In order for Celotex to successfully claim that the documents are protected by the attorney-client privilege, Celotex must allege and prove: (1) the documents are confidential communications, (2) the communications were between an attorney and a Celotex representative, (3) the communications were made to help provide legal services to Celotex. See TEX.R.CIV.EVID. 503(a)(2) & (b). Not all communications between a client and its attorney are privileged. Boring & Tunneling Co., No. 01-89-00868-CV, slip op. at 9.

A. Confidential communications.

Celotex made no assertion and presented no evidence that the two documents are confidential communications. The affidavit of Celotex's attorney does not assert that the documents are confidential. Without proof that the documents are confidential, Celotex cannot assert the attorney-client privilege. See Giffin v. Smith, 688 S.W.2d 112, 114 (Tex.1985).

B. Communications between client and attorney.

Only communications between a corporate client's "representative" and the corporation's attorney are protected by the attorney-client privilege. A "representative" of a client is "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." Tex. R. Civ. Evid. 503(a)(2). When a corporation asserts the attorney-client privilege to prevent discovery of a communication between its attorney and an employee, the

corporation must prove that, when the communication was made, the employee had authority to obtain legal services on behalf of the corporation, "or to act on the advice rendered pursuant thereto, on behalf of the client." Department of Mental Health v. Davis, 775 S.W.2d 467, 473 (Tex.App.--Austin 1989, orig. proceeding); Tex.R.Civ.Evid. 503(a)(2).

According to the affidavit, an in-house attorney for Celotex prepared the documents using information from "retired employees" and various corporate documents. There are no allegations or proof that the retired employees were representatives of Celotex, seeking professional legal services on its behalf.

C. Communications for legal services.

The purpose of the attorney-client privilege is to promote unrestrained communication between an attorney and client in legal matters, without fear that the confidential communications will be disclosed by the attorney in any legal proceeding. West v. Solito, 563 S.W.2d 240, 245 (Tex. 1978); see also Boring & Tunneling Co., No. 01-89-00868-CV, slip op. at 9. The privilege applies beyond litigation in one specific suit. Maryland Am. Gen. Ins. Co. v. Blackmon, 639 S.W.2d 455, 458 (Tex. 1982).

Here, Celotex has made the barest of claims that the communications between its in-house counsel and retired employees were made for the purpose of rendering legal services. Because Celotex did not prove that the communications were confidential and were made by and between its agents, we find that Celotex did not allege or prove that the two documents are protected by the attorney-client privilege.

III. Work product.

Celotex next claims immunity from discovery under the attorney work product privilege set out in TEX. R. CIV. EVID. 166(3(b)). The focus of Celotex's argument is that its employees prepared the two documents in anticipation of

litigation. Celotex seems to be invoking the party communications privilege, instead of the work product privilege under 166(b)(a).

Rule 166b(3), TEX.R.CIV.P., provides

Exemptions. The following matters are protected from disclosure by privilege:

a. *Work product.* The work product of an attorney, subject to the exceptions of Texas Rule of Civil Evidence 503(d) which shall govern as to work product as well as to attorney-client privilege.

....

d. *Party Communications.* . . . when made subsequent to the occurrence or transaction upon which the suit is based, and in anticipation of the prosecution or defense of the claims made a part of the pending litigation.

Rule 166b(3)(d) contains two requirements: (1) the document must have been prepared after the transaction upon which the suit is based; and (2) it must have been prepared in anticipation of the prosecution or defense of the claims made a part of the pending litigation.¹

Celotex made no assertion and presented no evidence that the two documents were prepared in anticipation of the underlying litigation. Celotex does not dispute that it compiled "A History of Philip Carey Asbestos Products" in 1978 and

¹ There is much confusion about the attorney-client privilege under TEX.R.CIV.EVID. 503 and the attorney work product exemption under TEX.R.CIV.P. 166(3)(a). Most cases seem to treat the attorney work product exemption having the same requirements as TEX.R.CIV.P. 166(3)(d). We can find no explanation for reading the requirements of TEX.R.CIV.P. 166(3)(d) into a claim for exemption under TEX.R.CIV.P. 166(3)(a). For that reason, we consider Celotex's claim of exemption as made under TEX.R.CIV.P. 166(3)(a).

The very nature of mandamus relief, which requires expedited consideration, often precludes serious analysis of seeming inconsistencies in case law.

revised it in 1980 and 1984; that it created "Celotex Insulation Products" sometime before 1984, and revised it in 1984; and that plaintiff filed this lawsuit in 1988.

Celotex argues that it compiled the documents to aid its defense in "asbestos related litigation." It does not contend that it developed the documents for a defense in plaintiff's suit. According to Celotex, plaintiff's third amended petition admits that Celotex had reason to believe as early as 1973 that many allegations and lawsuits would be brought against it.

The Texas Supreme Court has developed a two-prong test for determining whether there is good cause to believe a suit will be filed. Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 40-41 (Tex. 1989); Boring & Tunneling Co., slip op. at 4. First, the court must make an objective examination of the facts surrounding the investigation to determine if litigation was imminent. Flores v. Fourth Court of Appeals, 777 S.W.2d at 40-41. Second, the court must examine the subjective intent of the party opposing discovery to see if it had a good faith belief that litigation would ensue. Flores, 777 S.W.2d at 41; Boring & Tunneling Co., 01-89-00868-CV, slip op. at 4-5.

1. The objective test.

Under the first prong, we examine the facts surrounding the investigation to determine if litigation was imminent. The affidavit of Celotex's attorney, the only evidence of the attorney-client privilege, tells us nothing about the preparation of the two documents. For example, we cannot tell from the attorney's affidavit if Celotex had received a demand letter from plaintiff before it prepared the documents. See, e.g., Boring & Tunneling Co., No. 01-89-00868-CV, slip op. at 5; Foster v. Heard, 757 S.W.2d 464 (Tex.App.--Houston [1st Dist.] 1988, orig. proceeding).

2. The subjective test.

Under the second prong, we examine Celotex's subjective intent to see if it had a good faith belief that litigation would ensue. Again, we have no allegations or proof that Celotex had reason to believe litigation would ensue.

Celotex did not meet its burden to prove the two documents were prepared after the transaction upon which plaintiff filed suit, or that they were prepared in anticipation of the defense of the plaintiff's claims. See Victoria Lloyds Ins. Co. v. Gayle, 717 S.W.2d 166, 167 (Tex.App.--Houston [1st Dist.] 1986, orig. proceeding).

IV. Abuse of the discovery process.

The trial court made a finding that, even if the documents were privileged, Celotex waived the privilege through obscure and misleading discovery responses. The trial court held that the misleading answers to discovery were a fraud upon plaintiff and the court.

We have no authority, in a mandamus proceeding, to make fact findings. Jampole v. Touchy, 673 S.W.2d 569, 575 (Tex. 1984); West, 563 S.W.2d at 245. If the parties presented conflicting evidence on the issue of misleading and inconsistent answers to discovery, we must deem the decision of the trial court conclusive. Boring & Tunneling Co. v. Salazar, No. 01-89-00868-CV, slip op. at 10; Cameron County v. Hinojosa, 760 S.W.2d 742 (Tex.App.--Corpus Christi 1988, orig. proceeding).

The trial court's finding that Celotex waived any privilege through obscure and misleading discovery responses, alone, will justify our refusal to grant leave to file this application for mandamus.

Accordingly, we overrule the motion for leave to file the petition for writ of mandamus.

/s/ Michol O'Connor

Michol O'Connor

Justice

Justices Bass and Hughes also participating.

Do not publish. Tex. R. App. P. 90. Judgment rendered and opinion delivered 3-29-90.

True Copy Attest:

Kathryn Cox

Kathryn Cox
Clerk of Court

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(202) 466-6900

March 29, 1990

Ms. Carolyn Johnson
The Johnson Law Firm
5000 Caroline
Houston, Texas 77004

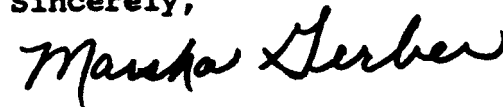
Re: No. 01-90-0219-CV; Celotex Corporation v. The Honorable
Neil Caldwell; In the Court of Appeals for the First
Supreme Judicial District of Texas at Houston, Texas

Dear Ms. Johnson:

In confirmation of our telephone conversation, pursuant to the Court's Discovery Order, Celotex will have a reasonable time, at a minimum the fifteen day time period provided for filing a Motion for Rehearing before the Court of Appeals, in which to file its Motion for Leave to File Petition for Writ of Mandamus and its Petition for Writ of Mandamus before the Texas Supreme Court. You have told me that during this time period and until all appeals are exhausted before the Supreme Court, the necessity for producing documents in compliance with the Court's Discovery Order is stayed. As you know, the First Court of Appeals denied Celotex's Motion for Leave to File its Petition for Writ of Mandamus late yesterday afternoon.

Thank you for your kind attention to these matters.

Sincerely,



Marsha Z. Gerber

MZGE/bd
Johnson.ltr
cc: The Honorable Neil Caldwell
District Judge
23rd Judicial District Court
Brazoria County Courthouse
400 North Velasco
Angleton, Texas 77515

All Counsel of Record

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

April 25, 1990

Ms. Elizabeth M. Thompson
Butler & Binion
1600 First Interstate Bank Plaza
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Houston TX 77002

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Dallas TX 75201

RE: Case No. C-9734
STYLE: CELOTEX CORPORATION
v. THE HONORABLE JOHN CALDWELL, JR.

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus, as supplemented, in the above styled case.

Respectfully yours,

John T. Adams, Clerk

By Blanca E. Moir
Deputy

cc.

Hon. Neil Caldwell
Judge, 23rd District Court
Matagorda County Courthouse
400 North Volasco
Angleton TX 77515



The Supreme Court of Texas

P.O. BOX 12248
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