SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SAN FRANCISCO

BROWN & WILLIAMSON TOBACCO CORPORATION, A DELAWARE CORPORATION,
Plaintiff,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, A PUBLIC ENTITY, AND DOES 1 THROUGH 10
Defendants.

Case No. 967298

May 25, 1995

Honorable Stuart R. Pollak

Well, once again, I really do want to thank you, comment on the superb lawyering, and the paperwork and the argument.

It is, at bottom, a fascinating question, I think, in terms of the issues that are presented. And it is really helpful to have the various positions presented as well as they have been.

Let me tell you the conclusions to which I come, and briefly, hopefully, explain my thinking.

First of all, it seems to me important to emphasize the various things that are not involved in this case, or in this application. This is not an action brought against Mr. Williams, the person who walked away with, stole, whatever word you want to use, without authority removed these documents. And I think it is very important to keep in mind that the court is not being asked to, nor is it passing upon, in any way, the propriety of his conduct, or whatever the consequences of his conduct may be, as far as he's concerned. So any ruling the court may make here is certainly not approving of the course of action which he took.

Secondly, we are not dealing with the question of the admissibility of any of these documents in to evidence during the course of a particular judicial proceeding. Any question that particular documents should not be received in evidence because they are privileged, because the privilege has not been waived, are for determination in another context, in another time. It may well be that the defendant is entitled to exclude some or all of these documents from evidence on that basis. We're not considering that question either; nor are we considering any question about the protectibility of trade secret or confidential business information of the type which has been provided protection in a variety of contexts.

Brown & Williamson make the argument that the attorney-client privilege somehow is entitled to greater protection than those trade secrets. I'm not sure I agree with that prioritization. I mean, we can agree that this is different. We can agree that the cases which Brown & Williamson relies upon, where protection was in fact provided, involved information of that commercial nature, where somebody was trying to put that information to their own commercial advantage.

What we're dealing with here is something different. And I think, again, whether you look at the discussion at the end of that FMC opinion, the indication there, and think it is one to which I would subscribe, is that that type of information would be entitled to greater protection than what we're discussing here.

But, in any event, it is certainly different. And then it's also, I think, worth observing -- we'll talk about a little more exactly what weight this should receive and how this fits into the whole analysis. But it is worth observing that at this point.

It is far from clear to what extent either the attorney-client or the work product privilege applies to the documents that are under discussion. Certainly, it is true that, looking at the description of the documents, on the face of it, there would appear to be, facially, a number of documents that would come within the privilege. It would appear that there are some which probably do not. It may be that there is a work product privilege that could properly be asserted with respect to some of them.

But as we sit here at this time, the number of documents properly subject to the privilege remains an open question. And, indeed, even if some of these documents come within the basic contours of the attorney-client privilege, there is also a question, as yet unresolved, as to whether any exceptions to that privilege might apply.

The arguments made in the papers that the exception for the communications that are made for the purpose of committing or planning a fraud do not come within the privilege, a contention has been made that that exception would apply here. I'm not certainly

ruling on whether that exception would or would not apply. The argument has been made.

The only point I'm making, initially, is that that, too, has not been demonstrated at this point, and I do think there is some merit to Mr. Patti's argument that the burden in that respect is on the moving party. And since the moving party is aware of all of the documents that are in issue, it presumably was in a position to make such a showing.

But I would not want to rest a ruling on that basis. I think, for purposes of analyzing the issue that is here this afternoon, we should assume that at least some of these documents may come within the scope of a privilege, and we should analyze the various questions presented on that assumption.

If, going forward, it were determined that this form of relief should be granted, some form of relief should be granted, obviously, before a final determination with respect to the University's obligation to return the documents was made, I think it would be necessary to look at documents one at a time, and make the determination as to whether or not there was in fact a legitimate basis for an assertion of any such privilege. But recognizing the question that is there, in that regard, I think we can proceed forward on the assumption that one or more such documents would at least be entitled to that protection.

I think the second thing that is important to recognize is that the plaintiff's argument for the return of all copies of these documents, as distinguished from simply seeking a set of the documents for itself, but the request to get every document back, and to deny the University the right to retain a set of these documents in its possession, and make use of it as it sees fit, is grounded on the contention which Brown & Williamson makes that the retention of privileged information constitutes a conversion, and that there is such a property interest in attorney-client information, or work product information, that it supports a conversion.

And on that premise, Brown & Williamson asks for an order, this so-called writ of possession to return the documents and all copies.

I don't believe that the law supports that theory. I don't believe that there really is any authority which goes so far as to say that the retention of a copy of a privileged document constitutes a conversion of the information belonging to the holder of the privilege.

And I think really the case which is most on point is the case that we spent a lot of time talking about during the argument. That is the FMC corporation case.

True, the information there was not attorney-client information. It was confidential business information, which I think normally has been entitled to greater protection. But, in any event, it was information which, whether it is entitled to more protection or less protection, clearly it was entitled to protection.

Yet the court, applying California law, held that, although the retention of the only copies of that information might constitute a conversion, so long as the originals were returned, the retention of a copy did not constitute a conversion. And ABC, or its affiliate, which was in possession of stolen information, therefore was not subject to an order to return all copies of the information, or not to disseminate the information further.

As I say, I think that case is the closest in point to any of the many, many cases that have been cited on that issue. All of the other cases that have been cited, I think, can be distinguished in one way or the other.

I'm not going to spend time going through them, and distinguishing them' but I think the fact of the matter is that what occurred here simply is not a conversion.

Which reminds me, one other think I want to emphasize. When we talk about what is not involved in this case, I think it is also important to emphasize that what is not involved is a situation where there is any contention or evidence that the University now holding the information participated in any way in the theft of the information.

If the University had in fact been a wrongdoer in obtaining the information, then we would have a very different situation. But here there is no suggestion that the University has done anything wrong.

The only contention arises with respect to whether or not their continued retention of the information, not having participated in obtaining it initially, whether that in itself is tortious, and would support a claim for conversion. And, as I say, I simply don't think the law supports that contention, nor do I think it is likely to do so.

The problem, in a sense, with that result, and it is sort of the argument that Ms. Caulfield is pushing with the court, very understandably, it seems to me one would be uncomfortable with a conclusion that the

court simply had no authority, under any circumstances, to prohibit a party from disseminating privileged information, even if that party was not responsible for obtaining it improperly.

The sort of hypotheticals that were being suggested during the argument, suppose somebody breaks into a psychiatrist's office or a lawyer's office, and walks off with confidential information, which gets turned over to the University or some other innocent party; is the court powerless to prohibit the dissemination of that information?

And it seems to me we would be uncomfortable if the answer to that question were this simply an imposition for the court to deal with that situation in an appropriate case. But I think where that leads us is not to accept the argument that Brown & Williamson is making, that somehow this constitutes a conversion, and can be dealt with by a writ of possession.

But I think the answer to the conundrum, if you will, lies in the equitable authority of the court. I think, no matter how plaintiff may try to cast this, it really has no choice but to come back to an application for equitable relief, whether it is an appointment of a receiver, to take hold of the information, whether it is a preliminary injunction or, ultimately, a permanent injunction.

It is basically a request for equitable relief to enjoin the dissemination of this information. And I would think that in an appropriate case the court would have authority to grant relief of that nature.

But I think that inevitably what is presented is a weighing process. And in a situation where there is no great public interest in the information, and again, going back to the hypothetical that was suggested, some individuals psychiatric record, legal records, which don't have much of an impact on anybody other than the particular person, there might be a pretty clear weighing of the balance, and the court might be inclined to grant such relief in a case of that nature.

I think what we've got to do is look at those type of considerations in this particular context, and decide whether, in light of those considerations, equitable relief is or is not appropriate.

It seems to me that there are a number of pretty strong considerations which weigh against the granting of such relief in this particular situation.

First of all, there are the first amendment concerns to which we were alluded, however is was cast. But the nature of what is being requested would in fact impinge upon public discussion, public study of this information, which has a bearing on all kinds of issues of public health, public law, documents which may be taken to suggest the advisability of legislation in all kinds of areas.

So, there is, it seems to me, a very strong public interest in permitting this particular information, judging from what has been shown in the papers, as to what it concerns, permitting this information to remain available for use by the University or by others who may obtain it from the University.

On the other hand, at this point in time, particularly, the interests or the strength of the interest of the defendant, it seems to me, have to be questioned. And it seems to me, at this point, they are particularly questionable.

First of all, at most their interest at this point, I think, is in avoiding potential liability of one sort or another. And I don't mean to say that is insignificant. But, in and of itself, when compared with the other competing interest, it may not be as great.

But what I'm really referring to is the fact that much, if not all of this information, has already gotten out. In a sense, it is now too late, whatever the situation might have been on day one, when somebody walked off with these documents.

It may be that the New York Times and other publications have not yet published every page of these documents. But it is clear from the record that all of these documents are in the hands of a number of news media.

One has to assume that those documents which have been reprinted in the papers must represent somebody's culling of the documents, you know, for the juiciest pieces of information.

What additionally remains from the documents that haven't yet been actually published publicly seems to me doubtful, although that is, to be honest, somewhat of a speculative observation. But what is not speculative is that all of the documents are out there, whether they have been published or not. And any order that the court might enter seems to me ultimately would be of very questionable benefit to the plaintiff, because there are so many others that are already out, and in circulation.

And an additional consideration, it seems to me as important, in trying to engage in this equitable balancing, is where we would go, were the court to grant the relief today that is being requested? The next step, as Brown & Williamson has indicated, and we've

actually bifurcated issues, so we could take things one at a time, but if Brown & Williamson were to prevail, this step, the next step would be to attempt to pursue and trace all of the copies of the documents that have gone from the university elsewhere, and have already been presented with applications to depose faculty members, depose other people, to find out which documents the have, when they get them, who they give them to. And, really, the specter of putting that process in motion, I thin, is a quite disturbing one. The word that comes to mind is "witch hunts." I don't know that that is fair.

I don't mean to use hyperbole. But it would be setting in process some steps that I think would be very, very troublesome, and certainly would present a good many additional first amendment concerns, intruding into the research of others, and what others have done, looked at the information, who they have them to, and tracing the whole thing through. A very disturbing prospect.

And I suppose another way of looking at that is that it just tends to emphasize the fact that it is simply too late, at this point. The genie is out of the bottle. These documents are out.

And the entry of an order by this court directing the university to return every copy, not to disseminate anything that they have obtained from these documents to others, would do nothing but create additional problems.

Just one more thing in that regard. The point that Mr. Patti made, I think, is a good one.

Suppose at that time the University did send back all of these documents to Brown & Williamson, and then were to obtain another set from the New York Times. Then what? They are under an order to pass a set along? And if not, what is the point of the whole exercise? Of course, the New York Times may or may not decide to give them to the University. But they might. They would have the ability to. We know they're out there. Again, just another way, it seems to me, of underscoring the fact that, whatever the damage is, it has been done in terms of letting the information out into the public. It hasn't been done in terms of using the information during the course of legal proceedings against Brown & Williamson.

And I mentioned that at the beginning, but it seems to me worth emphasizing, because that is not insignificant.

And one of the real purposes behind the attorney-client privilege is that we don't discourage people from dealing with their lawyers candidly, lest that information come back in litigation, and be used against them, and pose new liability, or whatever. And that is not the extent of it.

I don't mean to say that there isn't more to the privilege than that. But that is a very basic part of the privilege. And that possibility can still be protected by the exclusion of privileged documents during the course of legal proceedings, if the court finds that the privilege does exist and has not been waived.

And, indeed, at some point or other in Brown & Williamson's papers, I believe there was an indication that one of the things they were concerned about was that other courts not construe their failure to seek the return of these documents as itself constituting a waiver of the privilege.

And to whatever extent that was an objective of their application, I suppose it has been achieved. Certainly, they have made their request. Certainly, they have done what they could in these proceedings to obtain the return. And so I would suppose that anybody's job in trying to show that they voluntarily acquiesced in the disclosure, they're going to have a hard time with that.

But, in any event, it does seem to me that, although the court, I assume, does have the authority to issue an injunction here, when you waive the various considerations, despite the importance of the attorney-client privilege, despite the fact that the court certainly does not want to be understood as condoning the improper removal or disclosure or theft of confidential documents, nonetheless, what has happened has happened. And, respectively, when you weigh the various factors that I've mentioned in the balance, I don't think that issuing a preliminary injunction, or any other type of equitable relief, would be appropriate.

And that, as best I can explain it in a few minutes, is my thinking, and the basis upon which I'm going to deny the application.

I don't know whether I would receive a request or not -- I very possibly would -- but, in any event, recognizing the difficulty of these issues, I am going to stay the effectiveness of my order for 20 days, which will give Brown & Williamson the opportunity to seek relief from the court of appeal, if it should wish to do so.

And that will mean that the temporary restraining order, which was entered previously, will remain in effect for that time. I do think there should be an opportunity for the court of appeal to look at this, if Brown & Williamson wishes to seek relief at that level.

The other thing that is on the calendar here, which I don't think we should spend any time arguing, but I think I should dispose of it this afternoon, is the dismissal or, rather, the motion to strike, which the University brought under section 425.16, also an interesting motion.

But I am not inclined to grant that motion. I don't believe that this suit can properly be characterized as one that is brought against a person -- I'm reading from the statute -- "against the person, arising from any act of that person in furtherance of the person's right of petition or free speech."

An interesting issue, and I'm sure both sides could argue it, they have argued it in the papers; but my conclusion is that this action should not be classified as coming within that statutory provision.

So, I'm going to deny the motion to strike. I think that covers everything, does it not?

Thank you.

TO JKW

Case No. A070359

COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

Brown & Williamson Tobacco Corporation,
Plaintiff/Appellant

v.

Regents of the University of California,
Defendants/Respondents.

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JOINT STIPULATION AND REQUEST FOR

DISMISSAL OF APPEAL

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Case No. A070359

COURT OF APPEAL

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JOINT STIPULATION AND REQUEST FOR DISMISSAL OF APPEAL

Pursuant to California Rules of Court, Rule 19(b), plaintiff/appellant, Brown & Williamson Tobacco Corporation, and defendants/respondents, Regents of the University of California, hereby stipulate to the dismissal of the captioned appeal and

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request that this Court enter an order dismissing the appeal with prejudice, all parties to bear their own costs. A proposed order is attached.

Dated: 11/9/95, 1995.

SEDGWICK, DETERT, MORAN & ARNOLD

By _____
Kevin J. Dunne
Attorneys for
Plaintiff/Appellant
Brown & Williamson Tobacco
Corporation

Dated: 11/9/95, 1995.

UNIVERSITY OF CALIFORNIA, OFFICE OF THE GENERAL COUNSEL

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Case No. A070359

COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FILED

JAN - 5 1996

Court of Appeal - First App. Dist.
HON D. BARROW

By _____ DEPUTY

Brown & Williamson Tobacco Corporation,
Plaintiff/Appellant

v.

Regents of the University of California,
Defendants/Respondents.

[redacted] ORDER

Upon consideration of the Stipulation and Request, and for good cause shown, it is hereby

ORDERED, that the Remittitur entered in this case on November 28, 1995 be recalled.

ORDERED, that the Dismissal of Appeal entered in this case on November 28, 1995 be set aside and a new dismissal as follows be entered.

ORDERED, that this appeal is dismissed with prejudice, with each party to bear its own costs; and it is

FURTHER ORDERED, that nothing in this Order shall be construed to constitute a waiver by Brown & Williamson Tobacco Corporation of its attorney-client privilege or any other privileges that may attach to the documents, which are the

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subject of this lawsuit.

SO ORDERED.

Dated: JAN - 5 1996, 1995.

HANING, J

California Court of Appeal,
First Appellate District
Division Five

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2 of 4 DOCUMENTS

Brown & Williamson Tobacco Corporation, Petitioner v. Regents of the University of California, Respondent

S047281

SUPREME COURT OF CALIFORNIA

1995 Cal. LEXIS 4289

June 29, 1995, Decided

PRIOR HISTORY: [*1] Appeal from First Appellate District, Division 5, No. A070301

Application for stay and petition for review DENIED.

OPINION: