UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Paul Stepnes, *et al*,

Plaintiffs,

v.

Peter Ritschel, *et al*,

Defendants.

Civil Case No. 08-cv-5296 (ADM/JJK)

PLAINTIFFS' APPEAL OF A RULING OF THE MAGISTRATE JUDGE REGARDING DISQUALIFICATION OF COUNSEL: THE REAL FINAL

INTRODUCTION

Paul Stepnes has sued CBS and Esme Murphy for defamation. In late-summer 2009, Plaintiffs learned that Defendant Peter Ritschel had violated the Order of the Honorable Charles A. Porter, Jr. by sending Paul Stepnes' computer hard-drives for forensic analysis at the Minneapolis Police Crime Lab. That "Forensic Report" was produced into discovery in this case by the City Attorney's Office (MCAO) – before everyone realized that it had been done in violation of the state court order. This has caused numerous problems and challenges in the case, as the Court and parties have attempted to pick up the shards of glass spread everywhere, and yet be able to move the case forward. Plaintiffs have dubbed the collective collateral proceedings as the "Hard-Drive" issue.

Plaintiffs moved to disqualify counsel for the CBS-defendants ("CBS"), because what they learned from the hard-drives could never be erased from their

minds, and Plaintiffs were (and are) concerned that that knowledge would give those defendants an advantage in discovery and at trial. See *United States v. Agosto*, 675 F.2d 965, 969 (8th Cir. 1982), a party has an "interest in a trial free from even the *risk* that confidential information has been unfairly used against it." (Emphasis in original; cited by Judge Frank in *Arnold v. Cargill Incorporated*, 01-CV-2086 (DWF/AJB), p. 10-11).

Plaintiffs respect the Magistrate Judge's ruling on this matter, and respect his running of the case and his Courtroom. This has been a challenging case, and Plaintiffs want to make sure to communicate that the Magistrate Judge has been deftly handling numerous competing interests.

However, Plaintiffs do not know what will occur in future discovery (such as the deposition of Paul Stepnes) or trial, and wish to preserve this issue for appeal.

OBJECTIONS

These Objections are filed pursuant to Federal Rules of Civil Procedure 72(a), and Local Rule 72.2(a). On March 1, 2010, the Magistrate Judge issued the Order at Exh. A. On March 5, 2010, the Magistrate Judge modified the March 1 Order at Exh. B. The two orders are termed "The Order" for purposes of these Objections. Plaintiffs were granted the "other non-dispositive relief" requested;[1] and CBS-defendants have informed the Court that they have complied. That portion is not

[1] Except for the Special Master. But since CBS has already destroyed data, this issue is moot as a practical matter.

appealable. Plaintiffs are likewise not appealing the March 31 date to supplement discovery.

Plaintiffs appeal the denial of the motion to disqualify CBS counsel (and attendant motion to revoke the *pro hac vice* admissions), and therefore the implicit denial of Plaintiffs' request for attorney fees.

This Court should also be aware that Plaintiffs made an authorized *in camera* submission the Magistrate Judge. That is a confidential set of documents that Plaintiffs cannot attach to this filing. Plaintiffs will assist the transmittal of those documents.

PROCEDURAL & FACTUAL RECORD

Several motions and hearings led up to Plaintiffs' motion to disqualify counsel for CBS-defendants.

- Plaintiffs first approached the Court for guidance in September 2009, hearing on 9/24/09. [Memorandum at Docket 30; Affidavits at Docket 31, 32, 34, 35, 41, 42].
- Plaintiffs filed a motion for temporary restraining order in state court (before the Honorable Charles A. Porter, Jr.) and moved to stay these proceedings. [Memorandum at Docket 77, Affidavit at Docket 78]. (That motion was denied but not appealed.)

- Plaintiffs noticed the depositions of CBS attorney Walker (and others), and CBS-defendants' motion for protective order was granted. [Order at Docket 138].
- Plaintiffs moved to expand their expert time deadline and for other relief re Hard-Drives. [Memorandum at Docket 110, Affidavit at Docket 109].

Those filings were incorporated by reference into Plaintiffs' 1/26/10 filings regarding disqualification.

OBJECTIONS TO ORDER

Plaintiffs object to the following factual findings, or lack thereof:

1. It appears undisputed that the "converted email messages" referenced at Order **p. 5** contained numerous attorney-client privileged communications. (See Plaintiffs' Memo re Disqualification at Docket 155, p. 21 *et. seq*.).[2] It is acknowledged by the Order p. 5 that an attorney for CBS viewed those emails, and from those emails selected some to put into the "key documents" file. Yet the Order does not consider the harm to Plaintiffs from opposing counsel reviewing (and perhaps discussing) numerous emails between Paul Stepnes and his attorneys. The Order limited its analysis to the "key documents" file.
2. The Order acknowledges that a CBS attorney reviewed the Hard-Drives, but does not state that this was for a period of at least 6 hours. In 6 hours time an

[2] This document and supporting Declaration of Jill Clark were filed under seal. That seal had not been lifted. Plaintiffs have avoided discussing the detailed content of those documents in this filing – which, given the Magistrate Judge's order being public, they are filing in public.

attorney can learn an awful lot about another side's attorney-client privileged communications, *regardless of whether the communications are put into a separate file or printed out*. This was not analyzed in the Order.

3. The Order at p. 5 does include the fact that a CBS attorney copied portions of the Hard-Drives file onto a laptop and shared it between the 2 CBS firms. However, the Order does not analyze that the CBS attorneys were provided another full disk of the entire Hard-Drives content by an Assistant City Attorney, Sara Lathrop.[3]
4. The Order does not discuss that Plaintiffs noticed the deposition of Ms. Walker and other CBS agents, but were denied that opportunity. Appropriate cross examination to Mr. Sullivan's statement at Paragraph 6 of Docket 49 (cited at Order p. 6) would include: i) whether he has personal knowledge of the assertion regarding his firm (and whether he interviewed everyone in the firm or just some); ii) whether anyone reviewed what Ms. Lathrop sent (notwithstanding what Ms. Walker sent), and whether attorneys in the firm *discussed* the Hard-Drive content, even if they did not themselves see it. In the Eighth Circuit, there is an irrebuttable presumption that members of the same firm have discussed attorney-client privileged communications.[4]

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[3] Plaintiffs are included names here for the sake of clarity, only.

[4] In the Eighth Circuit, there is an irrebuttable presumption that the privileged confidences are shared by all members of the firm. *See, e.g., State of Arkansas v. Dean Foods Products Co., Inc.,* 605 F.2d 380 (8th Cir.1979), overruled on other grounds, *In re Multi-Piece Rim Prods. Liab. Litig*., 612 F.2d 377.

5. The Order does not consider that no affidavits were ever submitted by counsel of Record: Chad Bowman and John Borger, both attorneys for CBS. No affidavits discussed (and depositions were unable to get at) whether inside counsel for CBS learned any of the contents of the Hard-Drives, or whether legal assistants reviewed or discussed data.
6. The Order does not consider the undisputed fact that *none* of the CBS attorneys *ever* notified counsel for Paul Stepnes, that emails from attorneys were being viewed, reviewed, copied, etc.
7. The Order does not consider that Plaintiff counsel requested that CBS attorneys *return to her* all of the versions of the Hard-Drives that they had, and proposed that a neutral magistrate/mediator hold one-each copy in case this was needed for future reference. (See Federal Rule of Civil Procedure 26(b)(5)(B), and December 8, 2009 Tr. at p. 21-22 (Attorney Clark stating her idea). And that CBS counsel did not return anything to Plaintiff.
8. The Order does not consider that the Magistrate Judge, himself, told CBS counsel that it was his idea that CBS return all data to Attorney Clark, and give a copy to a neutral magistrate. (December 8, 2009 Tr. p. 43-44). And CBS counsel still did not return the data.
9. Indeed, the Order attributes the idea to return the data and provide a copy to a neutral magistrate to CBS – which is not accurate. CBS wanted to retain *the entire Hard-Drive data, and only allow Plaintiffs to "claw back" what was*

proven (over their arguments to the contrary) to be attorney-client privileged. It is true that the Magistrate Judge was able to get an agreement from CBS counsel on February 9, 2010 that it would be all right to return the data. (February 9, 2010, Tr. p. ____).[5] It is perfectly acceptable for Plaintiffs to contend that the vehemence with which CBS counsel held onto the Hard-Drives and sought to keep them, that this was evidence that CBS defendants really wanted to keep them, and that there must be some reason why.

10. The process set out by the Magistrate Judge was to handle privileged emails first, and then to get to the more routine discovery matters concerning the Hard-Drives. Stepnes continued to contend even non-privilege issues would prejudice Stepnes at trial. (December 8 2009 Tr. p. 21-24, 34-35; February 9, 2010 Tr. p. ____). Imagine if Plaintiffs were allowed to peruse whatever they wanted in Defendant Esme Murphy's computer hard-drive, locating documents *they never requested*. That is this case. CBS attorneys were given the opportunity to view documents that they never requested in discovery, *but now know about from the Hard-Drives*. This was not dealt with in this process, because this first cut was limited to the attorney-client privilege issue.

11. Plaintiffs tried to address the "dinner party emails" (Docket 155, p. 17), as emails *not* requested in discovery, and *not* relevant to this matter – yet in the

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5 Transcript ordered but not yet received.

possession of CBS counsel literally for *months*, such that they could have committed them to memory by the time the data was eventually returned. These emails have already caused problems in discovery.

12. The deposition of Paul Stepnes has not yet been taken. Plaintiffs predict that this deposition will be laden with problems. Attorneys cannot wipe from their brains what they can wipe from computer servers. How will Plaintiffs *ever* know whether CBS attorneys retain knowledge from the Hard-Drives that they are utilizing in order to formulate questions for Paul Stepnes?
13. The Order does not consider that CBS counsel threatened to review data in the Hard-Drives in order to respond to Plaintiffs' motion to disqualify them.
14. The Order does not consider that during the timeframe that the CBS attorney was allowed to visit the MCAO and to *save* large amounts of computer data onto her laptop and leave with it, the MCAO was refusing to provide Stepnes' Attorney, Jill Clark, with the electronic data. (Docket 30, p. 8-9).
15. Order p. 6 held that Plaintiffs learned that Judge Porter's order had been violated when they received a letter from Sara Lathrop. Plaintiffs actually learned when they received an order *from Judge Porter*, indicating that he had never reviewed the Hard-Drives. Plaintiffs then asked Ms. Lathrop to explain, and she then wrote the letter cited in the Order. (Docket 30, p. 9).

16. The right of a party to select one's own counsel should be balanced against the right of a party to have a trial free from even the *risk* that confidential information has been unfairly used against it (see citations above).

17. The Order did not appropriately consider that this is not the normal "inadvertent disclosure" situation. Here, CBS had what it had *solely* due to the willful violation of a court order by Minneapolis police.

18. Order at p. 9 found that Plaintiffs argued that counsel for the CBS Defendants have made mispresentations to the Court. That is not quite accurate. Plaintiffs cited to an Eastern District of California case, which *did* disqualify counsel, stating, "Self-serving protestations of counsel do not help assuage the fears of … the Court that" the confidential information was revealed. *Cargill Incorporated v. Budine,* 1007 Dist. LEXIS 48405 *35 (E.D. Ca. 2007). Attorneys are wordsmiths, and masters of word-mincing.[6] Without depositions of counsel, it becomes very difficult to tell what CBS counsel meant by their statements, and whether they minced words. Proceeding merely on attorney affidavits disclosing what they affirmatively *want* to disclose, (and only on a few affidavits[7]) can indeed leave Plaintiffs with a "self-serving" record.[8]

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[6] Indeed, Plaintiffs pointed out an example of this to the Court. After CBS counsel promised that they would not review the electronic data from the Hard-Drives, reviewed a *paper* copy of just that. (See Docket 155, p. 6-7).

[7] The first affidavits (one by Mr. Sullivan [Docket 49], and one by Attorney Walker [Docket 52]), heavily relied upon in the Order, were filed before Plaintiffs even made their motion, and in response only to Plaintiffs' request for a *process* within which to raise these complex issues.

19. Plaintiffs had staff review the Hard-Drive contents, and confirmed that none of the "key documents" (which CBS reviewed) had come from the "Jill Clark" folders, and Plaintiffs took care to disclose this in their motion. (See Declaration of Thomas Evenstad, Docket 154).

20. Plaintiffs were entitled to explore statements from Attorney Walker's affidavit, including: **i)** "I opened the subfolder titled 'Mbox (email) Messages' and reviewed the first few pages to determine the nature of its contents." – leaving Plaintiffs wondering what was reviewed; **ii)** "my review took *approximately* six hours total"; and **iii)** "I do not *recall* seeing the names of any of the attorneys, other than Jill Clark, identified in Plaintiffs' memorandum." (All emphasis supplied).

21. After working extremely hard to obtain the electronic data from CBS that Attorney Walker had copied onto her laptop (which included numerous communications between counsel, and finally, two motions to the Court),[9] Plaintiffs reviewed the file details, and included screen shots with their motion. Plaintiffs had *specific, concrete, documented evidence* that caused them to doubt the "six-hour" timeframe spent by Attorney Walker, which she admitted was "approximate." (Docket 155 p. 19-21).

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[8] Plaintiffs *did* state that the Court could decide whether any counsel had made a false statement Judge Frank did make that finding in *Arnold v. Cargill*, supra.

[9] Having told the Magistrate Judge at the September 24, 2009 hearing that CBS would give Plaintiff counsel a copy of the "key document," CBS refused. Plaintiffs had to bring a motion to enforce that "promise." Docket 91.

22. The Order did not discuss the oral order of 9/24/09, that the Court did not want to hear of anyone reviewing any of the attorney-client privileged materials [in the future]. (Docket 155, p. 10). And that after that, CBS had in-firm and outside services convert electronic data and bate-stamp emails from the Hard-Drives. (Plaintiffs did *not* argue that this meant that the CBS attorneys had essentially lied to the Court; rather, Plaintiffs argued that this showed the proliferation of the attorney-client privileged data, to people and services that Plaintiffs had no idea how to identify.)

23. The Order declined to accept arguments – that Plaintiffs had not made. Order p. 9 states that Plaintiffs argued that Ms. Walker should have notified them when she went to the MCAO. Rather, Plaintiffs argued that she did *not* need to disclose that, but *should* have disclosed that she left with large electronic files. (February 9, 2010 Tr. p. ___). Note that at that point *the City was refusing to produce* ***to Plaintiff counsel***. It is true that Plaintiffs had sent a June 12, 2009 email. (Order p. 9-10). And it is true that all attorneys at that time were relying on Ms. Lathrop's representation. However, it was obvious to CBS counsel by that time that this was a massive amount of electronic data. The ethical duty to notify Plaintiff counsel when *attorney-client* emails were located, remained. (A reviewing judge can inadvertently disclose privileged data just as easily as an attorney can.)

24. Further, if an attorney is *alerted* by counsel for Stepnes that there are privileged communications contained in those Hard-Drives – why would they not inquire *of Plaintiff counsel* as to what was privileged? Why instead, would they simply go right over and review the data?

25. Plaintiffs did not contend that Ms. Walker *must* have spent several hours looking through the largest email folder. (Order p. 10). Plaintiffs "doubted" that it had been a brief review, but they were very careful to be factual. (It is, true, however, that the email in question could have been located via a key-word search (Order p. 11; although that scenario would not comport with the affidavit of that Attorney), or it could have been located another way.) Having been unable to take depositions, Plaintiffs had to argue from circumstantial evidence.

26. Plaintiffs submit that if the *Cargill* Court in California could properly view attorney affidavits as self-serving, that they could, as well. This was a motion that had to be made. Plaintiffs still don't know what will befall their case due to the wrongful disclosure of these emails.

27. Plaintiffs' respectfully disagree with the Order and contend that once *fully on notice* that the Hard-Drives contained attorney-client privileged communications, and had *not* been released by Judge Porter, CBS should not have gone back to re-review emails with Stepnes' attorney(s), cite them to the Court and discuss them in public filings. The Order did not discuss that CBS

threatened that if Plaintiff did not immediately produce a privilege logs from the "key documents" – that CBS would go ahead and use all those emails.

28. Plaintiffs admit that they caused some confusion over the dates that Attorney Walker went to the MCAO. Plaintiffs have reviewed their Docket 155 submission/Declaration of Jill Clark and wish to correct the statement at p. 16 (it is unclear where she copied this email from if she was not at the MCAO). There is a problem with the *date*, as Ms. Walker *did* state she went to the MCAO on June 2**6**. Plaintiffs did *not* contend that Ms. Walker went to the MCAO on June 2**9**. Rather, what Plaintiffs argues that they could not tell *from the computer data* what was *modified* in the electronic data on June 2**9**. You can easily *copy* a file without "modifying" it – so Plaintiffs had a legitimate question as to why modification occurred. Plaintiffs were making a record that they had had insufficient discovery to bring this motion (they needed depositions).

29. Respectfully, Plaintiffs object to a "credibility" being made from affidavits of *some* of the CBS attorneys. (Order p. 11-12, p. 13, *passim*). Further, "not recalling" every document does not cure these attorneys of the taint of the Hard-Drives. Those attorneys (who likely did talk to each other about the data) may well remember emails from the Hard-Drives when specific topics arise in discovery or trial. Indeed, in a deposition that was taken subsequent to the attorney-filings for the motion to disqualify, Attorney Walker asked a

witness who was a sender/recipient of emails in the CBS "key documents" file about what emails she and Paul Stepnes had exchanged. If CBS is allowed to use what it in the minds of its attorneys in formulating questions in discovery, then the taint is *not* cured. And will never be cured.

30. Plaintiffs respectfully disagree that CBS attorneys repeatedly asserted their willingness to expunge their copies of Stepnes's hard-drive material (Order p. 12-13). See CBS' memorandum [Docket 158], which states the opposite.

31. The Order at p. 13 found it was all right for CBS counsel to reference clearly-privileged emails (found by the Court to be privileged) because "in light of Plaintiffs' accusations [they were] attempting to demonstrate [] that they have not reviewed privileged or sequestered information." But Attorney Sullivan cited those emails to the Court on 9/10/09 and 9/24/09. That stage was simply to request a process. Plaintiffs had not moved to disqualify, or alleged that CBS had not properly sequestered documents.

32. Order p. 14 discusses whether CBS gained an advantage. But only privileged information is discussed, and then, the "converted" emails are not considered.

33. Respectfully, Plaintiffs disagree with the Order's finding that the attorney-client privileged email in the "key documents" file did not prejudice Plaintiffs.

34. Respectfully, particularly given that the very CBS Attorney who spent the most time in with the Hard-Drive data was asking questions that would have elicited information about the "dinner party emails" at a deposition, Plaintiffs

disagree with the finding at Order p. 18 that CBS having access to (and the ability to study for months) non-privileged emails did not prejudice Plaintiffs.

35. Finally, Plaintiffs respectfully disagree that Stepnes' subjective understanding that communications with Simonson (who is an attorney but not a licensed one) were not sufficient to protect those emails from CBS – particularly given how CBS came by them. (It is easy to argue privilege when you have the documents; which they would not have had absent violation of the state court order.)

CONCLUSION

For all of the stated reasons, and those discussed in their Memorandum at Docket 155, and in oral argument (transcript forthcoming), Plaintiffs seek a reversal of the holdings that: a) counsel for CBS defendants are not disqualified (or *pro hac vice* revoked); and b) attorney fees for the time and extreme effort of Plaintiffs counsel relating to these issues are not awarded.

Date: March 19, 2010

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