STATE OF MICHIGAN

COURT OF APPEALS

CHARLES ALLEN LEIBEL and GRACE PATRICIA LEIBEL,

Plaintiffs-Appellees,

and

CHARLES A. LEIBEL and JENNIFER LEIBEL,

Plaintiffs,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellant,

and

JAMES SAMUEL NAPIER and BIRDIE VIRGINIA FISHER,

Not participating.

UNPUBLISHED
December 13, 2002

No. 240971
Oakland Circuit Court
LC No. 99-016381-NI

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's opinion and order holding that defendant waived the attorney-client privilege and work-product protection in regard to the "Toth Memo." We affirm.

The facts and procedural history of this case were set forth in great detail in *Leibel v General Motors Corp*, 250 Mich App 229, 232-236; 646 NW2d 179 (2002) and need not be repeated. In the previous appeal, this Court concluded that the Toth Memo was protected by both the attorney-client privilege and the work-product doctrine and that the trial court had erred in finding otherwise. *Id*. at 238-240, 245-248. The case was remanded for the purpose of determining whether defendant had waived these protections in regard to the Toth Memo. *Id*. at 243-244, 248. After conducting an evidentiary hearing, the trial court concluded, in part, as follows:

> The record reflects that Defendant GM has acted inconsistently with its assertion of the privilege, that is, GM has failed to take reasonable precautions against inadvertent disclosure. Specifically, in four different cases, including the *Dubay* case in Michigan, the Toth Memo would have been reviewed by the McGuire, Woods law firm on two occasions, once by GM and once by local counsel, before being produced to plaintiffs' counsel without any claim of attorney/client privilege and/or work[-]product privilege. There has been repetition of the error several times over. The Court thus finds an intentional and voluntary waiver by estoppel in this case. The risk of insufficient precautions must rest with the party claiming the privilege.
>
> In conclusion, the Court finds that GM has intentionally and voluntarily waived any claims for attorney/client or work[-]product privilege with respect to the Toth Memo.

On appeal, defendant argues that the trial court erred in holding that it waived both privileges because the trial court applied the wrong legal standard with regard to determining whether defendant executed a "true waiver." See *Leibel*, *supra* at 242-243. Whether a party voluntarily disclosed a document and thereby waived the document's privileged status is a mixed question of fact and law. *Id*. at 232. "The question of what constitutes a waiver of the attorney-client privilege is a question of law that we decide de novo." *Id*. at 240. However, "[t]his Court grants more deference to a trial court's decision whether the facts of a particular case demonstrate a valid waiver of the privilege and the trial court's ultimate decision whether to grant or deny discovery." *Id*. at 240, n 13, citing *Koster v June's Trucking, Inc*, 244 Mich App 162, 166; 625 NW2d 82 (2000). "A trial court's decision to grant or deny discovery is reviewed by the Court of Appeals for abuse of discretion." *Id*.

The waiver by estoppel doctrine was set forth in *Kelly v Allegan Co Circuit Judge*, 382 Mich 425, 427; 169 NW2d 916 (1969):

> There are some circumstances, however, wherein justice requires that a person be treated *as though* he had waived a right where he has done some act inconsistent with the assertion of such right without regard to whether he knew he possessed it. This is the doctrine of estoppel. [*Sterling v Keidan*, 162 Mich App 88, 92; 412 NW2d 255 (1987), quoting *Kelly*, *supra* (Emphasis in original).]

In *Leibel*, *supra* at 240-241, this Court quoted *Franzel v Kerr Mfg Co*, 234 Mich App 600, 615-616; 600 NW2d 66 (1999), in explaining when a party waives the attorney-client privilege:

> (1) The attorney-client privilege has a dual nature, i.e., it includes both the security against publication and the right to control the introduction into evidence of such information or knowledge communicated to or possessed by the attorney; (2) This dual nature of the privilege applies where there has been inadvertent disclosure of privileged material; (3) An implied waiver of the privilege must be judged by standards as stringent as for a "true waiver," before the right to control the introduction of privileged matter into evidence will be destroyed, even though the inadvertent disclosure has eliminated any security against publication; (4) A "true waiver" requires "'an intentional, voluntary act and cannot arise by

> implication,'" or "'the voluntary relinquishment of a known right;'" and (5) Error of judgment where the person knows that privileged information is being released but concludes that the privilege will nevertheless survive will destroy any privilege. [Citations omitted.]

This Court further explained:

> As discussed above, the fact that confidential information has been published does not automatically waive the attorney-client privilege. *Sterling*, *supra* at 93. Further, as *Sterling* and *Franzel* instruct, to constitute a valid waiver, there must be an intentional, voluntary act or "true waiver." Thus, a document inadvertently produced that is otherwise protected by the attorney-client privilege remains protected. *Franzel*, *supra* at 618. No Michigan case supports the proposition that a document loses its privileged status when it is obtained by one of the parties from an independent source. Absent a true waiver, therefore, a document retains its privileged status, regardless of whether it has been publicly disclosed. To hold otherwise would seriously erode one of the law's most protected privileges. [*Id*. at 241 (Footnotes omitted).]

"[O]nce otherwise privileged information is disclosed to a third party by the person who holds the privilege, or if an otherwise confidential communication is necessarily intended to be disclosed to a third party, the privilege disappears." *Id*. at 242, quoting *Oakland Co Prosecutor v Dep't of Corrections*, 222 Mich App 654, 658; 564 NW2d 922 (1997). However, a document's privileged status is not destroyed or waived solely because the document was publicly disclosed. *Leibel*, *supra* at 242-243. Although inadvertent or involuntary disclosure of a document eliminates any security against publication, it does not destroy its privileged status. *Id*. at 243. "At the very least, waiver through inadvertent disclosure should require a finding of no intent to maintain confidentiality or circumstances evidencing a lack of such intent." *Sterling*, *supra* at 96. Involuntary disclosure of information upon order of the court does not amount to a waiver of privilege. *Co-Jo, Inc v Strand*, 226 Mich App 108, 113; 572 NW2d 251 (1997).

In the instant case, the trial court concluded that defendant waived the attorney-client privilege and work-product doctrine by failing to take reasonable precautions against inadvertent disclosure of the Toth Memo. The trial court found an intentional and voluntary waiver by estoppel because "[t]here has been repetition of the error several times over." Although the trial court found that defendant's disclosure of the Toth Memo was not "inadvertent," it also found that defendant had erroneously disclosed the Toth Memo. It appears that the trial court found that several negligent inadvertent disclosures of the Toth Memo amounted to a purposeful voluntary disclosure. The trial court then stated, "[t]he risk of insufficient precautions must rest with the party claiming the privilege." In coming to this conclusion, it appears that the trial court relied on the federal district court's conclusion in *United States v Kelsey-Hayes Wheel Co*, 15 FRD 461, 465 (ED Mich, 1954), that "the risk of insufficient precautions must rest with the party claiming the privilege." However, as discussed in *Franzel*, *supra* at 616-617, the *Sterling* panel rejected the district court's analysis in *Kelsey-Hayes*. Consequently, the trial court erroneously relied on *Kelsey-Hayes* in reaching its conclusion that defendant waived the attorney-client and work-product privileges. Defendant's failure to take reasonable precautions to protect from inadvertent disclosure of the Toth Memo is not enough to find a "true waiver." Instead, the

disclosure must have been an intentional, voluntary act or defendant must have voluntarily relinquished the privileges. *Leibel, supra* at 240-241.

The next issue, then, is whether defendant's actions amounted to a true waiver of the attorney-client privilege and work-product protection. We first consider whether defendant waived the privileges through the actions of its attorney, Evan A. Burkholder, in *Simpson v General Motors Corp*, No. 17972 (Morris Co Ct, Tex).[1] In *Simpson*, the plaintiff sought the production of the Toth Memo, but GM opposed its production. When the parties went to court, Burkholder went with the understanding that the judge was going to order the production of the Litigation Study[2] and the Toth Memo and that the only issue remaining was the language of this order. In regard to the Litigation Study, Burkholder made the following statement on the record:

> It has been argued in many different courts and again, General Motors has never agreed to all the party Litigation Studies, *we can agree to their production here* but I think what we have done is sort of short-circuited the whole argument in a fashion. If permissible it will take up a—working up a proposed order if the Court would be willing to enter it, *it would be an agreed order* but it would be an order that would short-circuit the whole issue of Litigation Study. [Emphasis added.]

Outside the presence of the court, Leon Russell, the attorney for the plaintiff, and Burkholder then negotiated about the production of the Litigation Study and the Toth Memo. Russell testified at the evidentiary hearing that he and Burkholder reached an agreement that GM would produce the Litigation Study and the Toth Memo and not assert a claim of attorney-client or work-product privileges. Russell testified that Burkholder told him that defendant waived raising the attorney-client privilege and work-product doctrine in regard to the Litigation Study and Toth Memo. Russell testified that, in exchange, GM would not produce all of the documents requested by Russell, but would only produce the documents that GM had previously been ordered to produce in *Woody*. Burkholder, on the other hand, testified at the evidentiary hearing that he never agreed to produce the Toth Memo or any other part of the Litigation Study.

Burkholder further testified that, before the parties went back on the record in *Simpson*, he argued that GM would not produce any portion of the Litigation Study. The parties then went in front of the judge to put their agreement on the record. Before reading the proposed order into the record, Burkholder stated, "[a]lthough General Motors objects to the production of any part of the Litigation Study on the grounds of the attorney/client and work[-]product privileges we understand that based on what has gone on this morning that the Court would consider entering an order." Burkholder also indicated that he was not sure that it was "entirely necessary" to reduce the agreement to a written order. The agreement put on the record required defendant to produce all of the Litigation Study documents "that were ordered produced in a September 25, 1997[,] order entered by Judge Jerry Baxter in the case of *Woody v General Motors*, Case No.

---

[1] The privileges need only be validly waived one time to be conclusively destroyed. See *Leibel, supra* at 242.

[2] Although the Toth Memo is not technically part of the Litigation Study, it was grouped with the documents comprising the Litigation Study.

96-VS-0115085 . . . ." The order further provided, "[t]his court specifically finds that there is neither an attorney-client privilege or a work[-]product privilege with regard to the documents encompassed in this order." The order also indicated that the court heard the parties' arguments. In the agreement, GM relinquished its right to appeal the order. After putting the agreement on the record, Burkholder stated, "[e]ven though the order in fact, Your Honor, is a contested order, GM does agree with the proposal that has just been announced to the Court by way of Rule 11 agreement." The court then reduced the parties' agreement to a written order, which was signed by both parties and contained the word "APPROVED" above the parties' signatures.

Russell testified that the order was erroneous because the court never heard the parties' arguments and never determined whether the attorney-client privilege or the work-product doctrine applied to the Toth Memo. Russell testified that the *Simpson* court did not order GM to produce the Toth Memo, but only entered the order because Burkholder agreed to produce the Toth Memo. He further testified that GM did not contest the order to produce the Litigation Study and the Toth Memo. On the other hand, Burkholder testified that the "entire transcript . . . represents my position and General Motors' position that the Litigation Study will not be voluntarily produced." Burkholder testified that it was never his intention to voluntarily disclose any portion of the Litigation Study, including the Toth Memo. He testified that he agreed to the language of the order, but he contested the substance of the order. Russell testified that the language of the order providing that the court found that the Toth Memo was not protected by the attorney-client privilege or the work-product doctrine was only put in the order at the direction of the attorneys because, in Texas, a court may enter orders under "Rule 11," whereby the court just accepts whatever the lawyers say without making its own determinations. Burkholder testified that he never agreed to produce the Toth Memo and that he only agreed to the order because the court was going to compel GM to produce it.

Following the evidentiary hearing on remand here, the trial court made findings of fact regarding whether defendant agreed to produce the Toth Memo in the *Simpson* matter. In particular, the court noted that the *Simpson* record revealed that (1) "Burkholder informed the court that GM had never agreed to produce the entire Litigation Study but it would 'agree to their production here,'" (2) Burkholder stated that "the parties needed additional time to work out a 'proposed order.' He confirmed that the order would be an 'agreed order' which 'would short circuit the whole issue of the Litigation Study,'" (3) "[t]he record reflects that the parties reached an agreement under which GM would produce only a portion of the Litigation Study, the Oleszko version of the Toth Memo and would not assert either attorney/client privilege or work product privilege with respect to these documents," (4) "[a]t the Simpson hearing, Mr. Burkholder testified that 'even though the order in fact . . . is a contested order, GM does agree with the proposal that has just been announced to the Court by way of Rule 11 agreement," and (5) "[t]he Order that was signed by Mr. Burkholder on behalf of GM and subsequently entered, however, reflects that it was 'Approved.'" The trial court then concluded, "[t]his Court finds that GM essentially approved the Order."

The trial court's findings of fact are reviewed under a clearly erroneous standard. See MCR 2.613(C). Here, after comparing the extensive record related to the *Simpson* matter with the trial court's findings of fact, we conclude that the findings were not clearly erroneous. See *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). Next, although the trial court did not make a specific finding regarding whether Burkholder's actions in the *Simpson* case

amounted to a true waiver, we may consider the issue as a question of law. *Leibel, supra* at 240. A "true waiver" requires an intentional and voluntary release of the privileged information. See *Leibel, supra* at 240-241. Here, we concur with the trial court that Burkholder agreed to the discovery order in the *Simpson* matter and, thus, to the production of the memo as evidenced by (1) the comments he made on the record which included his agreement to the production, (2) his participation in the drafting of an order to reflect the same, (3) his agreement not to assert either privilege, (4) his explicit acknowledgment of the agreement, and (5) his signature on the "approved" order that was entered. Therefore, we conclude that defendant executed a true waiver of the privileges with regard to the Toth Memo in that Burkholder intentionally and voluntarily released the privileged information.

Defendant, however, argues that it did not voluntarily waive the attorney-client privilege or work-product doctrine because the order itself provides, "[t]his court specifically finds that there is neither an attorney-client privilege or a work[-]product privilege with regard to the documents encompassed in this order." A court speaks through its orders. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 54; 436 NW2d 70 (1989). Although the order indicated that the Toth Memo was not privileged and Burkholder stated that the order was a contested order, the transcript of the hearing shows that the court never made such a finding regarding the privileges and that Burkholder agreed to the order requiring GM to produce the Toth Memo. The parties apparently negotiated and agreed to the terms of the order. The order was entered under Tex R Civ P 11,[3] which allows for agreements by the parties to be enforced if made on the record. The trial court here found that Burkholder "essentially approved" the order requiring GM to produce the Toth Memo. That finding was not clearly erroneous. Consequently, we conclude that Burkholder's agreement to produce the Toth Memo was a "voluntary relinquishment of a known right." See *Leibel*, *supra* at 241, quoting *Franzel*, *supra* at 616. Burkholder's agreement to produce the Toth Memo in *Simpson*, even if based on an error in judgment that the privileges would not be destroyed in other cases, amounted to a waiver of the privileges. See *Leibel*, *supra*, quoting *Franzel*, *supra*. Because we conclude that defendant waived the attorney-client privilege and work-product doctrine through Burkholder's actions in *Simpson*, we need not address whether defendant waived the privileges through its other actions. See *Leibel*, *supra* at 242.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Richard A. Bandstra

---

[3] Tex R Civ P 11 provides:

> Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record.