STATE OF MICHIGAN

COURT OF APPEALS

CHRYSLER CORPORATION, Plaintiff-Appellant,	UNPUBLISHED July 10, 2001
v	No. 227511 Oakland Circuit Court
PAUL V SHERIDAN, Defendant-Appellee.	LC No. 94-489177-CZ

Before: White, P.J., and Wilder and Zahra, JJ.

PER CURIUM.

Plaintiff appeals by leave granted the circuit court's order denying plaintiff's motion for return of a privileged document. We reverse.

FACTS

Plaintiff filed this suit on December 27, 1994, claiming defendant wrongfully disclosed its trade secrets. A preliminary injunction was entered in 1996, prohibiting defendant from disclosing plaintiff's confidential, proprietary information. On February 23, 2000, the trial court dissolved that injunction. Soon thereafter, plaintiff learned of an affidavit defendant submitted in connection with a separate suit filed in Texas. Plaintiff claimed the substance of that affidavit referred to confidential information that plaintiff had not previously disclosed. On March 8, 2000, plaintiff filed a motion and brief for reconsideration of the court's decision to dissolve the injunction. Plaintiff specifically identified and attached to the brief three exhibits: Exhibit A was a copy of the trial court's February 23, 2000 opinion and order dissolving the preliminary injunction; Exhibit B was a copy of defendant's twenty-one-page affidavit filed in the Texas case; and Exhibit C was a copy of the trial court's March 27, 1996 opinion granting a preliminary injunction. Defendant's affidavit was attached to plaintiff's brief as Exhibit D, and behind defendant's affidavit was a copy of a two-page e-mail written by plaintiff's lead national trial counsel, David Tyrrell. The e-mail was not identified as a separate exhibit and was not referenced in defendant's affidavit, plaintiff's motion for reconsideration or the brief supporting plaintiff's motion for reconsideration.

On March 23, 2000, plaintiff filed an emergency motion for return of the document and for a temporary restraining order,[1] alleging that the e-mail was subject to the attorney-client privilege and that it had been inadvertently attached to the affidavit. Plaintiff requested that the court enter an order stating that no privilege had been waived and that defendant be ordered to return all copies of the document and to refrain from further dissemination and disclosure of the document. After a hearing on the issue, the trial court ruled the e-mail is not privileged and denied plaintiff's motion for its return. In a short opinion and order denying plaintiff's motion for return of any copies of the e-mail, the court stated, in pertinent part:

> Here, the document is not marked confidential or privileged. The unrelated attorney who first forwarded the document did not mark it confidential. The in-house counsel of the client forwarded the document without marking it confidential. When received by the court and defense counsel, the document was not marked confidential. Rather, it appears related to the arguments in the motion to which it was attached. When received by Defendant's counsel, the document was further distributed around the country. Assuming the document was subject to privilege and its attachment to the exhibit was an inadvertent error, there was little to notify the recipients that the document may be subject to a privilege. As such, this court finds that the document is not now subject to a privilege and Plaintiff's motion for return of privileged document and restraining order is denied.

The instant appeal followed.

ANALYSIS

A. Standard of Review

The sole issue before us is whether the trial court erred in determining the e-mail document is not subject to the attorney-client privilege. Whether the lower court properly construed the privilege is a legal question we review de novo. *Reed Dairy Farm v Consumers Power Company*, 227 Mich App 614, 618; 576 NW2d 709 (1998). If the lower court properly construed the privilege, application of the privilege to the facts of the case is reviewed for an abuse of discretion. *Franzel v Kerr Mfg*, 234 Mich App 600, 614; 600 NW2d 66 (1999). An abuse of discretion may be found if we conclude that an unprejudiced person reviewing the facts and law would find no justification or excuse for the trial court's ruling. *Id*. at 617.

B. Common Law Privilege and Waiver

The common law attorney-client privilege attaches to direct communications between a client and his attorney and communications made through their respective agents. *Reed Dairy*

[1] Plaintiff's counsel claims to have first discovered that defendant possessed a copy of the e-mail that same day.

Farm, supra. Where the client is an organization, the privilege extends to communications between attorneys and agents or employees of the organization authorized to speak on its behalf in regard to the subject matter of the communication. *Id*. at 619.

Although a communication is subject to the attorney-client privilege, that privilege may be waived. *Franzel, supra* at 616; *Sterling v Keidan*, 162 Mich App 88, 91-92; 412 NW2d 255 (1987). In *Franzel*, this Court clarified the following with respect to waiver of 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. [*Franzel, supra* at 613-614, citing *Sterling, supra* (internal citations omitted).]

Thus, regardless whether a party is charged with an intentional or implied waiver of the attorney-client privilege, there can be no waiver without an intentional, voluntary act. Inadvertent disclosure of a privileged communication does not constitute a waiver. *Id*.

C. The E-Mail was Privileged and Production of it Did Not Constitute a Waiver of the Privilege

Proper analysis of this issue requires us first to examine whether the e-mail is protected under the attorney-client privilege. If that question is answered in the affirmative, we must then consider whether the privilege was waived when the copy of the e-mail was attached to plaintiff's motion and brief for reconsideration. It is undisputed the e-mail was drafted by a member of plaintiff's national legal counsel. While neither the e-mail itself nor its copies were expressly marked "confidential" or "privileged," the undisputed facts establish it was distributed to members of plaintiff's legal counsel in confidence. Defendant does not claim Tyrrell sent the e-mail to anyone other than plaintiff's agents or counsel. Nor is there evidence that plaintiff's in-house counsel sent the document to any party other than plaintiff's trial counsel in the present case. The e-mail was specifically addressed to plaintiff's in-house counsel and contains Tyrrell's candid impressions of defendant's suspected knowledge of various issues. It also contains Tyrrell's opinions, conclusions and recommendations in regard to defendant's affidavit and defendant's qualifications as a witness against plaintiff. Under these circumstances, we conclude the e-mail was intended as a confidential communication between plaintiff's agents and counsel pertaining to on-going and future litigation, and is subject to the attorney-client privilege. *Reed Dairy Farm, supra* at 618-619.

We conclude as a matter of law that the production of the e-mail was inadvertent and neither plaintiff nor its counsel waived the privilege by this inadvertent production. Plaintiff's trial counsel in the present case submitted a detailed affidavit below, asserting the e-mail was inadvertently attached to the motion. The attorney who signed the motion for reconsideration appeared in court on the hearing date prepared to testify that the e-mail was inadvertently attached to the motion for reconsideration, and to submit to cross-examination by defendant and examination by the court. Defendant did not examine the attorney and did not present any evidence to dispute these assertions.[2] Instead, defendant argued that the privilege does not apply or was waived because the e-mail related to the motion for reconsideration. The trial court appears to have accepted defendant's argument, at least in part, as it concluded that the e-mail related to the contents of plaintiff's motion for reconsideration. The trial court abused its discretion in reaching this conclusion.

The content of the e-mail reflects the opinions and factual assertions of plaintiff's counsel in the Texas litigation. The e-mail is not presented in the form of an affidavit. This document, as attached to the motion for reconsideration, is of no evidentiary value to a court. It is not documentary evidence of any kind. Had plaintiff intended to present the opinions or factual assertions of Texas counsel as evidence to support its motion for reconsideration, such information would have been offered by way of an affidavit. Moreover, each of the marked exhibits offered in support of the motion for reconsideration is specifically referenced in the brief supporting the motion. Significantly, the e-mail, which was not marked as an exhibit to the motion, is not referenced anywhere in the motion, the brief or the exhibits supporting the motion. In sum, we conclude that an unbiased person viewing all of the facts presented would not be justified in concluding that the e-mail was intentionally attached to support the motion for reconsideration. The facts and circumstances presented below do not support the conclusion that plaintiff or its counsel no longer intended to maintain the document's confidentiality. *Sterling, supra* at 96. Plaintiff's counsel's inadvertent disclosure of the e-mail did not constitute a waiver of the attorney-client privilege that attached to the document. *Franzel, supra*; *Sterling, supra*.

We also are not persuaded that the absence of a statement in the e-mail notifying recipients of its confidential or privileged nature defeats the privilege or constitutes a waiver. No authority requires that a document be expressly marked confidential or privileged in order for it to be subject to the attorney-client privilege.[3] As discussed *supra*, the e-mail was a confidential communication between plaintiff's counsel and agents involving legal issues and was subject to

[2] Defendant requested below that discovery be taken on the issue whether the e-mail was inadvertently disclosed. We do not believe discovery on that issue is warranted. Disclosure of the e-mail was purely collateral to plaintiff's underlying suit. The parties had opportunities to present argument regarding the circumstances surrounding the disclosure and we believe the question of plaintiff's inadvertence can properly be determined from the record established below.

[3] The circuit court's reliance on *Sterling*, *supra* and *Resolution Trust Corp v First of America Bank*, 868 F Supp 217 (WD Mich, 1994) for the proposition that the e-mail is not privileged because it does not notify recipients that it is confidential or privileged is misplaced. While both cases held that documents expressly marked "confidential" or "privileged" were protected under the attorney-client privilege, the presence of those statements was not dispositive of the holdings.

the attorney-client privilege. Plaintiff's counsel's inadvertent disclosure of the document did not constitute a waiver of the privilege.[4]

CONCLUSION

Accordingly, we hold that the trial court abused its discretion in denying plaintiff's request for an order declaring that the privilege was not waived.

Reversed.

/s/ Helene N. White
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

[4] We reject defendant's claim that the crime-fraud exception bars application of the attorney-client privilege in this case. The substance of the e-mail concerns Tyrrell's opinions in regard to defendant's affidavit testimony and defendant's qualifications as an expert. There is no evidence suggesting the e-mail was distributed in furtherance of a criminal enterprise or fraud. *People v Paasche*, 207 Mich App 698, 705; 525 NW2d 914 (1994).