

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: Baycol Products)
 Litigation) File No. MDL 1431
) (MJD)
)
) Minneapolis, Minnesota
) June 12, 2006
) 2:00 p.m.
)

BEFORE THE HONORABLE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT JUDGE

(EMERGENCY HEARING)

APPEARANCES

For the Plaintiffs: CHARLES ZIMMERMAN, ESQ.

For Defendant Bayer: ADAM HOEFLICH, ESQ.
 SUSAN WEBER, ESQ.
 ELIZABETH WRIGHT, ESQ.

For Defendant TRACY VAN STEENBURGH, ESQ.
GlaxoSmithKline:

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Proceedings recorded by mechanical stenography;
transcript produced by computer.

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P R O C E E D I N G S

IN OPEN COURT

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2
3 THE CLERK: Multidistrict Litigation 1431,
4 In Re Baycol Products. Please state your appearances for
5 the record.

6 MR. ZIMMERMAN: Good afternoon, Your Honor. Bucky
7 Zimmerman for the PSC.

8 THE COURT: Good afternoon.

9 MR. HOEFLICH: Good afternoon, Judge. Adam
10 Hoeflich for Bayer.

11 THE COURT: Good afternoon.

12 MS. WEBER: Good afternoon, Your Honor. Susan
13 Weber for Bayer.

14 THE COURT: Good afternoon.

15 MS. WRIGHT: Elizabeth Wright for Bayer.

16 THE COURT: Good afternoon.

17 MS. VAN STEENBURGH: Tracy Van Steenburgh on
18 behalf of GlaxoSmithKline.

19 THE COURT: Good afternoon.

20 Mr. Zimmerman.

21 MR. ZIMMERMAN: In an MDL proceeding when we are
22 in the case-specific phase of discovery and a lawyer
23 harasses or coerces or somehow gets a *pro se* plaintiff to
24 produce confidential documents or work product documents in
25 the setting of a deposition where the issue is supposed to

1 be what was the medicine and what caused the injury, we
2 think it's a matter that should be brought to the Court's
3 attention.

4 I think the record is very clear as to what
5 happened. I don't think it's necessary for me to go back
6 through the brief and back through the transcripts to tell
7 the Court what occurred.

8 But I think the bottom line is we have a *pro se*
9 plaintiff who didn't want to turn over some documents, who
10 felt they shouldn't be turned over; and he was convinced
11 through some pretty heavy lawyering to do something he
12 didn't want to do.

13 And then when he did it, he didn't get the consent
14 of the PSC. He had a weekend, I guess. He could have
15 called -- and he did place a call, but counsel was not
16 available when he placed the call.

17 But then after he did it, those documents came
18 into the possession of a sophisticated lawyer and a
19 sophisticated law firm representing a sophisticated,
20 international, multibillion dollar client and they didn't do
21 anything with those documents that were marked
22 attorney-client privileged, confidential, which contained
23 strategies and information written by me and written by
24 others about strategies in the case, even after we wrote
25 them a demand on I believe it was May 26th asking them to

1 turn them over. And so then we brought the matter before
2 the Court.

3 I don't think that's making a mountain out of a
4 molehill or applesauce out of apples, as Judge Lebedoff used
5 to say. I think it's something that should be brought
6 before the court who is supervising this litigation.

7 The PSC represents thousands of people out there
8 and some of them are *pro se* plaintiffs; and when something
9 like this happens, Your Honor, we think it needs to be
10 brought to your attention.

11 We think the facts are clearly outlined. The
12 Defendants have come in with all kinds of ways -- now they
13 have sealed the records and they have held them into someone
14 else's hands and then they've got an expert to tell you that
15 it really didn't happen this way or if it happened this way
16 it really isn't a bad thing. I don't buy it. I don't know
17 if the Court is going to buy it.

18 I think the fact of the matter is that a young --
19 I mean a client, *pro se* client, who has a personal injury
20 case that's not a significant serious rhabdo case but a
21 smaller case, who is under his second deposition, is
22 whipsawed into believing he's got to do something he didn't
23 want to do; and then after he did it, when the documents are
24 clearly defined as to what they are, work product, and what
25 they contained, opinions and direction of litigation,

1 they're not turned over, they're not turned back. It's
2 wrong and I think the Court should do something about it.

3 What I would like the Court to do is allow us to
4 do some discovery to find out really what did happen with
5 those documents, who did look at them, if someone was
6 looking at them why did they look at them and why didn't
7 they turn them back, and allow us to come back before this
8 Court on a fuller record so we can ask the Court what should
9 be the appropriate response.

10 We've been down this trail before and I think it
11 should be -- what's good for the goose should be good for
12 the gander, Your Honor. Thank you.

13 THE COURT: Thank you.

14 MR. HOEFLICH: Good afternoon, Judge Davis.

15 THE COURT: Good afternoon.

16 MR. HOEFLICH: We are here on an emergency motion
17 concerning allegedly confidential information. There is no
18 emergency here. The Plaintiffs' Steering Committee learned
19 on May 8th that Mr. Hayes, a *pro se* litigant, who has been
20 involved in more than ten lawsuits, had provided documents
21 to the Defendants in a case that's pending in this court.

22 The Plaintiffs' Steering Committee then waited
23 weeks to send a letter to Ms. Weber and Mr. Mizgala and to
24 the local counsel involved as well. There was no phone call
25 to Ms. Weber. There was no phone call to me. There were no

1 e-mails sent. Instead they filed this motion.

2 And when we immediately offered to return the
3 documents, despite the fact that we do not believe that
4 there is any confidence there, we were told that that wasn't
5 enough, that the young lawyer who had taken the deposition
6 needed to be removed from the case. That's why we're here
7 in front of this Court. We've offered to give them back the
8 materials even though they're not confidential and that
9 offer has been rebuffed.

10 The background of this motion is also that there
11 has been no broad disclosure of the documents. The
12 documents that were provided by Mr. Hayes four days after
13 the deposition are in the Court's hands. We do not have a
14 copy of them. The documents that were attached to his
15 deposition as exhibits to the deposition have not been
16 broadly circulated, I believe there may be a few copies, and
17 we've offered to give all of those back to Mr. Zimmerman.
18 The document has been removed from the tracking system that
19 Bayer uses to keep track of depositions.

20 Finally, there's been no inappropriate --

21 THE COURT: Where are the documents?

22 MR. HOEFLICH: The documents that were sent to the
23 Defendants four days after the deposition I believe were
24 delivered to the Court.

25 THE COURT: I've got those, but you said that

1 there were some other documents that were --

2 MR. HOEFLICH: Yes, there are copies in
3 Mr. Lavery's file back in Kentucky in a file cabinet. We
4 brought a set of the documents that are here under seal in
5 case the Court wanted to see the deposition exhibits today,
6 and we can provide those to the Court or to Mr. Zimmerman
7 immediately.

8 THE COURT: All right.

9 MR. HOEFLICH: There's also been no inappropriate
10 conduct here. The Plaintiffs' Steering Committee made a
11 conscious decision to provide documents to Mr. Hayes. The
12 Plaintiffs' Steering Committee has made no showing that they
13 took any steps whatsoever to preserve confidentiality with
14 respect to those documents.

15 We have not been provided with any sort of joint
16 prosecution agreement or any other material that even
17 conceivably could be used to show that there was some sort
18 of confidence.

19 Second, Mr. Hayes came to the deposition, put the
20 documents on the table and proceeded to say that he reviewed
21 them and was relying on them for his deposition. At one
22 point he said he was going to hammer Bayer with this one.
23 Under those circumstances, if there ever was any confidence,
24 it was waived; and it's not any different than a waiver
25 Mr. Hayes did before.

1 If I may approach, Your Honor?

2 THE COURT: (Indicating.)

3 MR. HOEFLICH: When Mr. Hayes provided his
4 case-specific expert report that came through the
5 Plaintiffs' Steering Committee, he attached to it a science
6 perspective on the Baycol cases and the Plaintiffs' Steering
7 Committee provided that to us. Mr. Hayes gave a colloquy at
8 the end of his deposition where he again relied on documents
9 from the Plaintiffs' Steering Committee.

10 He made a conscious decision four days after the
11 deposition to send documents to Defendants, documents that
12 he relied on in his testimony. When Mr. Hayes did that,
13 that was a decision to use those materials. If there ever
14 was any confidence, that confidence was waived.

15 I would also note that Mr. Hayes has not provided
16 an affidavit. He has not filed a motion in front of this
17 Court. He made a conscious decision to use those documents
18 and to rely on them. There is a clear waiver of any
19 confidence that may have existed.

20 Mr. Lavery, who is with us today in the courtroom,
21 at no point coerced Mr. Hayes to do anything and Mr. Hayes
22 is not someone who could be coerced. He has been involved
23 in more than ten lawsuits, including lawsuits against
24 insurance companies, lawsuits against judges. This is not
25 his first time dealing with counsel.

1 Mr. Hayes also said that he called Mr. Zimmerman's
2 office and that he was providing us the documents -- or he
3 told Mr. Lavery's paralegal that he was providing the
4 documents only if he didn't hear back from Mr. Zimmerman's
5 office. There was a clear decision to use these documents
6 and to provide them to us.

7 Your Honor, Mr. Lavery reasonably believed that
8 there was no confidentiality. He did nothing wrong in
9 asking Mr. Hayes for these documents.

10 You've seen the affidavit of Professor Hodes and
11 Professor Hodes says, first, there was no confidentiality in
12 the documents; second, if there was any work product
13 protection, it was clearly waived; third, after reviewing
14 the deposition, Professor Hodes stated that Mr. Lavery acted
15 entirely appropriately.

16 The portion of the deposition that's been pulled
17 out by Mr. Zimmerman, all it says is that Mr. Lavery is
18 going to file a motion if the documents aren't given and
19 that he'll seek costs in accordance with that motion. I
20 would respectfully suggest that if Mr. Lavery did not tell
21 the litigant what he planned to do, we might be accused of
22 sandbagging the man.

23 There was absolutely nothing done inappropriately
24 in that deposition and we urge the Court to read it. There
25 was no harassment, intimidation, or anything else. We

1 approached the PSC and we think we acted reasonably. We
2 offered to give back all copies of the documents.

3 And I'd again note there's been no showing of
4 privilege, there's been no showing of a common interest,
5 there's been no affidavit by Mr. Hayes, or any evidence at
6 all of what steps the PSC took to keep these documents
7 confidential. There's been no document-by-document showing
8 of why these materials should be protected by the Court and
9 we have a complete record that what Mr. Hayes did waived any
10 privilege.

11 That said, we understand the peculiar
12 circumstances that are at issue here and we're not looking
13 to create any issue for Mr. Zimmerman or the PSC and we
14 offer to give back the documents and all copies.

15 What we won't do is take a step that's
16 unprecedented in the case law or in the history of this
17 case. There has never been an instance when a counsel who
18 has seen an even inadvertently produced document or any
19 other circumstances where someone has been removed from the
20 litigation. Mr. Moll is still practicing in this matter.
21 We do not think that the penalty for a young lawyer for
22 acting appropriately should be to put a black mark on his
23 record and remove him from this case.

24 We have offered to give all copies of the
25 materials to Mr. Zimmerman. We've offered not to keep any

1 of them. All we need to know are which deposition exhibits
2 that he believes he needs back and we'll give them to him,
3 but we don't think anything more is required and we don't
4 think anything more would be appropriate.

5 THE COURT: Thank you.

6 Anything else?

7 MR. ZIMMERMAN: Your Honor, we need to look at
8 reality here. First off, if you look at the documents that
9 were turned over, they say, Confidential, attorney work
10 product, Baycol plaintiffs' counsel only. It's a
11 February 26, 2004 letter from me on my letterhead.

12 Counsel asked the client, Well, who is Zimmerman
13 Reed? They're not your -- he must have known it came from
14 me. He asked, Well, who's Zimmerman Reed? He's not your
15 attorney.

16 Now, anybody involved in this litigation knows
17 that Zimmerman Reed is involved in this litigation as one of
18 the co-lead counsel, but yet he is asking Mr. Hayes to
19 testify or not testify whether Mr. Zimmerman is his attorney
20 when he knows he's about to be handed a document that has a
21 legend on top that says, Confidential, attorney-client --
22 excuse me -- attorney work product and authored by me.

23 And there are four of these letters and contained
24 within them are lots of strategies about how we're going to
25 approach nonrhabdo cases in the future, what the science is,

1 what the medicine is, and what you should do.

2 Now, if you tell me that a lawyer doesn't know
3 that that's an inappropriate kind of information to seek
4 from a *pro se* client, I'm in a different reality. And if
5 the Court tells me that that's a waiver because this poor
6 soul who is being asked under threat of motions and costs
7 and sanctions to turn something over, that that's voluntary,
8 I guess I must be in a different reality.

9 This was not a conscious decision by Mr. Hayes to
10 turn over documents. He said he doesn't want to turn them
11 over. He placed a call to Dick Lockridge's office on
12 Friday after -- the deposition was on a Thursday. He placed
13 a call to him on Friday. He was in trial in New York. He
14 placed a call to my office. I did not get the message. He
15 put it into my voice mail.

16 I got the message on -- I got a message on Monday
17 at about 5:00 saying he had already turned over the
18 documents. He didn't ask me about turning them over. He
19 said he had turned them over, at which point I tried to
20 locate Dick, waited until his trial was over, and ultimately
21 we sent the letter of May 26th saying to Mr. Lavery, Darryl
22 Lavery, copied to Susan Weber, copied to James Mizgala, Turn
23 back over the documents.

24 Three weeks later, three weeks later we're before
25 this Court and they say, well, somehow that's not an

1 emergency. Emergency or not, it's a matter of some concern
2 to the integrity of the Court and the integrity of the
3 system where you've got lots of other depositions going on
4 out there with lots of other people.

5 THE COURT: Let's stop. I set this on quickly, so
6 you got my attention. Both sides, understand that you got
7 my attention.

8 MR. ZIMMERMAN: Okay.

9 THE COURT: I received some of the documents that
10 are under seal. I have not opened them. My understanding
11 is there's some more here that can be turned over to the
12 Court and I will turn them over to the PSC. There's one set
13 or one copy that's down in Kentucky. I will have that
14 brought up under seal and turned over to the Court so I can
15 turn that over to the PSC.

16 The next question is how do we set up a procedure
17 to make sure that this does not occur again, because there
18 are a number of *pro se* clients that are out there. What is
19 your suggestion?

20 MR. ZIMMERMAN: My first suggestion was -- and
21 that's what created a little bit of controversy -- to say
22 that the person who did this the first time shouldn't be
23 continuing to do it and ask that he not be allowed to
24 continue to bring these kinds of pressures on *pro se*
25 plaintiffs.

1 THE COURT: Well --

2 MR. ZIMMERMAN: That was my first suggestion.

3 THE COURT: Let me back up on that. Let me talk
4 you through that. Depositions, I guess, are something that
5 I don't see and I can say the great judicial system is
6 working because when you come before me you say, "Your
7 Honor" and "Yes, Your Honor," and "No, Your Honor," but I
8 know from talking to you and talking to Defense and talking
9 to other lawyers that depositions are the bane of being a
10 lawyer now. Depositions have just gotten out of hand.

11 I can't be at every deposition. I think I
12 received one call during the whole course of this litigation
13 dealing with a deposition that was being taken taking place
14 out in New York about time limits. We spent more time
15 dealing with me finding out what was going on than the
16 amount of time that was being asked to extend the
17 deposition, and I acted on that quickly.

18 I acted on this quickly because at this point I
19 don't have a magistrate judge, and I will be appointing a
20 magistrate judge shortly to be handling any more of these
21 types of issues so I don't have to take the Court's time to
22 handle this. But now that you've got my attention, I saw it
23 and I want to make sure that we rectify it.

24 And whether or not the Defense is right or wrong
25 of bringing up Ken Moll because they never suggested what

1 should happen other than a fine on him, I went through a
2 series of factual findings and I fined him and he paid off
3 the fine and I took him off the PSC, but I allowed him to
4 continue to represent his clients.

5 What I can do is for you to get all the documents
6 back, make sure that we have them. We can set procedures
7 into place dealing with protected documents that *pro se*
8 clients may have that are received from the PSC, making sure
9 that the Defense knows that before they receive any
10 documents they are to check with the PSC whether or not they
11 are, in fact, attorney-client privileged. If that's
12 violated, then I have something in place.

13 I think that -- you've all spent a tremendous
14 amount of money to be here today; and that was my point, to
15 get you here so I can get your attention.

16 Now, I can -- as you know, I can come down with a
17 big hammer and I have and will in my career. I can do that.
18 That's not a problem, but I feel more comfortable making
19 sure that we get everything and that if you feel that
20 something has leaked out, that you haven't gotten
21 everything, certainly I can give you limited discovery.

22 But my question is that's more money, that's more
23 of your time. If I have an order coming from the Court
24 saying this has to be done and if it's violated and everyone
25 knows if it's violated, then they're going to have to reckon

1 with me.

2 We're all tense. We've been together for close to
3 five years on this matter. You have been appointed by me to
4 lead this litigation for the Plaintiffs. You have -- you
5 had and you still have my support on the work that you have
6 been doing. And so the question is at this point what else
7 can the Court do.

8 MR. ZIMMERMAN: Okay. Short answer. Number one,
9 I have to be sure that the documents that have my mental
10 impressions about this litigation as conveyed to people who
11 have an interest in the litigation that are not the Defense
12 have been protected. I have to be sure that this
13 information didn't go anywhere else within Bayer or within
14 their counsel. I have to be sure of that.

15 THE COURT: So you want discovery?

16 MR. ZIMMERMAN: Yes.

17 THE COURT: How many depositions do you think you
18 have to take?

19 MR. ZIMMERMAN: I imagine it would be maybe --
20 possibly two. I can only think of one right now, which is
21 counsel who took the documents in, and whoever might have
22 touched them within that frame of reference, which I
23 understand at this point is only one person. Maybe it's
24 more.

25 THE COURT: Granted. What else?

1 MR. ZIMMERMAN: Second thing I would like, Your
2 Honor, is I would like you to understand the process that's
3 going on has an intimidation to it and that we need to make
4 sure that the message goes out that taking and noticing and
5 asking questions at depositions is for the purpose of
6 discovery and not for the purpose of backing people away
7 from cases. Now, I don't know quite how to do that, Your
8 Honor, but that's what's happening.

9 And this kind of message where a *pro se* plaintiff
10 gets sort of hammered up and then has to do something he
11 doesn't want to do has a very strong message among people
12 who have claims that aren't necessarily gigantic claims and
13 it gets people to back off and back away and, you know, get
14 a little -- run a little scared of Bayer's tactics, Your
15 Honor. And that concerns me, and you know that has
16 concerned me for some time. I don't know how to deal with
17 it exactly.

18 THE COURT: Well --

19 MR. ZIMMERMAN: Maybe limiting the number of
20 depositions, perhaps.

21 THE COURT: Well, the situation dealing with the
22 depositions, I see no reason to change that, but certainly
23 for *pro se* litigants and dealing with documents to be turned
24 over, we can set up a protocol that both the PSC and the
25 Defense understand that if there's going to be a possibility

1 of turning over documents that are attorney-client -- at
2 least work product, attorney work product, that the PSC has
3 turned over to the *pro se* plaintiff, that the *pro se*
4 plaintiff have an opportunity to contact you or
5 Mr. Lockridge or someone designated within your firms to
6 give the okay or no okay on those documents.

7 That can be done. That's simple. There's no rush
8 to get these documents. A delay of a week is not going to
9 make the world come to an end.

10 And so that's what I am talking about, so there is
11 something in place that both the PSC knows that will protect
12 their interests dealing with work product matters and that
13 whoever the Defendants send out, whether or not they are
14 young lawyers -- and young lawyers have to get experience
15 and young lawyers, just like experienced lawyers, make
16 mistakes.

17 At this point I'm not rushing to judgment on
18 whether or not this was on purpose or not. I hope I don't
19 have to -- you don't force me to do that. Because if I come
20 down against you, that doesn't help you any in any event.

21 So that's why I am trying to get a settlement here
22 where we can have a procedure in place, that I file an order
23 that this is what's going to occur when there's a *pro se*
24 plaintiff involved. If there's an attorney involved, you
25 know, you have to deal with the attorney.

1 MR. ZIMMERMAN: But if --

2 THE COURT: If the attorney turned something over
3 that shouldn't be turned over, well, then there's ethical
4 violations there.

5 MR. ZIMMERMAN: Let's talk about that, Your Honor,
6 because the *pro se* plaintiff apparently turned over
7 something that was just handed up to you, which was a
8 PowerPoint program -- it contained, among other things, a
9 PowerPoint program prepared by one of Mr. Lockridge's
10 partners, Bert Black.

11 Now, when that was turned over, that clearly was
12 work product, clearly on its face was work product. The
13 lawyer who received that, whether it be at Adam's office,
14 Susan's office, or Mr. Lavery's office, should have turned
15 that back over. I mean, that was clearly work product.
16 They knew it. They saw it. They say, well, it's voluntary
17 and it was turned over.

18 This is just a problem I'm concerned about. They
19 take these documents, they don't turn them back, they kept
20 them and say it's been waived and now we've got it and --

21 THE COURT: Mr. Zimmerman, I am trying to be
22 reasonable here because --

23 MR. ZIMMERMAN: And I am trying to come up with a
24 system --

25 THE COURT: I can tell you that we've looked at

1 the law, and you can win on the law and you can lose on the
2 law. So that's --

3 MR. ZIMMERMAN: All I am saying is I think we
4 should have a system where they are turned back. I am
5 agreeing with what Your Honor has said. Under those
6 circumstances when something is turned over that shouldn't
7 be, we should have a system to bring them back.

8 I'm agreeing with Your Honor. I'm not asking for
9 anything other than what you're saying you feel is
10 appropriate, that documents that are turned over that
11 shouldn't have been turned over by a *pro se* plaintiff, like
12 the PowerPoint, are turned back or brought back.

13 THE COURT: If I didn't -- certainly that's the
14 whole aspect of if something is turned over, that it should
15 be --

16 MR. ZIMMERMAN: That was my point.

17 THE COURT: If it's within the guidelines of work
18 product documents, if it's not stamped but it's still
19 obvious that it's a work product document, certainly that
20 could be point number four or five or whatever agreement
21 that we come up with, that Defense will turn those back over
22 and --

23 MR. ZIMMERMAN: All I'm -- okay.

24 THE COURT: I just don't want to beat this into
25 the ground. I think it is something that we can resolve

1 fairly quickly. And I've got the attention of everyone.
2 You're here. You're a very busy person. Adam is very busy,
3 Susan is very busy, and Tracy is very busy.

4 Everyone is here and so let's see if we can
5 resolve it by coming to an agreement on some kind of
6 procedures that we can -- and that I will publish them. I
7 think that has --

8 MR. ZIMMERMAN: I think that has the --

9 THE COURT: I think that has a resounding effect
10 in a litigation, so people know.

11 MR. ZIMMERMAN: I totally agree with that. My
12 last point, Your Honor, is until we know what happened to
13 the document, I think the young lawyer who took the
14 deposition should at least not be taking them further until
15 we resolve what happened with them. That was my other point
16 and we leave that to the Court, but it seems to me *prima*
17 *facie* we made a case that something was done that shouldn't
18 have been done and it shouldn't continue to happen in the
19 future.

20 THE COURT: Well, I suspect -- I don't know. I've
21 given you the right to take his deposition and one other
22 person that may have touched the documents. You take that
23 quickly and I think you will find out what I surmise, that
24 it's something that was done by a young lawyer that was in
25 no way trying to violate the rules of evidence, the rules of

1 a court. But I may be wrong. You may be able to find
2 something, but that's why I am allowing you to take the
3 deposition.

4 MR. ZIMMERMAN: Okay. Thank you.

5 THE COURT: And do it quickly and get it over with
6 and don't do as I hear the other lawyers do, badger during
7 the deposition.

8 MR. ZIMMERMAN: I will promise you, Your Honor,
9 that I will not badger. Thank you.

10 THE COURT: Adam.

11 MR. HOEFLICH: Thank you, Your Honor. First I
12 would like to address Mr. Zimmerman's comments about the
13 attachment to the rule -- the PTO 114 report. The PSC
14 received that report at the same time that we did.

15 There was a clear decision by Mr. Hayes to, if
16 there ever was a work product protection for that document,
17 waive it. There is no rule of which we're aware or to which
18 the PSC directed the Court saying that a *pro se* plaintiff
19 does not have the ability to waive work product protection.
20 That clearly was done.

21 And I believe that the law is relatively clear and
22 straightforward that there is no confidentiality on that
23 document, and I would assume that that is why the PSC never
24 asked for that document back.

25 Similarly, Mr. Lavery's behavior at the deposition

1 was straightforward and appropriate. Mr. Hayes made
2 decisions to provide those documents to Mr. Lavery. There
3 was waiver of any work product protection that ever existed.

4 When the Plaintiffs' Steering Committee decided to
5 give documents to Mr. Hayes and they've made no showing at
6 all that they took any steps to protect those documents,
7 they lost protection for those documents.

8 When the witness came to the deposition and said
9 he had reviewed them and was relying on them for testimony
10 he was giving, we were entitled to ask for that material.

11 THE COURT: What about the procedures that I want
12 to put in place? Let's talk about those.

13 MR. HOEFLICH: We're happy to work with the Court
14 and Mr. Zimmerman. We offered the documents back. My
15 principal concern, Judge, is to drag Mr. Lavery in front of
16 Mr. Zimmerman for a deposition when he did absolutely
17 nothing wrong and the record is clear.

18 Mr. Lavery provided the Court with a detailed
19 affidavit of what happened with the documents that came four
20 days after the deposition. We're happy to give you an
21 affidavit on whatever copies may be in Mr. Lavery's firm.
22 You have an affidavit from Mr. Maxwell, the paralegal at his
23 firm.

24 There's no reason for this person to be deposed
25 and there's certainly no reason for him to be besmirched in

1 this court. We are happy to come back in chambers with
2 Mr. Lavery and speak to the Court and speak to Mr. Zimmerman
3 and try to work this thing out, but this young lawyer did
4 absolutely nothing wrong in that deposition. He didn't
5 intimidate, harass, or coerce anybody.

6 We understand the situation the PSC is in. We
7 understand the situation with *pro se* litigants and we are
8 happy to work with the Court because we understand the
9 concerns, despite what the law is. We want to move this
10 forward. What we don't want to happen is for somebody to be
11 unfairly dragged through this.

12 So we remain open, ready, and willing to work with
13 Mr. Zimmerman and with the Court, just like we were the
14 minute we heard about this dispute.

15 THE COURT: Let's spend some time drafting a --
16 certainly when lawyers turn over something inadvertently,
17 well, you know, it's too bad, but here we have a *pro se* -- I
18 don't know how many *pro se* litigants that you're taking
19 depositions of. It's just a -- there is going to be a court
20 order so things -- so we don't have to have these types of
21 hearings before the magistrate judge dealing with whether or
22 not waiver has taken place.

23 Let's just get -- it will be simple,
24 straightforward. Before a huge amount of documents are
25 turned over that shouldn't be turned over and then you come

1 into court saying -- then we are fighting back and forth
2 whether or not Plaintiffs' PSC has done the appropriate
3 thing in protecting those documents and then whether or not
4 there's waiver by the *pro se* client, let's just get a simple
5 four or five paragraph or four or five sentence document
6 that I can sign off on that you are going to draft right
7 here and now in the next half hour and we'll solve this
8 problem.

9 I have the documents. Let's get all the documents
10 and copies back. They can be turned over to Mr. Zimmerman
11 today or in the next couple of days. We can have this
12 matter resolved. Can I call on counsel to do that?

13 MR. HOEFLICH: Absolutely, Your Honor. And I
14 would add that part of the equation is taking steps to make
15 sure the *pro se* litigants understand that Mr. Zimmerman does
16 not intend for these documents to be attached to PowerPoints
17 or expert reports or used in court.

18 MR. ZIMMERMAN: Your Honor, we're kind of running
19 a little bit beyond afield here. Adam is making an argument
20 as a matter of law that there's waiver. Adam is making an
21 argument as a matter of law that the conduct of his
22 co-counsel was appropriate. Adam is making an argument as a
23 matter of law to all of this stuff. And I am just not
24 buying it the way Adam sells it. I don't believe that's
25 exactly what happened.

1 Now, I'm perfectly willing to sit here and work on
2 these procedures going forward, I want to do that, I want to
3 bring integrity to the process going forward, but I can't
4 just walk away from what happened before. I need to find
5 out what happened. I think that's the right thing to do.

6 And I think that's what the Court asked me to do
7 and I don't know if you are telling me I shouldn't do that
8 now or I should do that now, but I feel strongly that I just
9 can't buy into Adam's --

10 THE COURT: I don't see where I said that you
11 could not take two depositions.

12 MR. ZIMMERMAN: I thought he asked that that not
13 occur.

14 THE COURT: He can ask for the whole world, but
15 I've already stated that you could take two depositions.

16 MR. ZIMMERMAN: Okay. I thought he was asking
17 that that not occur.

18 THE COURT: Well, of course he's going to ask
19 that, that's his job, but when you asked for it, I ruled on
20 it.

21 MR. ZIMMERMAN: All right. I thought there was a
22 backing off of that when you said sit down and work this
23 out.

24 THE COURT: But I need you to sit down and work
25 out the five or six sentence --

1 MR. ZIMMERMAN: Fine.

2 THE COURT: -- order that I will be signing off on
3 and read it into the record. I can put it in writing and we
4 can docket it.

5 MR. ZIMMERMAN: I understand.

6 MR. HOEFLICH: Your Honor, may I clarify the scope
7 of the depositions? I believe the Court ordered two
8 depositions on what has happened to the documents and copies
9 of the documents.

10 THE COURT: Right.

11 MR. HOEFLICH: And it's limited to that?

12 THE COURT: And that's all it's limited to.

13 MR. HOEFLICH: Thank you, Your Honor.

14 THE COURT: Where else would it go? I don't want
15 it to go any further than that. That's where the
16 documents -- what happened to the documents and where they
17 went.

18 And by that time -- if Mr. Zimmerman still thinks
19 the depositions are to take place after this afternoon's
20 hearing, well, that's fine, he can take them. He has a
21 constituency that he has to deal with and so I have given
22 him the opportunity to take those two depositions.

23 So why don't we take 20 minutes and pound out
24 something. We've got Susan here. She's very good at that.
25 So let's get something that Mr. Zimmerman will agree to and

1 can be read into the record and I will come back out in 20
2 minutes.

3 MR. ZIMMERMAN: Your Honor, I have a plane I have
4 to catch at 5:20, but we do have people here that --

5 THE COURT: You have what?

6 MR. ZIMMERMAN: A plane I have to catch at 5:20.
7 I am willing to work on it now. I just want the Court to
8 know I've got to run to the airport and catch a plane at
9 5:20. I'll work on it right now and there are other people
10 in the courtroom who can also help me. I don't have --

11 THE COURT: I said in 20 minutes. I can't imagine
12 that you can't pound this out in 20 minutes.

13 MR. ZIMMERMAN: Right. I am just giving you my
14 problem so it doesn't come up later that I have to run out
15 of the courtroom.

16 THE COURT: I am sure Adam and Susan has a plane
17 to catch back to Chicago. We'll get it done. That's why I
18 brought you here. You asked for an emergency hearing and
19 then you're telling me that you've got to get on a plane?
20 Let's pound out the agreement and I can read it into the
21 record by 3:00.

22 MR. HOEFLICH: Your Honor, I don't know if
23 Mr. Zimmerman has it with him, but it might be helpful to
24 have whatever agreement you have, if you have any, with
25 Mr. Hayes or *pro se* litigants that's used to protect any

1 confidentiality.

2 MR. ZIMMERMAN: I don't have it with me. They all
3 sign the same joint prosecution --

4 MR. HOEFLICH: Has he signed one?

5 MR. ZIMMERMAN: He has agreed to it. Whether I
6 have a signed one, I don't -- he has agreed to it.

7 MR. HOEFLICH: We can deal with this as part of
8 the order. Thank you, Judge.

9 THE COURT: Give him back these things. I don't
10 want them anymore.

11 All right. I will come out at five after 3:00.

12 MR. ZIMMERMAN: Thank you.

13 (Recess taken at 2:40 p.m.)

14 * * * * *

15 (3:10 p.m.)

16 **IN OPEN COURT**

17 THE COURT: Mr. Zimmerman, what do we have?

18 MR. ZIMMERMAN: I believe we've reached an
19 agreement for a PTO, Your Honor. Susan Weber is going to
20 read it, and then we'll see if it meets with everyone's
21 approval.

22 THE COURT: All right.

23 MS. WEBER: This is in my chicken scratching, Your
24 Honor. What we would propose is that we have a game plan
25 here, that we actually type it out so you can read it and

1 get it to you tomorrow. It would be a PTO titled something
2 like Special Procedures for Depositions of *Pro Se*
3 Plaintiffs.

4 We have some preparatory language. The PSC has
5 provided certain MDL work product (PSC documents for the
6 rest of the order) to *pro se* plaintiffs who may not fully
7 appreciate the ordinary procedures for protecting the
8 confidentiality of such material. It is therefore ordered:

9 1. If during a deposition a *pro se* plaintiff
10 relies upon a PSC document or documents and makes clear that
11 it is a PSC document, the plaintiff shall, in the presence
12 of deposing counsel, place the documents in a sealed
13 envelope and at the close of the deposition mail the
14 documents to the PSC care of -- and we stuck Yvonne Flaherty
15 with this job for the PSC, who will telephone national
16 counsel for Bayer, which would be me, and Fred for GSK to
17 meet and confer regarding appropriate disposition of the
18 documents.

19 Then we had a second paragraph covering the
20 scenario where it's not clear that it's a PSC document that
21 gets produced until it's in the defendant counsel's hot
22 little hands.

23 If a *pro se* plaintiff has produced a document or
24 documents to deposing counsel and that document reasonably
25 appears to be PSC work product, defense counsel shall, in

1 the presence of *pro se* plaintiff, place the document in a
2 sealed envelope and at the close of the deposition -- and
3 then the rest of that paragraph would read just as the
4 preceding paragraph, mail it to Yvonne, who will contact
5 Fred and me.

6 Paragraph 3. Pursuant to either paragraph 1 or 2,
7 local defense counsel will immediately -- will at the close
8 of the deposition immediately call national defense counsel
9 to advise them of events at the deposition. National
10 defense counsel will contact PSC counsel to alert the PSC
11 that possible work product materials are being transmitted
12 pursuant to the procedures set forth herein.

13 If counsel for the PSC and national defense
14 counsel cannot agree on appropriate disposition of the
15 documents, the matter will be referred to -- we thought the
16 magistrate you're about to appoint.

17 Nothing in this order is intended to or shall be
18 construed to confer confidentiality on or work product
19 protection upon any document or to waive confidentiality or
20 work product protection for any document.

21 THE COURT: All right.

22 MR. ZIMMERMAN: I think that captures it, Your
23 Honor, very clearly. We've set up some parameters to be
24 protected.

25 THE COURT: How much time do you need to schedule

1 these depositions so we can get this out of the way so I'm
2 done with this matter?

3 MR. ZIMMERMAN: I imagine we could have these done
4 within two weeks or less.

5 THE COURT: All right.

6 MR. ZIMMERMAN: Is that -- I don't know if that
7 works for you all. Do you need -- do you think you need
8 more time for the depositions?

9 MR. HOEFLICH: Subject to Mr. Lavery's schedule, I
10 would think that would work for defense counsel.

11 MR. ZIMMERMAN: Let's just put it -- what's today,
12 the 12th? Should we just say to the last Friday of the
13 month, this month, the 28th?

14 THE CLERK: June 30th.

15 MR. ZIMMERMAN: Say by June 30th, Your Honor.

16 THE COURT: Is that agreeable?

17 MR. LAVERY: To have it on June 30th?

18 MR. ZIMMERMAN: To have it on or before
19 June 30th.

20 MR. LAVERY: I'll make time.

21 THE COURT: All right. Okay. Anything further?

22 MR. HOEFLICH: No, Your Honor.

23 MS. WEBER: Perhaps we should go on the record
24 with what we decided to do with respect to the deposition
25 documents at issue here.

1 MR. ZIMMERMAN: Sure.

2 MS. WEBER: There are two different categories of
3 documents at issue in the Terry Hayes case. We have the
4 documents that were produced only after the deposition and
5 those have been returned to the PSC, who will transmit it to
6 Mr. Hayes if it's appropriate.

7 With respect to the documents --

8 THE COURT: Katie.

9 MR. HOEFLICH: Thank you, Katie.

10 MS. WEBER: With respect to the documents that
11 were exhibits to the deposition, we've conferred with the
12 PSC based on the exhibit list at the front of the
13 deposition. They have advised us which of the exhibits they
14 think may be PSC work product. They agree that certain of
15 the exhibits, for instance, fax sheets, medical records, are
16 not in dispute. We have hard copies here of the Court's --
17 the copy that was produced to the Court and the copy defense
18 counsel had, which we will return to the PSC.

19 Mr. Lavery will check the documents that are in
20 his possession, remove the disputed exhibits, and we will
21 return those to the PSC without anyone reviewing them.

22 And then we'll have a deposition with all of the
23 other undisputed records ready so that we can make that
24 available and proceed with the litigation in Mr. Hayes'
25 case.

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MR. ZIMMERMAN: I find that appropriate, Your Honor.

THE COURT: All right. Anything further?

MR. ZIMMERMAN: No, Your Honor.

MR. HOEFLICH: Thank you, Your Honor.

THE COURT: We can go off the record.

(Court adjourned at 3:20 p.m.)

* * *

I, Lori A. Simpson and Lorilee K. Fink, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: Lori A. Simpson, RMR-CRR

Certified by: Lorilee K. Fink, RPR-CRR