

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 9

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-CV-1709

ABBOTT LABORATORIES, et al.

Defendants.

**WISCONSIN'S RESPONSE TO DEFENDANTS' NOTICE OF EXCEPTION
TO THE SPECIAL DISCOVERY MASTER'S DECISION ON
DEFENDANTS' MOTION TO COMPEL PRODUCTION OF E-MAIL**

Defendants have appealed a carefully constructed opinion of Judge Eich finding that a small chain of e-mails between an attorney working on this case (Mr. Gebhart) and a state employee assisting him in the production of evidence (Mr. Blaine) are privileged, and that the privilege was not waived by the inadvertent production of these e-mails. (Exhibit A.) There is no merit to defendants' exception. Judge Eich's opinion is thorough and complete, written by a judge who has ample experience in these kinds of determinations. Indeed, the opinion really requires no defense, and Wisconsin does not intend to burden the record with any more briefing than necessary. Instead, Wisconsin will point out three simple points that are not covered either by the opinion and/or defendants' exception.

I. DEFENDANTS' EXCEPTION DOES NOT COME CLOSE TO MEETING THE STANDARD FOR REVIEW.

Unmentioned in defendants' exception is the test defendants' must meet to overturn Judge Eich's findings, a test to which the defendants' stipulated. Under paragraph 5 of the agreed reference order the Court is to "review any findings of fact under the clearly erroneous standard...." (Exhibit B attached hereto.) Under this standard, "to command a reversal, such evidence in support of the contrary finding must itself constitute the great weight and clear preponderance of the evidence." *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983), attached hereto as Exhibit C.

Defendants cannot meet this standard and do not even try. Instead they try to side step this insurmountable barrier by arguing that Judge Eich inappropriately shifted the burden of proof on this issue. Thus, they hope to transmute their exception into a legal challenge, not a factual one (and, hence, subject to de novo review). This sleight of hand is unsupported by any language in Judge Eich's opinion. Indeed, every important finding Judge Eich made is a factual one supported by a record that defendant never challenged with contrary evidence.¹ Thus, he found as a fact that there was an attorney client relationship between the Attorney Gebhart and Robert Blaine, and he found as a matter of fact that the e-mails were meant to be confidential communications. And he found as a matter of fact that the production of the e-mails was inadvertent and/or mistaken, and that Wisconsin had not waived the privilege. Defendants have no substantive contrary evidence to any of these findings, let alone the clear preponderance of evidence in their favor they would need to prevail on this appeal.

¹ For example, Defendants' Notice never argued that Mr. Gebhart was not working on this case or that Mr. Blain was not assisting him. See Judge Eich's opinion at n. 1.

II. DEFENDANTS' WAIVER ARGUMENT IS INCONSISTENT WITH ITS OWN REPRESENTATIONS.

Judge Eich found that the production of the e-mails was inadvertent and did not constitute a waiver of the privilege. This finding, apart from being supported by the record and the clear language of the protective order, is completely consistent with defendants' own representations. Here is what defendants said about inadvertence and waiver:

At the outset, we wish to make clear that we accept at face value your statement that the document was inadvertently produced and we are not relying on the fact of the document's production as a basis for denying its return. In other words, we are not suggesting that Wisconsin's production of the document waived any privilege that might have applied to it. We believe that our stipulated protective order provides for the return of such documents and we respect all parties' right to recover inadvertently produced privileged documents. Thus, if we agreed with your claim that the document reflected privileged communication, we would return or destroy it or, at a minimum agree to Wisconsin's re-production of a redacted form that did not show any privileged elements, and agree not to make use of any privileged information in it. (Exhibit D)

Having so assured plaintiff's counsel, it is hard to believe that defendants spend over half their Exception arguing otherwise.

III. THE E-MAILS ARE IRRELEVANT.

What makes the defendants' exception not just wrong but frivolous is that these e-mails are of no value to the defendants other than to wave around in settlement discussions (something the defendants have already done). The e-mails are clearly not competent evidence in any sense of the term.

For certain, the documents are not admissible as admissions. Wis. Stat. 908.01(4)(b)(3) defines an admission as "statement by a person authorized by the party to make a statement concerning the subject," and subsection (4) requires a "statement by a

party's agent or servant concerning a matter within the scope of the agent's...employment." These memos contain no such statements. Instead, they are a characterization of someone else's statements, the precise contents of which are unknown. This hardly qualifies as an exception to the hearsay rule.

They lack all the basic requirements of a report of a conversation: where the conversation took place, who was present, when it was held, and who said what to whom. And they lack any patina of reliability. For all we know, the unknown persons who made these comments had no personal knowledge of the subject, or were seeking to blame others for Wisconsin's overpayments. We just cannot tell.

Defendants cannot avoid the impact of the obvious inadmissibility of the e-mail by arguing that the document will somehow help them in discovery. Defendants have possessed the e-mail for many months, and they have deposed every official working on Wisconsin's Medicaid program whose opinions could have any relevance in this case. Thus, there is nothing to be gained by permitting the defendants to continue to wave the document about.

With these three points as background, Wisconsin rests on the basis of Judge Eich's opinion.

Dated this 19th day of August, 2008.

Respectfully submitted,



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EXHIBIT A

STATE OF WISCONSIN,

PLAINTIFF,

Vs.

ABBOTT LABORATORIES, *ET AL.*,

DEFENDANTS

**DECISION OF THE SPECIAL DISCOVERY
MASTER ON PLAINTIFF'S MOTION FOR A
PROTECTIVE ORDER RELATING TO THE
BLAINE-GEBHART CORRESPONDENCE**

JULY 8, 2008CASE NO. 04-CV-1709
UNCLASSIFIED-CIVIL: 30703**Appearances**

Attys. Charles Barnhill and Elizabeth Eberle for Plaintiff

Attys. Steven F. Barley and William M. Conley for Defendants

Background & Ruling

In this antitrust litigation between the State of Wisconsin and several pharmaceutical manufacturers—in which a principal claim is that Defendants overstated claims for Medicaid drug reimbursements—the State seeks an order declaring that an e-mail message from an attorney employed by the Wisconsin Department of Health & Family Services to a supervisor employed by the Department of Administration, which briefly discussed the litigation, constitutes a privileged attorney-client communication. The e-mail was disclosed to Defendants in the course of the lengthy and voluminous document discovery in this case, and the State asks that it be declared privileged and returned.

Defendants argue that the communication is not privileged—and they contend that, if it is, the State has waived the privilege.

For the reasons stated below, I conclude that the communication at issue is privileged, that the privilege was not waived, and that The State's motion should be granted.

Discussion

In January, 2005, several weeks after the Complaint in this action was filed, Robert Blaine, the Administrator of the Division of Executive Budget and Finance in the Wisconsin Department of Administration, who worked closely with DHFS in preparing [its] budget ...”(which, apparently, involved items relating to Medicaid drug reimbursements to pharmaceutical manufacturers)—and whose responsibilities included “look[ing] for documents responsive to defendants’ discovery requests” in this action—sent an e-mail to Neil Gebhart, the assistant general counsel for DHFS, asking whether DHFS had consulted with Gebhart with respect to the action. [Brief, at 2] Gebhart replied, describing his (and his department’s) involvement in the lawsuit—which he believed would probably center on “responding to discovery requests ... from the [Defendants].” He went on to refer to what he believed to be the personal views of “some [people] here” with respect to the merits of the action, and to discuss his (and other lawyers’) thoughts on the likelihood of settlement. The exchange concluded with Blaine asking Gebhart to provide him with a copy of the State’s brief in the case outlining the State’s position.

The State, maintaining that Gebhart and the State of Wisconsin have an attorney-client relationship, argues that the e-mail is privileged. According to the State, Gebhart, along with other state-employed attorneys, “some of whom have not appeared in court,” is “assist[ing] the Attorney General in representing the State of Wisconsin, not just the DHFS in this litigation.”¹ [Brief, at 3] Thus, says the State, “[w]hen Attorney Gebhart responds to an inquiry from an employee in [DOA] directly in connection with a law suit he is helping to prosecute, he is engaged in an attorney-client relationship.” [Id.]

¹ Defendants do not appear to challenge this assertion.

The attorney-client privilege is codified in § 905.03, *Wis. Stats.*, and generally applies to “confidential communications made for the purpose of facilitating the rendition of professional legal services to the client...” § 905.03(2). “Client” is defined in the statute as “a person, public officer ... or ... organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.” § 905.03(1)(a). And a communication is said to be “confidential” if it is “not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” § 905.03(1)(d).

Defendants argue first that there can be no privilege because the State has not shown that the e-mails were “made for the purpose of facilitating the rendition of professional legal services to the client,” within the meaning of § 905.03(2), *Wis. Stats.*, citing *Fisher v. United States*, 425 U.S. 391, 403 (1976), for the proposition that the attorney-client privilege the privilege applies to “only those disclosures necessary to obtain informed legal advice.” Defendants contend that there can be no attorney-client relationship between Gebhart and Blaine because they work for separate agencies. Citing a text on lawyers, they state that “it is well-recognized that ‘[c]ommunications between a lawyer representing one governmental agency and an employee of another ... agency are privileged only if the lawyer represents both agencies.’”² Here, however, the State has asserted, and the e-mails themselves note, that Gebhart is one of the DHFS attorneys working with the Wisconsin Department of Justice and outside counsel on the litigation in question³ and, as indicated, the e-mails relate to that representation, as well as the attorneys, thoughts on settlement, and various statements relating to the merits of the case. To me, that connection is strong enough to overcome Defendants’ argument that no privilege may attach because Blaine and Gebhart work for different agencies.

² See, *Restatement (Third) of the Law Governing Lawyers*, § 74, cmt. c.

³ According to Gebhart, he and a few other agency attorneys are on a litigation committee with the Department of Justice attorneys and outside counsel handling the trial.

Nor do I agree with Defendants that Blaine's request is based on personal "curiosity" rather than in his capacity as a senior state official. It is true, as Defendants point out, that in his initial e-mail to Gebhart inquiring in to the DHFS attorneys' involvement in the action, Blaine states at one point that he was "curious" as to the nature and the details of that involvement. But the quoted word alone does not, in my judgment, turn a government official's communication to a government attorney inquiring into matters relating to an ongoing lawsuit—litigation in which the attorney and the two men's employing agencies are involved—into a purely personal foray. Defendants have not persuaded me that the Blaine-Gebhart exchange was unrelated to their positions in Wisconsin government, and thus non-privileged. Indeed, I am satisfied that the communication in question meets the statutory definition of a communication "made for the purpose of facilitating the rendition of professional legal services to the client..."

Defendants also argue that the State has not shown that the Gebhart e-mail was a "confidential" communication within the meaning of § 905.03(1)(d), *Wis. Stats.*—that is, one "not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client ..." § 905.03(1)(d), *Wis. Stats.* "To the contrary," say Defendants, "the communications ... relay [only] non-confidential factual information regarding procedural matters..." [Brief, at 7] I believe the relationship between Gebhart and Blaine and the nature of the e-mail, as recounted more than once above, compel the conclusion that the communication is confidential under § 905.03(1)(d).

Finally, Defendants maintain that any privilege that might otherwise attach to the e-mail was waived by the State. As indicated, the e-mail was provided to Defendants in response to a general discovery request, and Defendants argue first that the State has failed to establish one of the prerequisites for relief: that its production of the e-mail was inadvertent. Second, they argue that the State waived any privilege that might otherwise have attached to the communication by "allowing Defendants to use it in a manner consistent with non-privileged documents." [Brief, at 10]

As to the first, defendants cite to the trial court's Protective Order for the proposition that only privileged documents that are "inadvertently" produced must be returned, and they argue at length that the State has failed to establish that production of the Gebhart e-mail was inadvertent, citing cases for the proposition that waiver of a privilege is determined on a case-by-case basis using a five-factor test "that includes, in pertinent part, an examination of the reasonableness of precautions taken to prevent disclosure, the amount of time taken to remedy the error, and overriding issues of fairness." [Brief, at 9] In support of their argument, Defendants have submitted the affidavit of one of their attorneys purporting to summarize a conversation he had with one of the attorneys for the State in which State's attorney is said to have stated that they had not undertaken "the kind of review necessary to make designations of confidentiality or privilege." [Brief, Exhibit 6] Thus, say Defendants, "the evidence suggests that there was no inadvertence—[the e-mail] was produced because no privilege review was conducted." [Brief, at 10] The State has included as an exhibit to its brief an e-mail from the attorney in question responding to the statements in Defendants' counsel's affidavit. The attorney states that his conversation with Defendants' counsel did not relate to the document production that included the Gebhart e-mail, but rather related to "different documents, [in] a separate production [occurring] at a different point in time." [Brief, Exhibit 1]. Specifically, he states that the production containing the Gebhart e-mail occurred a year earlier—at a time when the State's attorneys did, in fact, "review records for confidentiality concerns." [Id.]

Beyond that, as the State points out, the court's Protective Order is not limited to the return of only inadvertently-produced documents; it also covers documents that were "mistakenly" produced by a party. See, Protective Order, ¶ 33, which states that "If information subject to a claim of attorney-client privilege ... is inadvertently *or mistakenly* produced, such production shall in no way prejudice or otherwise constitute a waiver of, or estoppel as to, any claims of privilege for such information..." (emphasis added).⁴ I believe it is reasonable to assume that the concept of "mistake" was included

⁴ The paragraph does go on to provide that, upon notice to the other side within 21 days of discovery that allegedly privileged documents had inadvertently or mistakenly been produced, they must be returned. The

in the calculus to ensure that there would be only very limited circumstances (in the State's words "virtually no circumstances") in which a party would not be entitled to the return of a privileged document provided to the other side through mistake or inadvertence. Like the State, I believe such a provision is of particular significance in a case like this where literally millions of documents are in circulation during the discovery process.

For all these reasons, I am not persuaded by Defendants' "no inadvertence" argument.

Defendants also argue that any privilege was waived because, somewhere along the way, the State's counsel, after requesting return of the Gebhart e-mail, did not immediately seek its return, but simply advised Defendants' attorneys that the e-mail should be marked "Confidential" (because of what counsel described as the "proprietary nature of communications between an attorney and his client"), and that, under the court's Protective Order, such a designation has the effect of "permit[ting] the document's use in this litigation." [Brief, at 11] The portion of the Protective Order to which Defendants refer is ¶ 11, which provides as follows:

11. All information designated "Confidential" or "Highly Confidential" or Confidential Health Information" in accordance with the terms of this ... Order and produced or exchanged in the course of the ... Litigation shall be used or disclosed solely for the purpose of the Wisconsin AWP Litigation and in accordance with the provisions of this ... Order. Such ... information ... shall not be used for any business purpose, or in any other litigation or proceeding, or for any other purpose, except by Court Order or otherwise required by law. The foregoing notwithstanding, this ... Order has no effect on, and its scope shall not extend to any party's use of its own Confidential or Highly Confidential information.

Again, I must disagree. Although the State's delay in filing the instant motion for return of the e-mail is somewhat puzzling, it is true, as the State points out, that the

time limit does not apply, however, where, as here, the initial assertion of privilege is challenged by the other side..

Protective Order does not provide any time limit for pursuing such relief where the claim of privilege is challenged by the other side. *See*, note 4, *supra*.

Nor do I consider ¶ 11 of the trial court's order to waive any privilege. By its terms, the paragraph is one limiting, not expanding, the use of discovered documents. It deals with how documents with various confidentiality designations are to be handled by the parties, and the steps which must be taken to limit such use to this lawsuit and protect the documents from "outside" exposure. It does not discuss "privileged," as opposed to "confidential," information, and nowhere does it suggest that anything in its text was intended to bear in any manner on the release or non-release of otherwise-privileged communications—much less provide grounds for finding waiver of any privilege granted by law. Beyond that, whatever thoughts may have led the State's attorney to refer to the "confidential" designation, he made it clear at the time, as Defendants themselves note, that he believed the Gebhart e-mail was a privileged communication. In short, counsel for the State has been consistent in his position that the document was privileged; and, as the State notes in its brief, because there was no time limit in the applicable discovery procedures for seeking its return, and because the bell had been at least partially rung in that Defendants had the document in their possession (and counsel were busy with other aspects of the case)—and any question of inadmissibility was in the future—counsel saw no need to rush to court on the issue. In the State's words, "... it waited to [seek the document's return] when it became an issue;" which, Says the State, "[i]t is now." [Brief, at 7] Defendants have not persuaded me that, under all the circumstances, counsel's remark regarding a "confidential" designation should be held to have waived the privileged status of the document.

Conclusion

For the foregoing reasons, I conclude that the challenged communication is subject to the attorney-client privilege and that the State's Motion for a Protective Order should be granted, and the Defendants ordered to return the disputed document(s) to the State.

IT IS SO ORDERED.

Dated at Madison, Wisconsin, this 8th day of July, 2008

William Eich
Special Discovery Master

EXHIBIT B

COPY

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH: 7

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

AMGEN, INC., et al.,

Defendants.

Case No: 04 CV 1709

Unclassified - Civil: 30703

**STIPULATION AND ORDER OF REFERENCE
TO SPECIAL DISCOVERY MASTER**

STIPULATION

It is stipulated that the following Order of Reference to Special Discovery Master may be entered by the Court.

Dated: June 2, 2005.



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**ORDER OF REFERENCE
TO SPECIAL DISCOVERY MASTER**

Pursuant to Wis. Stat. § 805.06, the Court hereby enters this Order of Reference to a Special Discovery Master ("SDM") for the purpose of assisting the Court in conducting and completing discovery in an orderly and efficient manner.

1. By agreement of the parties, William F. Eich is hereby appointed Special Discovery Master *pro hac vice* to assist in resolving certain discovery disputes that may arise in this action.

2. (a) The SDM shall have the duty and the power to decide discovery disputes that are within the scope of Wis. Stat. §§ 804.01(3) and (4) and §§ 804.12(1), (2)(b) and (4). The SDM shall have the ability to impose expenses, including the fees of the SDM in deciding a particular discovery dispute, pursuant to Wis. Stat. §§ 804.12(1)(c) and 804.12(2)(b). The SDM does not have the duty or power to decide the issue pending before the Court as to whether Plaintiff may share confidential information it receives from discovery in this case with other law enforcement officials. The SDM does not have authority to award sanctions under Wis. Stat. §§ 804.12(2)(a)1 through 4.

(b) The SDM shall have the duty and power to schedule proceedings, require the submission of briefs and other written materials, make *in camera* inspection of documents, and hold hearings, take testimony, hear oral arguments, compel the appearance of witnesses and parties and supervise the conduct of depositions for the purpose of determining discovery disputes and to issue appropriate orders adjudicating such discovery disputes.

(c) The SDM shall have the power and duty to mediate discovery disputes.

(d) The SDM shall act in accordance with the Wisconsin Rules of Civil Procedure, the Local Rules of this Court, and other orders of this Court.

3. All discovery motions and responses and other materials shall be served upon the parties and the SDM and shall be filed with the Court. Each party making a motion must certify that the movant has made a good faith effort to resolve the discovery dispute with the opposing party or parties.

4. (a) The SDM shall be reasonably available to hear matters promptly and at such times as may be convenient, at the discretion of the SDM. Argument may be heard by the SDM in person or by telephone pursuant to Wis. Stat. § 804.12(5). In the event a telephone hearing is conducted other than during a deposition, reasonable advance notice and an opportunity to participate in the telephone conference shall be provided to the parties.

(b) Hearings will be held at places directed by the SDM and may, with the SDM's consent, be held over the telephone. The parties involved in any hearing shall jointly arrange for a court reporter to be present at all hearings and shall provide to the SDM the original transcript of the hearing promptly thereafter. The costs of the court reporter shall be borne in the same manner as set forth in paragraph 6(b). Any party ordering a copy of the transcript shall be responsible for the cost of such transcript.

(c) All decisions of the SDM shall be accompanied by a written Report stating the reasons for the decision or recommendation. The Report may

also indicate the SDM's opinion as to whether or not it would be appropriate or helpful for the Court to review his decision. The Report shall be served upon the parties by mail and filed with the Court pursuant to Wis. Stat. § 805.06(5)(a).

5. Exceptions to any decision made by the SDM may be taken to this Court. The Court has full authority to modify or set aside the ruling of the SDM if the ruling is based on an erroneous exercise of discretion or other error of law. The Court shall review any findings of fact under the clearly erroneous standard provided by Wis. Stat. § 805.06(5)(b) and shall review issues of law *de novo*. Unless an exception is taken, any ruling by the SDM shall automatically and without hearing be adopted and entered as a ruling of the Court upon the expiration of fourteen (14) business days from the date the SDM mails the Report to the parties and to the Court for filing.

6. (a) The SDM shall be compensated at the rate of \$_____ per hour, billed no more often than monthly, for services rendered, and also shall be reimbursed for all reasonable and necessary expenses.

(b) The compensation and reimbursement of expenses shall be paid fifty percent (50%) by the plaintiff and fifty percent (50%) by the defendants subject to paragraph 2(a).

7. All orders and decisions made by the SDM shall be appealable after the final disposition of this case, to the full extent and as if made by this Court. A

party need not take exception to a decision by the SDM in order to preserve the issue for appeal, either on an interlocutory basis or as an appeal of a final order. All submissions and communications by all parties to the SDM, and all orders, decisions and communications from the SDM to the parties in connection with this Order, shall become part of the formal record in this action, and shall be considered part of the record on appeal pursuant to Wis. Stat. § 809.15. Upon the request of any party or the Court, prior to the entry of final judgment, the SDM shall forward the files to the Clerk of this Court for inclusion in the record.

8. Any party may move for a modification of this Order for good cause shown.

IT IS SO ORDERED this _____ day of _____, 2005.

BY THE COURT:

Honorable Moria G. Krueger
Circuit Judge

EXHIBIT C

Westlaw.

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C

Noll v. Dimiceli's, Inc.
 Wis.App., 1983.

Court of Appeals of Wisconsin.
 Drew C. NOLL, Plaintiff-Respondent,
 v.
 DIMICELI'S, INC., Defendant-Respondent.
No. 82-2347.

Submitted on Briefs Sept. 15, 1983.
 Opinion Released Oct. 25, 1983.
 Opinion Filed Oct. 25, 1983.

Plaintiff who had both invested in and done remodeling work on tavern at request of tavern manager brought action against tavern owner to recover investment and profits allegedly due him. The Circuit Court, Milwaukee County, Ralph Adam Fine, J., entered judgment in favor of plaintiff, and tavern owner appealed. The Court of Appeals, Wedemeyer, P.J., held that: (1) evidence that tavern manager had authority to make arrangements which were binding upon owner supported finding that manager was agent of tavern owner in soliciting investment and remodeling work, and thus, trial court properly granted damages against tavern owner on basis of quantum meruit, but (2) trial court erred in awarding interest on judgment at rate of 7%, as legal interest rate was only 5%.

Affirmed as modified.

West Headnotes

[1] Principal and Agent 308 ↪24

308 Principal and Agent
 308I The Relation
 308I(A) Creation and Existence
 308k24 k. Questions for Jury. Most Cited Cases
 Determination of whether principal-agent relationship exists is question of fact, turning on facts concerning understanding between alleged principal

and agent, and is for trier of fact.

[2] Appeal and Error 30 ↪1008.1(5)

30 Appeal and Error
 30XVI Review
 30XVI(I) Questions of Fact, Verdicts, and Findings
 30XVI(I)3 Findings of Court
 30k1008 Conclusiveness in General
 30k1008.1 In General
 30k1008.1(5) k. **Clearly Erroneous** Findings. Most Cited Cases
 On review of factual determination made by trial court without jury, appellate court will not reverse unless finding is **clearly erroneous**. W.S.A. 805.17(2).

[3] Appeal and Error 30 ↪1008.1(5)

30 Appeal and Error
 30XVI Review
 30XVI(I) Questions of Fact, Verdicts, and Findings
 30XVI(I)3 Findings of Court
 30k1008 Conclusiveness in General
 30k1008.1 In General
 30k1008.1(5) k. **Clearly Erroneous** Findings. Most Cited Cases
 In applying "**clearly erroneous**" test as appellate **standard of review** for findings of fact made by trial court without jury, cases which apply "great weight and clear preponderance" test to same situation may be referred to for explanation of **standard of review**, since two tests are essentially the same. W.S.A. 805.17(2).

[4] Principal and Agent 308 ↪23(5)

308 Principal and Agent
 308I The Relation
 308I(A) Creation and Existence
 308k18 Evidence of Agency
 308k23 Weight and Sufficiency
 308k23(5) k. Sufficiency to Support

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115 Wis.2d 641, 340 N.W.2d 575

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Verdict or Finding as to Agency. Most Cited Cases
 In action to recover investment in and remodeling work done on tavern, evidence that manager of tavern, who solicited such investment and remodeling work, had authority to make arrangements which were binding upon tavern owner supported finding that manager was tavern owner's agent in solicitation of investment and remodeling work, and thus, trial court did not err in granting damages against tavern owner on theory of quantum meruit.

[5] Interest 219 31

219 Interest
 219II Rate

219k31 k. Computation of Rate in General.

Most Cited Cases

In action to recover for investment in and remodeling work done on tavern, trial court erred in awarding plaintiff interest on judgment at rate of 7%, as legal interest rate allowable was only 5%.

****576 *642** Edward R. Cameron, Milwaukee, for defendant-appellant.
 Harold Harris, Milwaukee, for plaintiff-respondent.

Before WEDEMEYER, P.J., and DECKER and BROWN, JJ.

WEDEMEYER, Presiding Judge.

Dimiceli's, Inc., (Dimiceli's) appeals from a judgment entered November 26, 1982, wherein the trial court awarded Drew C. Noll (Noll) \$9,565.99 as damages. On appeal Dimiceli's argues that the trial court made the following errors: (1) finding that Michael Volpe (Volpe) was the agent of Dimiceli's; (2) granting damages based on the theory of *quantum meruit*; and (3) awarding Noll interest on the judgment at the rate of seven percent from May 1, 1980, to November 26, 1982, the date the judgment was entered. Because we conclude that the trial court's finding that Volpe was Dimiceli's agent is not **clearly erroneous**, we affirm issues one and two; however, because the legal rate of prejudgment interest is only five percent, we modify that part of the judgment awarding Noll interest at the

rate of seven percent from May 1, 1980, to November 26, 1982.

On August 11, 1977, Noll met Volpe at the "Talk of the Town" tavern. At this meeting, Volpe informed Noll that he was managing the tavern for Dimiceli's. Volpe told Noll that he needed some money for remodeling work and was looking for someone to do it. Noll advised Volpe that he was available to do the work. An agreement was reached wherein Noll invested \$5,000 in return ***643** for twenty percent of the net profits of the tavern. Noll did the remodeling work, but never received any of the profits of business nor a return of his \$5,000 investment. Further facts will be discussed as are necessary for the resolutions of the issues.

Dimiceli's argues that the trial court erred by finding that Volpe was its agent. We disagree.

[1] Dimiceli's states that a trial court's determination regarding whether a principal-agent relationship exists is a question of law to which we need not give any deference. On the contrary, the determination of whether a principal-agent relationship exists is a question of fact for the trier-of-fact. The question turns on facts concerning the understanding between the alleged principal and agent. See ****577** *Soczka v. Rechner*, 73 Wis.2d 157, 163, 242 N.W.2d 910, 913 (1976).

[2][3] On review of a factual determination made by a trial court without a jury, an appellate court will not reverse unless the finding is **clearly erroneous**. See sec. 805.17(2), Stats. While we now apply the "**clearly erroneous**" test as our **standard of review** for findings of fact made by a trial court without a jury, cases which apply the "great weight and clear preponderance" test to the same situation may be referred to for an explanation of this **standard of review** because the two tests in this state are essentially the same. *Robertson-Ryan & Associates v. Pohlhammer*, 112 Wis.2d 583, 591 n. *, 334 N.W.2d 246, 251 n. * (1983) (Abrahamson, J., dissenting). In applying the "great weight and clear

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preponderance" test our supreme court as stated:

The evidence supporting the findings of the trial court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. *644 Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. In addition, when the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact. *Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 249-50, 274 N.W.2d 647, 650 (1979). [Citations omitted.]

[4] We have reviewed the record in this appeal and conclude that the trial court's finding is not **clearly erroneous**. The record reflects that Volpe acknowledged that he was merely the manager of the tavern, but that he had authority to make arrangements which were binding upon the corporation. It was established that Joe Dimiceli was aware that Noll was doing remodeling work at the tavern and that Noll had invested money in the business. Accordingly, we must affirm the trial court's finding.

Dimiceli's next argues that the trial court erred in granting damages based on the theory of *quantum meruit*. The sole basis for this argument is that Noll's work was not done at the request of Dimiceli's but at the request of Volpe. Because we have held above that the trial court was correct in finding that Volpe was Dimiceli's agent, we conclude that the trial court properly granted damages based on the theory of *quantum meruit*.

[5] Lastly, Dimiceli's argues that the trial court erred by awarding Noll interest on the judgment at the rate of seven percent from May 1, 1980, to November 26, 1982, the date the judgment was

entered. We note that Noll *645 concedes that the trial court erred in so doing because the interest rate is only five percent. We agree with the parties and, accordingly, modify the judgment to provide for interest at the rate of five percent from May 1, 1980, to November 26, 1982.

Judgment modified, and as modified, affirmed.

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END OF DOCUMENT

EXHIBIT D

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December 28, 2006

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BY ELECTRONIC MAIL

Frank Remington, Esq.
Wisconsin Department of Justice
Office of the Attorney General
P.O. Box. 7857
Madison, WI 53707

Re: State of Wisconsin v. Amgen Inc., et al., Dane County
Case No. 04-CV-1709; Assertion of Privilege as to
Wisconsin Produced Document No. WI-Prod-AWP 112268

Dear Frank:

This letter addresses the claim of privilege you asserted in your December 4 and 11, 2006 emails to me regarding Wisconsin produced document number WI-Prod-AWP 112268. You have advised that the document was inadvertently produced and that you believe that it is protected from disclosure by the attorney-client privilege. Based on those positions, you have asked that all defendants who have copies of the document return or destroy it. Having considered the facts provided in your emails, and discussed them with counsel for other defendants in the referenced action, we cannot agree to return the document at this time.

At the outset, we wish to make clear that we accept at face value your statement that the document was inadvertently produced and we are not relying on the fact of the document's production as a basis for denying its return. In other words, we are not suggesting that Wisconsin's production of the document waived any privilege that might have applied to it. We believe that our stipulated protective order provides for return of such documents and we respect all parties' right to recover inadvertently produced privileged documents. Thus, if we agreed with your claim that the document reflected privileged communication, we would return or destroy it or, at a minimum agree to Wisconsin's re-production of a redacted form that did not show any privileged elements, and agree not to make use of any privileged information in it.

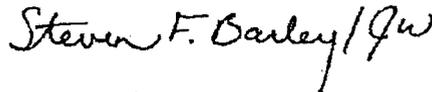
Frank Remington, Esq
December 28, 2006
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Our concern is that the facts in your two emails to me do not establish that the document, and everything in it, is privileged. While your December 11 email includes facts that suggest that circumstances could exist in which a communication between Robert Blaine and Neil Gebhart would reflect a request for legal advice by Mr. Blaine and the rendering of such advice by Mr. Gebhart, neither Document number WI-Prod-AWP 112268 nor either of your emails provides a sufficient basis for concluding that the document discloses any such communication. As you know, the mere fact that one of the participants in a communication is an attorney does not render the communication privileged. Based on the information you have provided, there is not an adequate basis for concluding that the communication reflected in WI-Prod-AWP 112268 is privileged.

Because we believe that truly privileged communications should be protected and not waived by inadvertent production, in keeping with the terms of the protective order, we have advised all defendants to maintain WI-Prod-AWP 112268 in a sealed envelope and not to make any use of the document pending a resolution of this disagreement one way or the other.

We believe that it is in all of our interests to reach a resolution promptly and therefore propose that we forego a motions practice at this time and instead mediate this disagreement with the assistance of Judge Eich. To that end, we attach a proposed letter to send to Judge Eich.

Sincerely,



Steven F. Barley

Enclosure

cc: All counsel of record (via LNFS)

