

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 1999-009334

08/24/2004

HON. PAUL A KATZ

CLERK OF THE COURT  
B. Navarro  
Deputy

FILED: 08/30/2004

ALLAN WACHTER, et al.

DAVID C TIERNEY

v.

JOHN LEZDEY, et al.

DAVID PAUL BROOKS

DOUGLAS J ROVENS  
ZELLE HOFFMAN VOELBEL MASON  
& GETTE LLP  
660 S FIGUEROA ST  
STE 1910  
LOS ANGELES CA 90017  
DARREN LEZDEY AND  
JARETT LEZDEY AND  
NOREEN LEZDEY  
4625 E BAY DR STE 302  
CLEARWATER FL 33764  
DARREN LEZDEY AND  
JARETT LEZDEY  
148 MARKDALE BLVD  
INDIAN ROCKS BEACH FL 33785

**UNDER ADVISEMENT RULING**

The Court having taken Defendant and Counterclaimant John Lezdey's Motion to Dismiss, or, Alternatively, Disqualify Sacks Tierney and Allow Discovery under advisement; having considered the evidence presented at the hearing of this matter; having considered the written closing arguments of the parties; and good cause appearing,

**IT IS ORDERED** denying Defendant and Counterclaimant's motion in its entirety.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 1999-009334

08/24/2004

This Court has deep concerns with respect to the conduct of the Plaintiff, Dr. Allan Wachter, and with respect to the conduct of Defendants John Lezdey, Darren Lezdey and Jarett Lezdey throughout this litigation. Allan Wachter and his wife, Susan Wachter, both testified at the evidentiary hearing that they had fear of the Lezdeys, that on August 18, 1999, Jarett Lezdey made a threatening telephone call to Susan Wachter which resulted in the Tempe Police being called, and that Dr. Wachter's office was shot at by an unknown assailant. Dr. Wachter also testified that John Lezdey filed a false BOMEX claim against him in August of 1999 and that he was also threatened by Jarett Lezdey on August 18, 1999 when testifying in unrelated proceedings in San Francisco, California. After that time, Dr. Wachter tells us that he bought guns for himself and his wife, obtained concealed weapons permits and hired the Spinelli Agency to conduct surveillance of the Lezdeys, allegedly for personal safety and security reasons.

Darren Lezdey, at the evidentiary hearing, denied that either he or his family have ever threatened the Wachters, and further contended that it was his belief that the Wachters or Spinelli Investigations burglarized Lezdey homes and business properties to obtain either confidential or attorney/client privileged information.

This Court has little doubt that the Wachters may have been threatened and that certain Lezdey properties may have been burglarized, but this Court believes that both Plaintiffs and Defendants have such animosity toward one another, that they have deeply exaggerated their fears and the nature of their confrontations.

In or about August 1999, Dr. Wachter hired Spinelli to investigate the Lezdeys premised on security concerns. At the time of this hiring, Spinelli was doing unrelated work for the Sacks Tierney firm and had investigated AlphaMed, a company owned by the Lezdey family, for alleged trade secret violations. George Spinelli, the owner of Spinelli Investigations, was introduced to Dr. Wachter by attorney Yavitz at the Sacks Tierney firm.

Initially, Spinelli was hired to do a background investigation of the Lezdeys, to do a public records search of them, and to engage in surveillance, allegedly for personal security reasons.

Upon the recommendation of George Spinelli, Spinelli Investigations was hired in or about October 1999 to conduct its surveillance through "trash diving". George Spinelli testified at the time that his services were focused upon providing the Wachters with security, and that he had no idea whether or not the information he received would or could be used in litigation.

David Tierney, the Wachters' counsel, was well aware of this surveillance investigation and Wachter's hiring of Spinelli. To insulate himself from the possible receipt of attorney/client, or otherwise, privileged information, Tierney advised both George Spinelli and the Wachters that he did not want to receive any of the information that Spinelli might obtain from the trash collection operation. However, this Court believes that Tierney should have gone a step further

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 1999-009334

08/24/2004

in advising Spinelli not to share any information that he believed might be attorney/client privileged with the Wachters or any of the employees of Arriva Pharmaceuticals, the company that ultimately has paid Spinelli's bills.

Spinelli's initial work for Wachter was completed in late 1999, before any trade secrets investigation of the Lezdeys conduct was commenced. This Court does not believe that Spinelli, its agents or employees were responsible for any break-ins into Lezdey businesses or residences.

In or about November 2000, Wachter again asked Spinelli to resume its investigation of Lezdey. During this latter investigation, Spinelli, through its Florida agents, obtained a list of questions that Lezdey intended to ask Dr. Wachter at Dr. Wachter's deposition. This list of questions was obtained after the taking of such deposition, and there is no evidence that it was ever shared with Dr. Wachter. During this latter investigation, Spinelli also recovered from the trash some handwritten pleadings prepared by John Lezdey, a letter from a consulting attorney to John Lezdey with a draft of a counterclaim, and a draft of AlphaMed's business plan.

This Court concludes that the draft questions, communications between John Lezdey and his attorneys, and any draft pleadings remain confidential or attorney/client privileged, even though they were discarded in the trash. The Arizona case law is clear that one does not lose the attorney/client privilege unless the client intends to waive the same. However, until the immediate motion was filed, there is no competent admissible evidence before this Court to suggest that the attorney/client privileged information was ever shared with Allan Wachter, and it is quite clear to this Court that, to the extent Dr. Wachter was aware of such information, he never shared the same directly or the substance thereof with his counsel.

While the implications of Rule 26.1, Ariz.R.Civ.P. do come into play with respect to the issues presented herein, everything that the Plaintiffs discovered through the Spinelli trash diving operation consists of information already in the possession of the Lezdeys and with which they were intimately familiar. While this Court has serious concerns regarding the ethics of "trash diving", particularly when given the blessing of counsel, there is no competent evidence before this Court that in any way suggests that Wachter or his counsel gained any tactical advantage from the results of Spinelli's efforts.

While this Court would have preferred that Tierney had not inspected the volumes of documents which were presented to this Court during the course of the immediate hearing (items recovered from Lezdeys' trash) before the taking of George Spinelli's deposition, he would ultimately have required access to this information as part of the immediate proceedings which are targeted at seeking the dismissal of this action or the removal of the Sacks Tierney firm as Plaintiffs' counsel.

There is no evidence before this Court that, as the result of Spinelli's conduct, or the receipt of the information by Dr. Wachter, that Plaintiffs or their counsel obtained an unfair advantage in this litigation or in any way changed their legal strategy as a the result thereof. It is

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 1999-009334

08/24/2004

undisputed that none of the documents which the Lezdeys claim are attorney/client privileged or work product were ever shown to or discussed with Mr. Tierney or any employees of the Sacks Tierney law firm. Mr. Tierney took adequate, though not complete precautions, in advising Dr. Wachter that he should not discuss with Mr. Tierney anything that he saw or learned from the trash, and it appears that these instructions were strictly complied with. It also appears that during the course of the Spinelli investigation, Wachter only obtained 30 to 50 pages of documents, most of which were inconsequential and very few of which, if any, were attorney/client privileged.

For all of these reasons, the Court finds no legal cause to either dismiss Plaintiffs' Complaint, or disqualify the Sacks Tierney law firm or David Tierney from further representation in this matter.

**IT IS FURTHER ORDERED** granting John Lezdey's Motion to Strike Plaintiffs' "Notice of Submission of Additional Evidence Concerning Defendant's 'Motion to Dismiss, or Alternatively Disqualify Sacks Tierney'".

**IT IS FURTHER ORDERED** denying Plaintiffs' Application for Contempt Sanctions Against Douglas J. Rovens, Esq.

FILED: Exhibit Worksheet; Hearing Worksheet

cc: Judge Armstrong