

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

**In re: BRIDGESTONE/FIRESTONE, INC., ) Master File No. IP 00-9373-C-B/S  
TIRES PRODUCTS LIABILITY LITIGATION ) MDL NO. 1373  
\_\_\_\_\_)  
THIS DOCUMENT RELATES TO ALL )  
ACTIONS )**

**ENTRY REGARDING INADVERTENTLY DISCLOSED DOCUMENT**

This cause is before the magistrate judge on defendant Ford Motor Company's ("Ford") Motion for Order Permanently Sealing Deposition Transcript and Requiring Return of Inadvertently Disclosed Document.<sup>1</sup> The issues raised in Ford's motion have been extensively briefed by the parties, and the magistrate judge, being duly advised, and after careful consideration of all of the parties' arguments, **DENIES** Ford's motion for the reasons set forth below.

At issue is a document which Ford argues is protected by the attorney-client and work product privileges. For the purposes of this ruling, the magistrate judge will assume that the document is, in fact, privileged.

The document at issue first came to Ford's (and the court's) attention on July 12, 2001, when counsel for the plaintiffs marked it as an exhibit during a deposition in Venezuela. Plaintiffs' counsel had obtained the document from the website which serves as Ford's electronic document depository for this and other related litigation ("the website"). Because the document on its face bears a header indicating that it is privileged and confidential, Ford's attorney at the deposition immediately asserted that the document was privileged and had been inadvertently

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<sup>1</sup>Ford has amended its motion twice, each time to add an additional deposition transcript that it wishes to have permanently sealed.

produced by Ford. The parties contacted the magistrate judge by telephone for a ruling whether the plaintiffs could question the deponent regarding the document, and in the interests of efficiency, the magistrate judge ruled that questioning could proceed, but that the document and all portions of the transcript referring to it would be sealed and submitted to the court for an in camera review, pending the court's ultimate ruling regarding whether the document was, in fact, privileged, and whether the privilege had been waived by Ford.<sup>2</sup>

An investigation by Ford after the July 12, 2001, deposition revealed that the document apparently was posted to the website through a combination of mistakes by both Ford and its scanning vendor. In order to process the enormous number of documents which it has placed, and indeed is still placing, on the website, Ford has contracted with at least two outside vendors: one to scan the documents into electronic form, and the other to post the electronic documents on the website. When it sent the document in question to the scanning vendor, Ford failed to include a notification sheet indicating whether the box in which the document was contained had been cleared for production in this litigation or was to be returned to Ford for further evaluation before production. The scanning vendor, in turn, improperly coded the box as being cleared for production, rather than seeking clarification from Ford as to the status of the box. The mis-coded document therefore was sent by the scanning vendor to the website vendor, and on or about May 22, 2001, the vendor posted the document on the website. Ford was unaware that this had occurred until the July 12<sup>th</sup> deposition.

Were that the end of the story, this Entry could also end here, as Ford has established that

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<sup>2</sup>The magistrate judge subsequently made the same ruling regarding two additional Venezuelan depositions; these depositions are the subject of Ford's two amendments to the instant motion.

the document was posted on the website inadvertently, and the Case Management Order (“CMO”) entered in this case contains the following provision relevant to inadvertently produced documents:

In the event that a privileged document is inadvertently produced by any party to this proceeding, the party may request that the document be returned. In the event that such a request is made, all parties to the litigation and their counsel shall promptly return all copies of the document in their possession, custody, or control to the producing party and shall not retain or make any [copies]. Such inadvertent disclosure of a privileged document shall not be deemed a waiver with respect to that document or other documents involving similar subject matter.

While one might certainly question whether Ford sufficiently supervised its outside vendors and had adequate procedures in place prior to May 2, 2001, to prevent such inadvertent productions from occurring, the circumstances surrounding the posting of the document to the website do not seem to be so egregious as to remove the production of the document out of the “inadvertent” category.

There is more, however. On September 14, 2001, shortly after the original briefing of Ford’s motion was completed, the plaintiffs filed a Notice of Filing Supplemental Authority in Support of Plaintiffs’ Memorandum of Law in Opposition to Ford Motor Company’s motion to Seal Deposition Transcripts. The “supplemental authority” submitted by plaintiffs was a letter from Firestone’s counsel to Ford’s counsel indicating that Ford produced the same document again, this time in a group of 25 boxes of documents delivered to Firestone on September 10, 2001.<sup>3</sup> While Ford argues that this is merely a second inadvertent production and the CMO

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<sup>3</sup>Ford does not concede that the document was included in the September 10, 2001, production to Firestone, but it also does not, and cannot, deny that it was. The fact that Ford has no real way of knowing exactly what was produced to whom on September 10<sup>th</sup> underscores the fact that it has delegated far too much responsibility and discretion to its outside vendors. The magistrate judge feels quite confident in relying upon the representations of Firestone’s counsel,

applies to once again preclude the waiver of any privilege based upon the inadvertent production, the magistrate judge disagrees. To produce the document once was inadvertence; to produce it again while at the same time vigorously asserting in court the importance of keeping it confidential, was something else entirely. The magistrate judge determines that under these unusual circumstances—which certainly were not contemplated by the court when it approved the CMO—Ford is not entitled to rely upon the provision in the CMO regarding inadvertent production of documents. The magistrate judge further determines that Ford's failure to maintain the confidentiality of the document after the first inadvertent production was discovered was inexcusable and constituted a waiver of any privilege that may have originally attached to the document. This is not a subject matter waiver, but applies only to the document itself and the specific contents thereof.

The document and deposition transcripts and briefs discussing it shall remain sealed for 10 days from the date of this Entry to permit Ford to file an appeal of this ruling to Judge Barker, if it so desires. In the event that an appeal is filed within 10 days, the document and deposition transcripts and briefs discussing it shall remain sealed pending resolution of the appeal. If no appeal is filed within 10 days, the Clerk shall unseal the document and deposition transcripts and briefs discussing it, Ford shall re-post the document on the website, and the parties will be free to use the document in this litigation as relevant.

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as an officer of the court, absent any evidence to suggest that those representations are incorrect.

ENTERED this \_\_\_\_\_ day of October 2001.

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V. Sue Shields  
United States Magistrate Judge  
Southern District of Indiana

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