

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE  
PREVENTION OF CRUELTY TO  
ANIMALS, et al.,

Plaintiffs,

vs.

RINGLING BROTHERS AND BARNUM  
BAILEY CIRCUS, et al.,

Defendants.

.  
. Docket No. CA-03-2006  
. .  
. .  
. .  
. Washington, D.C.  
. Friday, September 16, 2005  
. 2:35 p.m.  
. . . . .

TRANSCRIPT OF A MOTION  
BEFORE THE HONORABLE EMMET G. SULLIVAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: KATHERINE A. MEYER, Esquire  
KIMBERLY DENISE OCKENE, Esquire  
MEYER GLITZENSTEIN & CRYSTAL  
1601 Connecticut Avenue, NW  
Suite 700  
Washington, DC 20009

For the Defendants: EUGENE D. GULLAND, Esquire  
JOSHUA D. WOLSON, Esquire  
COVINGTON & BURLING  
1201 Pennsylvania Avenue, NW  
Washington, DC 20004-2401

Court Reporter: Elaine A. Merchant, RPR, CRR  
Official Court Reporter  
333 Constitution Avenue, NW  
Room 6822  
Washington, DC 20001  
(202)289-1571

Proceedings recorded by machine shorthand, transcript produced  
by computer-aided transcription.

1 great work. But your clients, I think, have hidden the ball  
2 from you and they find themselves in a very precarious  
3 position.

4 MR. GULLAND: Your Honor, I am unaware of any bad  
5 faith or effort to hide the ball here.

6 THE COURT: The bad faith would be they didn't  
7 produce everything they knew existed, though. That's the bad  
8 faith. Oh, off-site veterinary, oh, we didn't know you were  
9 talking about that, we thought it was just these couple of  
10 documents, and thank God the plaintiffs had the diligence to  
11 have a meet and confer because now we know. I mean, that's  
12 crap. And I'm not referring to you. That's just crap your  
13 clients are giving you, counsel. That's exactly what it is.

14 And I'm going to order that all those documents be  
15 produced. And I want someone to come in here and tell me. I'm  
16 going to set this down for an evidentiary hearing because I am  
17 truly displeased about the manner in which discovery has taken  
18 place. Those documents should have been produced prior to any  
19 meet and confer. There was a request. They had an obligation  
20 as clients to be up front with the plaintiffs and the Court.  
21 And if there were privileged documents, to say these documents  
22 are privileged so we could have litigated the privilege issue.

23 MR. GULLAND: Your Honor, we've never said the  
24 documents are privileged.

25 THE COURT: I want them produced. But I want them

1 also to show cause why they shouldn't be held in contempt of  
2 court, and I mean it. And if I find they're in contempt of  
3 court, I'm going to impose sanctions. I'm going to give the  
4 word monetary recovery a new definition, because they're  
5 playing games with the Court and I don't appreciate that.

6 MR. GULLAND: Your Honor, with all due respect, I  
7 don't think that there's an adequate basis here to reach that  
8 conclusion.

9 THE COURT: Fine. Then they can respond to my order  
10 to show cause, but someone is going to respond and tell me why  
11 they could not respond to a clear English request for a  
12 production of all medical and veterinarian records. They're  
13 going to do that. And if they don't, if they can't do it, I'm  
14 going to hold them in contempt and impose significant -- and do  
15 you know what, I'm not going to rule out incarceration either.  
16 Because I'm sick and tired of all these efforts by litigants to  
17 hide the ball. I've seen it time and time again and I'm tired  
18 of it.

19 So an order to show cause will be separate and apart  
20 from my ruling to produce all of the medical records and  
21 veterinarian records. And when I say all, I mean all, every  
22 last record.

23 Now, if there's some research going on that is going  
24 on in an effort to prepare some documentary, that's something  
25 different. If it can be justified. If it can be justified.

1           Now, I'm open to someone filing something, either  
2 under seal or on the public record, in an effort to persuade me  
3 that there's a need or a basis for a protective order in that  
4 regard. And I'll just leave it at that. It may well be that a  
5 basis will exist for the entry of such a protective order. And  
6 it doesn't sound like plaintiffs seriously disagree with that  
7 if an appropriate showing can be made.

8           But with respect to veterinarian records and medical  
9 records, I want them all produced and I want them produced now.

10           MR. GULLAND: Your Honor, on the question of the  
11 protective order, Ms. Meyer said --

12           THE COURT: The medical records and veterinarian  
13 records?

14           MR. GULLAND: Yes. Focused on that.

15           Ms. Meyer said again and again that there's no basis  
16 here to fear that the plaintiffs are going to misuse these.  
17 Just last week, Your Honor, a San Francisco television station,  
18 plaintiff Tom Rider appeared on that. Tom Rider appeared on  
19 that station and provided a reporter on that station with  
20 copies of tapes that were produced in this litigation.

21           In particular, there was a tape showing the birth of  
22 a baby elephant. And Mr. Rider and other persons affiliated  
23 with the plaintiffs made a commentary on that, very one-sided  
24 in our point of view, showing the elephant chained while she  
25 was having a baby in order to protect the baby elephant and

1 documents out of the purview of the public.

2 I agree with you, misuse. And that's why I stopped  
3 counsel when she kept using the word misuse. I'm concerned  
4 about the appropriate utilization, if at all, of these  
5 documents. And it may well be that if they're discoverable and  
6 there's no privacy interest and there's no otherwise recognized  
7 objection to production of these documents, I'm not quite sure  
8 they shouldn't find their way into the public purview.

9 MR. GULLAND: Well, it's well settled, Your Honor,  
10 that when information that is produced in discovery is later  
11 admitted into evidence in court, then it is in the public  
12 domain and there's no way we can disagree with that.

13 But the purpose of discovery protective orders is to  
14 prevent all of the raw materials that are exchanged between the  
15 parties during the litigation which may contain confidential,  
16 embarrassing or other information and lend themselves to  
17 misuse, or even if not intentional misuse, misinterpretation in  
18 the public domain. That's why you have the order.

19 And I quite agree with you that after things  
20 percolate and we determine whether it's relevant, whether it's  
21 admissible, whether it would be appropriate to come into  
22 evidence, then if you make that determination, then it's not  
23 subject to a protective order.

24 But all I'm asking right now is that the materials  
25 should be protected as we are shoveling them into the --

1 THE COURT: How many materials --  
2 what kind of volume are we talking about for these  
3 documents?

4 MR. GULLAND: May I address that question to  
5 Mr. Wolson?

6 MR. WOLSON: Your Honor, the records vary by  
7 elephant, of course. But we're talking about on the order of  
8 about 70 elephants. And the records tend to be anywhere from  
9 ten to 30 pages from the ones I've seen. I don't know that  
10 I've seen them all.

11 THE COURT: Per elephant?

12 MR. WOLSON: Per elephant, that's right.

13 THE COURT: I'm sorry, ten to 30 pages?

14 MR. WOLSON: Per elephant, yes.

15 I don't know that I've seen them all, Your Honor, so  
16 there may be variation outside those bounds either way for some  
17 of the elephants.

18 THE COURT: A couple thousand pages that they  
19 overlooked?

20 MR. WOLSON: That's right, Your Honor.

21 THE COURT: They overlooked them?

22 MR. WOLSON: They overlooked them.

23 THE COURT: How could you overlook 2,100 pages of  
24 documents?

25 MR. WOLSON: The answer, Your Honor, is really that

1 there's a disconnect at times, I think in any organization,  
2 including this one, between in-house lawyers, who are sort of  
3 coordinating the process of discovery, and people at various  
4 decentralized locations. As Mr. Gulland referenced, this is a  
5 very decentralized organization. And, in this case, records  
6 that were off-site and stored in one of the veterinarian's  
7 homes were overlooked. That's my understanding, his home  
8 office, as I understand it.

9 THE COURT: Someone needs to get me a declaration  
10 under oath about that, because I'm not pleased about that at  
11 all. And, again, I want the record crystal clear, I'm not  
12 faulting the law firm at all. I have every reason to believe  
13 that you did exactly what any outstanding lawyer would do, you  
14 tell your clients to get these documents and then you have to  
15 rely upon what your clients give you. So I'm not shifting the  
16 blame to the lawyers at all. But I'm displeased about an  
17 argument that they overlooked some 2,100 pages.

18 By the same token, I don't think the remedy is to  
19 punish anyone and for a Court not to seriously consider the  
20 pros and cons of a protective order. I would not do that and  
21 not be arbitrary in that regard. But it causes the Judge to  
22 pause when we're talking about failure to produce documents of  
23 this magnitude.

24 MR. GULLAND: I can surely understand dissatisfaction  
25 with the failure to produce the documents in the first round,

1 information together.

2 Mr. Gulland mentioned that the person who had the  
3 documents off-site is William Lindsey. He is their full-time  
4 veterinarian, Your Honor, and has been for years. He is  
5 Ringling Brothers' chief vet. He's been listed as a witness  
6 because of that by these same attorneys, Your Honor.

7 They had an obligation to go to their client and say  
8 the plaintiffs have asked for all of the medical records on  
9 each of the elephants. Dr. Lindsey must produce all of his  
10 records. Not to come here --

11 THE COURT: Because there's no privilege that  
12 attaches.

13 MS. MEYER: There's no privilege. And not instead to  
14 hide the ball. And now here we are a year and a half later and  
15 they're telling you -- we've never heard this before, by the  
16 way -- they're telling you the reason we didn't produce them is  
17 because Dr. Lindsey had them at his house and there was a  
18 disconnect.

19 That is just not acceptable, Your Honor, it's not  
20 acceptable. Dr. Lindsey is their vet, full-time vet. He's the  
21 guy who's there when the USDA inspectors come, he's the guy  
22 who's there that's always talking about how wonderful their  
23 care of their elephants is, he's the guy, he's the point man,  
24 he's their principal vet. They had an obligation to ask him  
25 for these records and not just rest on some disconnect about



1 some disjointed, you know, organization.

2 This is a huge corporation, Your Honor, a  
3 well-financed corporation. This just is not going to cut it  
4 there's some mom and pop disconnect here. William Lindsey,  
5 they've identified him as a witness in this case. So I don't  
6 buy it.

7 I understand you're trying to give them, you know,  
8 whatever deference they're due, Your Honor. But the notion  
9 that the lawyers had nothing to do with this. They have an  
10 obligation, just as we did, Your Honor. We produced -- you  
11 haven't seen a motion to compel from the defendants in this  
12 case, Your Honor. We took our discovery obligations seriously.  
13 We gave them everything they asked for. Anything that was  
14 privileged we put it on a privilege log. We detailed it, we  
15 told them what it was and we told them why it was privileged.  
16 We're entitled to the same from them and we have not received  
17 it.

18 The Tom Rider documents you just heard about, the  
19 same pattern and practice, Your Honor. Did not identify the  
20 records, did not list them on the privilege log. To this day,  
21 Your Honor, they have not listed any of those documents that  
22 Mr. Gulland just told you are, of course, all covered by the  
23 work product privilege on a privilege log. They're not listed.  
24 They're not identified, they're not listed.

25 They took the position, as they do with a lot of the

1 discovery -- and I really hope you read our papers on the  
2 motion to compel, Your Honor, because this is the big  
3 problem -- they took the position that since they made a  
4 general objection to the way we defined Ringling Brothers in  
5 our instructions, we found this out later, that because they  
6 don't agree that attorneys and agents and consultants should be  
7 allowed to be part of that definition, that anything in the  
8 possession of their attorneys was nonresponsive.

9 They didn't claim it was privileged. This is a new  
10 claim that it's privileged. They pretended it didn't exist, it  
11 was nonresponsive, because they had a general objection  
12 concerning how we defined Ringling Brothers. As I said  
13 earlier, Your Honor, the problem is they had ten general  
14 objections. They asserted all ten for every single discovery  
15 response.

16 So there is absolutely no way for us to know what  
17 have they not given us and why. And that's why it took us the  
18 time it took us to sift through it, figure it all out, press  
19 them, press them, press them, press them, and now they're  
20 piecemeal belatedly asserting privileges for these things.  
21 Under Athridge they're just not allowed to do that, they're not  
22 allowed to do it.

23 And if you give them a protective order, and here's  
24 my problem with the way you want to proceed, Your Honor, it  
25 shifts the burden to us. It gives them what they want, a broad

1 protective order, and then puts the burden on my clients to  
2 come forward and ask you with respect to particular  
3 information, please let that be lifted from the protective  
4 order.

5 That's not the way it's supposed to work, Your Honor,  
6 under the rules. The burden is on them, the burden is on them  
7 to show that something, that there's good cause to have  
8 something subject to a protective order. Otherwise, the  
9 presumption is that these proceedings should be open to the  
10 public.

11 Now, I've got to address what Mr. Gulland had to say  
12 about the Channel 2 report in San Francisco. It's true, that  
13 was a videotape that they released to us, never claimed it was  
14 confidential, never claimed it was privileged, our clients have  
15 it. And Mr. Rider, as I explained, he goes around the country,  
16 he tries to talk to reporters, tell them what's really going on  
17 behind the scenes, because it is an issue of great public  
18 debate. The only reason they're allowed to have these animals  
19 that's an endangered species, Your Honor, is because our  
20 federal government allows them to have them because they claim  
21 they're conserving them.

22 And one of the reporters say, well, do you have  
23 anything? You say they chain their elephants all the time,  
24 Ringling Brothers say they don't chain their elephants all the  
25 time. Do you have any anything that would show they chain

1 their elephants? Yeah, we have this videotape that shows a  
2 nine year old elephant chained on three legs giving birth to a  
3 baby. Here it is. They gave it to us in discovery, just as  
4 you suggested.

5 The correspondence that Mr. Gulland referred to, they  
6 even gave the reporter the correspondence from Mr. Wolson. Do  
7 you know why we gave him that correspondence? Because the  
8 editor called us up on the phone and said where did you get  
9 this, how did you get this? We said they gave it to us in  
10 discovery, here's the letter, here's the letter from their  
11 lawyer. That's why we gave it to them.

12 So we just said we got it in discovery, they gave it  
13 to us, it's their videotape. That's exactly what we did.  
14 That's all we did. There's nothing nefarious about that. And  
15 they don't want that kind of information to be made public,  
16 Your Honor.

17 I've got to say one other thing, Your Honor, again,  
18 about them controlling the debate. They go around the country,  
19 they issue, here's an example, colored brochures handed out.  
20 This one we got in April of this year, babies, babies, babies  
21 and more on the way. All about their wonderful conservation  
22 program. They're breeding more elephants for use in the circus  
23 and they say they're conserving them.

24 This is what they're handing out to the public, Your  
25 Honor. Now, they didn't bother to tell the public that three

1 of these baby elephants who are depicted here, Kenny, Benjamin  
2 and Ricardo, are dead, they're dead. We think the public is  
3 entitled to know that. These baby elephants all died when they  
4 were under the age of four in the care of Ringling Brothers.  
5 They don't tell the public that. They say, babies, babies,  
6 babies.

7 THE COURT: Is this a recent publication?

8 MS. MEYER: Yes, Your Honor.

9 THE COURT: And it's published post-death of those  
10 baby elephants?

11 MS. MEYER: Yes, Your Honor. We got it just in  
12 April, April of 2005. It was picked up at the circus. The  
13 three babies that are dead are at the bottom of the page. The  
14 two in the corner, Kenny and Benjamin, it tells you when  
15 they're born, it tells the public when they're born. It  
16 doesn't mention that they're dead. The other elephant is  
17 Ricardo. Here he is on the left-hand page. He's at the  
18 bottom. Ricardo, born 12-05-03. Well, Ricardo died last  
19 August. They don't mention that. This was handed out at the  
20 circus in April of this year in Washington, D.C.

21 THE COURT: I didn't go this year.

22 MS. MEYER: So they're allowed to do that.

23 THE COURT: Not because I didn't want to go. My  
24 grandkids didn't want to go.

25 MS. MEYER: The point is, Your Honor, I don't

1 begrudge them their right to issue things like this. I have no  
2 problem with that at all.

3 I do object strenuously, however, when they come to  
4 this Court and say the actual records about these animals,  
5 records that might show that Ricardo is dead, that Kenny is  
6 dead, that Benjamin is dead, oh, the public can't see those  
7 because those are confidential. They get to control the  
8 debate. That's not fair.

9 And that's my position, Your Honor.

10 Again, we are willing to entertain the notion that  
11 there may be some particular medical record that relates to  
12 some scientific study that they're working on.

13 Mr. Gulland kept talking about how they're so  
14 cryptic, they're cryptic, they're cryptic. I mean, I know in  
15 the Exemption 4 context under FOIA. If the information is so  
16 cryptic, there is case law that says, well, then how could it  
17 be of any commercial value to any competitor if it's so cryptic  
18 you can't understand it without additional information. It  
19 seems to be what he's taking. It's your cryptic.

20 But there's simply no basis for basically giving them  
21 what they want and again rewarding them for the practice that  
22 they engaged in here by a year and a half later giving them the  
23 protective order and making us have to come in document by  
24 document and explain to you why this should be made public.

25 we don't want to advocate that a particular document

1 should be made public. We may not rely on any of this  
2 information in the public domain, I don't know. The point is  
3 it shouldn't be held in secret, unless there's a good reason to  
4 hold it in secret.

5 I mean, I got to tell you, Your Honor, one of the  
6 other reasons that we want this information to be available to  
7 us is, frankly, the only way we've been able to figure out that  
8 there are documents that we asked for that we didn't get,  
9 because, again, they didn't tell us, they didn't list them on a  
10 privilege log, was, frankly, talking to other groups and  
11 talking to reporters. The way we found out about this baby  
12 Ricardo, we had no medical records on him at all, the baby who  
13 is dead, the way we found out about it is a Washington Post  
14 reporter wrote an article about a lion, a Ringling Brothers  
15 lion, a young lion that had died last summer. And in the  
16 course of writing that story he found out that Ricardo, a baby  
17 elephant --

18 THE COURT: You're saying three of these elephants  
19 are dead?

20 MS. MEYER: Correct.

21 THE COURT: When did this appear? When did this  
22 publication appear?

23 MS. MEYER: This was a souvenir program that was  
24 handed out by Ringling Brothers in April of 2005 at either the  
25 MCI Center or the Armory.

1 THE COURT: It ends, and when Asian elephants are  
2 content, they naturally make little Asian elephants creating a  
3 wondrous living legacy for many generations to come.

4 Endangered species? Not if we can help it. And  
5 three of these elephants are dead?

6 MS. MEYER: Correct, Your Honor. And they don't want  
7 the public to know that. And that's why they don't want us to  
8 have any of these records in public.

9 Again, Your Honor, the burden is on them, the burden  
10 is on them. They claim they're not privileged, they have some  
11 other basis for saying this information should be withheld from  
12 the public. Let them make a document by document  
13 demonstration. But don't put the burden on my plaintiffs to  
14 come forward and show that a particular document should be  
15 disclosed. That's just not the way the rules are supposed to  
16 work.

17 And I really think it really gives these defendants  
18 what they wanted and what their whole strategy was designed to  
19 get. And I really just don't, in the interest of fairness, in  
20 addition to the fact that that's not the way the rules work, I  
21 don't think that should be the outcome here.

22 I'm a little concerned that we haven't really  
23 addressed the motion to compel, because there are large  
24 categories of other records that we've never seen. There's  
25 videotapes. We asked for all the videotapes that depict their