NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

# United States Court of Appeals for the Federal Circuit

MISCELLANEOUS DOCKET NO. 762

IN RE RAMBUS, INC.,

Petitioner.

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MISCELLANEOUS DOCKET NO. 772

IN RE RAMBUS, INC.,

Petitioner.

ON PETITION FOR WRIT OF MANDAMUS

Before GAJARSA, LINN, and PROST, Circuit Judges.

Order for the court filed by Circuit Judge PROST. Order concurring in part and dissenting in part filed by Circuit Judge GAJARSA.

PROST, Circuit Judge.

ORDER

Rambus, Inc. petitions for a writ of mandamus to direct the United States District Court for the Eastern District of Virginia to vacate its orders directing Rambus to produce certain documents that Rambus asserts are covered by the attorney-client and work product privileges.* Infineon Technologies AG, et al. oppose. Rambus moves for leave to file a reply, with reply attached. Infineon opposes.

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* In Misc. 762, Rambus sought a petition for a writ of mandamus directed to a district court order that has now been superseded by the two additional district court orders on review in Misc. 772. Thus, Misc. 762 is dismissed as moot.

The district court, after an in camera review of various documents that Rambus asserts are privileged, granted Infineon's motion to compel production of certain documents. Specifically, the district court determined that (1) documents related to Rambus's document retention policy and litigation policy should be produced because Rambus had engaged in an improper spoliation scheme, and (2) alternatively, those documents should be produced because Rambus had previously selectively disclosed matters related to its document retention policy and litigation policy. Because these are alternative holdings, to fully succeed on its mandamus petition, Rambus has to convince us that both determinations are in error. Under the standards governing petitions for writs of mandamus, Rambus has not met its burden.

The remedy of mandamus is available only in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power. In re Calmar, Inc., 854 F.2d 461, 464 (Fed. Cir. 1988). A party seeking a writ bears the burden of proving that it has no other means of attaining the relief desired, Mallard v. U.S. Dist. Court for the Southern Dist. of Iowa, 490 U.S. 296, 309 (1989), and that the right to issuance of the writ is "clear and indisputable," Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980). A court may deny mandamus relief "even though on normal appeal, a court might find reversible error." In Re Cordis Corp., 769 F.2d 733, 737 (Fed. Cir. 1985).

Here, Rambus has not shown that the district court's relevant determinations, factual and legal, were clearly and indisputably incorrect. The district court's determinations regarding waiver of the privileges due to spoliation are largely factual in nature, and no error sufficient to warrant mandamus relief has been demonstrated in that regard. Rambus has not clearly shown that an act such as spoliation, if a prima facie case of such had been found, could not be used as a basis for determining whether the

privileges should apply. And although we need not reach the district court's alternative determination regarding subject-matter waiver, we note our agreement with the concurrence-in-part, dissent-in-part that the district court properly used the waiver doctrine to require Rambus's disclosure of all but its pure opinion work-product documents. Additionally, Rambus's challenge to the in camera review conducted by the district court is not convincing.

Accordingly,

IT IS ORDERED THAT:

(1) Rambus's petition for a writ of mandamus, Misc. 772, is denied.

(2) Rambus's previous petition, Misc. 762, is dismissed as moot.

(3) Rambus's motion for leave to file a reply, with reply attached, is granted.

FOR THE COURT

AUG 18 2004
Date

Sharon Prost
Circuit Judge

cc: Michael J. Schaengold, Esq.
Christopher Landau, Esq.
USDC, E.D. Va., Judge
USDC, E.D. Va., Clerk

# United States Court of Appeals for the Federal Circuit

MISCELLANEOUS DOCKET NO. 762

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MISCELLANEOUS DOCKET NO. 772

IN RE RAMBUS, INC.,

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GAJARSA, Circuit Judge, concurring in part and dissenting in part.

Rambus, Inc. petitioned this court for a writ of mandamus, asking the court to order the United States District Court for the Eastern District of Virginia to vacate its orders directing Rambus to produce documents for which Rambus claims attorney-client and work product privileges. The district court issued two opinions, reaching identical results under different theories.

In its first opinion, the district court considered the applicability of the crime/fraud exception to the spoliation of evidence. The district court first ruled that spoliation could trigger the crime/fraud exception even if it did not rise to the level of either crime or fraud, and second, that Rambus's corporate document retention policy rose to the requisite level. The district court did not indicate what types of document retention policies would preserve privilege; it simply recited a lengthy factual litany of Rambus's

inappropriate behavior, and concluded that Rambus's policy was neither criminal nor fraudulent, but that it had waived Rambus's work product privilege.

In its second opinion, the district court reviewed the facts surrounding Rambus's document production in both the instant matter and a related matter in front of the Federal Trade Commission, and concluded that Rambus had disclosed selected documents describing its corporate document retention policy and the relationship between that policy and its litigation strategy. The district court then concluded that this selective disclosure acted to waive privilege for a broader category of documents from which Rambus selected them.

The majority has ruled inter alia that "Rambus has not clearly shown that an act such as spoliation, if a prima facie case of such had been found, could not be used as a basis for determining whether the privileges should apply." In so ruling, the majority has avoided the critical question underlying Rambus's petition: Whether Fourth Circuit law permits a trial court to waive a party's privilege as a remedy for spoliation of evidence that is neither fraudulent nor criminal. According to the Fourth Circuit,

> [s]poliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. The right to impose sanctions for spoliation arises from a court's inherent power to control the judicial process and litigation. . . . Thus, while the spoliation of evidence may give rise to court imposed sanctions deriving from this inherent power, the acts of spoliation do not themselves give rise in civil cases to substantive claims or defenses. While a district court has broad discretion in choosing an appropriate sanction for spoliation, the applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine. . . . We review the district court's exercise of its discretion for abuse.

Silvestri v. GMC, 271 F.3d 583, 590 (4th Cir. 2001) (citations omitted).

Though the district court in its spoliation ruling, Infineon in its brief to this court opposing Rambus's petition, and the majority rely heavily upon this "broad discretion" to find that Rambus has waived its privilege, none have pointed to a single instance of a trial court waiving a party's privilege as a remedy for spoliation. The Fourth Circuit's most recent comment on the matter is that its "spoliation of evidence rule allows the drawing of an adverse inference against a party whose intentional conduct causes not just the destruction of evidence . . . but also against one who fails to preserve or produce evidence." Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 450 (4th Cir. 2004). In an earlier discussion, the Fourth Circuit noted that

> This circuit has addressed the spoliation of evidence rule in only one case and held that it is a rule of evidence. . . . [There,] we approved the trial court's instruction to the jury that it could draw an adverse inference from the plaintiff's destruction of evidence under much the same circumstances as were present here. We did not address any more severe action than drawing an adverse inference . . .

Cole v. Keller Indus., 132 F.3d 1044, 1046-1047 (4th Cir. 1998). The Fourth Circuit has yet to consider remedies more severe than drawing an adverse inference or crafting appropriate jury instructions. The district court here would not have abused its discretion by drawing an inference adverse to Rambus. The extension of the spoliation rule to pierce privilege protecting all legal documents surrounding a corporate document retention policy that is neither fraudulent nor criminal, however, represents a drastic increase in the severity of the remedy. The Fourth Circuit, in my judgment, would likely find that the district court abused its discretion by applying this remedy to this offense.

In addition to misstating the law and abusing its discretion, the district court's spoliation ruling will likely have a severe impact on public policy. I agree with Rambus that this ruling will confuse and likely chill all corporate efforts to develop reasonable

document retention policies. The district court's inability to define a clear separation, short of common-law fraud, differentiating permissible policies from impermissible policies, will open all corporations with document retention policies—likely meaning all corporations—to the piercing of privilege with respect to those policies.

The district court and both parties concede that the Fourth Circuit has never addressed this issue. We should not presume that the Fourth Circuit would reach a conclusion with such dire policy implications. The majority's decision to uphold the principle that some vaguely defined quantum of inappropriate behavior surrounding document retention policies waives privilege casts a cloud of uncertainty around all such policies. This court should not allow the district court's ruling on spoliation to stand. We should grant Rambus's requested mandamus on this issue.

Nevertheless, I agree with the majority that Rambus was required to turn over most of the documents on which it claimed privilege because of the district court's ruling on subject matter waiver. If, in fact, Rambus did disclose documents selectively, it has waived privilege for the entire category. Under Fourth Circuit Law, however, pure opinion work product is excluded from the scope of this broad waiver. In re Martin Marietta Corp., 856 F.2d 619, 625-626 (4th Cir. 1988) ("[W]e feel that it is incumbent upon us to decide . . . whether subject matter waiver 'applies' with equal vigor to opinion work product. We hold that the doctrine does not apply to such materials."). The district court determined that some of the documents on which Rambus claimed work product privilege were, in fact, opinion work product in the sense described in Martin Marietta. Though the district court nevertheless asserted that these documents fell within an exception in Martin Marietta, there does not appear to be any such

exception; Fourth Circuit law does not extend waiver to opinion work product. Because we review factual findings for clear error, I see no reason to disturb any of the district court's factual findings. We should therefore have required Rambus to turn over all documents except for the few that the district court identified as opinion work product.

The majority, however, has chosen to force Rambus to turn over all documents by upholding the district court's ruling on spoliation. That ruling has no basis in the law, and is likely to have widespread negative consequences across the corporate world. I therefore respectfully concur in part and dissent in part.