

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MARYLAND

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 UNITED STATES OF AMERICA, :
 Plaintiff :
 :
 vs : :Criminal Action: RWT-10-694
 :
 LAUREN STEVENS, :
 Defendant. :
 -----x

Tuesday, May 10, 2011
Greenbelt, Maryland

The above-entitled action came on for a Jury Trial Proceeding before the HONORABLE ROGER W. TITUS, United States District Judge, in courtroom 2C, commencing at 9:24 a.m.

APPEARANCES:

On behalf of the Plaintiff:

SARA M. BLOOM, Esquire
PATRICK G. JASPERSE, Esquire

On behalf of the Defendant:

REID H. WEINGARTEN, Esquire
WILLIAM HASSLER, Esquire
COLLEEN CONRY, Esquire

I N D E X

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25 Reporter's Certificate12

1 THE COURT: Yesterday I heard very eloquent
2 arguments on both sides in support of and in opposition
3 to the Defendant's motion for judgment under Rule 29 of
4 the Federal Rules of Criminal Procedure. Under that rule
5 the Court has various options, as I previously reviewed,
6 of either granting the motion, denying it, or deferring
7 it as authorized by Rule 29(b).

8 Under Rule 29, the standard is whether any
9 rational trier of fact could find the defendant guilty
10 beyond a reasonable doubt, viewing the evidence in the
11 light most favorable to the government, which is the
12 standard I must and will apply.

13 During the government's case, which is now
14 concluded, the Court heard extensive testimony of both
15 FDA and GSK officials and, to put it mildly, a large
16 volume of documentary evidence. Very significant
17 portions of the documents placed before the Court were
18 what would otherwise be privileged attorney-client
19 documents. They were obtained by the United States as a
20 result, as I've learned, of an order of a magistrate
21 judge in the District of Massachusetts who ordered them
22 produced under what's known as the Crime Fraud Exception.

23 There are, of course, profound implications for
24 the free flow of communications between a lawyer and
25 client when the privilege is abrogated, as it was in this

1 case. The Crime Fraud Exception is designed to overcome
2 the privilege only when the evidence establishes that the
3 client intended to perpetrate a crime or fraud and the
4 communications at issue between the attorney and the
5 client were made in furtherance of such crime or fraud.

6 The Crime Fraud Exception has been mentioned in
7 some recent decisions in this circuit, including a recent
8 decision from the District of South Carolina last month
9 in *United States versus Giannini*. And the Court there
10 observed that the Crime Fraud Exception exists when, 1),
11 the client was engaged in or planning a criminal or
12 fraudulent scheme when he sought the advice of counsel to
13 further the scheme and, 2), the documents containing the
14 privileged materials bear a close relationship to the
15 client's existing or future scheme to commit a crime or
16 fraud.

17 A similar ruling was handed down by the Western
18 District of Virginia in *Billings versus Stonewall Jackson*
19 *Hospital* in 2009, once again saying the two tests must be
20 satisfied: 1), the client was engaged in or planning a
21 criminal or fraudulent scheme when he sought the advice
22 of a counsel to further the scheme and 2), the documents
23 containing the privileged materials bear a close
24 relationship to the client's existing or future scheme to
25 commit a crime or fraud.

1 With the 20/20 vision of hindsight, and that's
2 always the place to be in terms of wisdom, the
3 Massachusetts Order was an unfortunate one, because I now
4 have benefitted from a trial in which these documents
5 that were ordered produced were paraded in front of me,
6 and the prosecutors were permitted to forage through
7 confidential files to support an argument for criminality
8 of the conduct of the defendant.

9 What those records demonstrate to the Court is,
10 first of all, that access should not have been granted to
11 them in the first place. But that's not for me to
12 decide. That's already been decided by a magistrate
13 judge in Massachusetts. But they also show that this was
14 a client that was not engaged to assist a client to
15 perpetrate a crime or fraud. Instead, the privileged
16 documents in this case show a studied, thoughtful
17 analysis of an extremely broad request from the Food and
18 Drug Administration and an enormous effort to assemble
19 information and respond on behalf of the client.

20 The responses that were given by the defendant in
21 this case may not have been perfect; they may not have
22 satisfied the FDA. They were, however, sent to the FDA
23 in the course of her bona fide legal representation of a
24 client and in good faith reliance of both external and
25 internal lawyers for GlaxoSmithKline.

1 Now, what are the consequences of that? As to
2 Counts One and Two, the Safe Harbor Provision of Section
3 15(c) is an absolute bar. GlaxoSmithKline did not come
4 to Ms. Stevens and say, assist us in committing a crime
5 or fraud. It came to her for assistance in responding to
6 a letter from the FDA. I conclude on the basis of this
7 record that no reasonable juror could conclude otherwise
8 beyond a reasonable doubt.

9 As I included in my draft instructions that I had
10 prepared in this case had it gone to the jury, on the
11 role of lawyers and advice of counsel, the Safe Harbor
12 Provision is designed specifically to protect an attorney
13 who is acting in accordance with the obligation that
14 every lawyer has to zealously represent his or her client
15 and place their position in the most favorable possible
16 light. That is the obligation of a lawyer as pointed out
17 in the proceedings in Congress when 1515(c) was adopted.

18 The Subcommittee on Criminal Justice had received
19 complaints of prosecutors harassing members of the
20 defense bar, and that vigorously and zealously
21 representing a client is no a basis for charging an
22 offense under the Obstruction of Justice chapter. That
23 addresses the Safe Harbor Provisions which only pertains
24 to Counts One and Two.

25 As to all counts relating to the question of

1 advice of counsel, the evidence in this case can only
2 support one conclusion, and that is that the defendant
3 sought and obtained the advice and counsel of numerous
4 lawyers. She made full disclosure to them. Every
5 decision that she made and every letter she wrote was
6 done by a consensus. Now, even if some of these
7 statements were not literally true, it is clear that they
8 were made in good faith which would negate the requisite
9 element required for all six of the crimes charged in
10 this case.

11 The government contends that some statements were
12 false. For example, they point to the statement made by
13 Ms. Stevens in a letter to the FDA in which she states
14 that GlaxoSmithKline is not engaged in the promotion of
15 Wellbutrin SR for weight loss. They seek to take that
16 statement, however, in isolation, and the Court simply
17 cannot do that and cannot permit a jury to do that.

18 It is clear that while that statement was made,
19 the same or other communications clearly disclosed to the
20 FDA that there had been -- speakers had been provided
21 inadvertently with an off-label slide deck, that at least
22 -- that approximately 75 speaker presentations had
23 off-label topics; that Dr. Wolkowitz had used the
24 presentation that contained phrases and information about
25 the effect of the drug on body weight that some may

1 consider as outside the product's approved indication.

2 She also disclosed that the company became aware
3 of certain activities that were inconsistent with the
4 company's policies; took its responsibilities seriously
5 and instituted appropriate and necessary corrective
6 actions to address these activities. The same applies to
7 activities of Dr. Hudziak that were disclosed. So, this
8 is not a statement that can be taken as being false when
9 you consider it in the context in which it was given.

10 I conclude on the basis of the record before me
11 that only with a jaundiced eye and with an inference of
12 guilt that's inconsistent with the presumption of
13 innocence could a reasonable jury ever convict this
14 defendant.

15 When a Rule 29 motion is made, she is not stripped
16 of the presumption of innocence. And the government,
17 while it gets the benefit of all inferences, they must be
18 sufficient to overcome that presumption and permit a
19 reasonable juror to find guilt beyond a reasonable doubt.

20 I take my responsibility seriously. I practiced
21 law for a long time and made a number of Rule 29 motions
22 that -- or in the state system equivalent of them. I
23 don't have a very good track record with those motions.
24 In my seven and a half years as a jurist I have never
25 granted one. There is, however, always a first.

1 I conclude that I have an obligation when I find
2 legally and sufficient evidence to sustain a conviction
3 on any count that the motion must be granted. I believe
4 that it would be a miscarriage of justice to permit this
5 case to go to the jury.

6 Moreover, there are serious implications for the
7 practice of law generated by this prosecution. Lawyers
8 can never assist a client in the commission of a crime or
9 a fraud, and that's well established. Lawyers do not get
10 a free pass to commit crimes. I have presided over other
11 trials of lawyers and have sent some to jail.

12 I was affirmed by Fourth Circuit this year for
13 having sent a lawyer who was in his 60s to jail for seven
14 years for commission of -- assisting a client in the
15 commission of a fraudulent tax scheme. I have lawyers
16 awaiting sentencing before me. Lawyers do not get a free
17 pass in front of me. I'm more than happy to preside over
18 their trials and where they're convicted, as appropriate,
19 give them jail sentences if that's appropriate, and I
20 wouldn't hesitate to do that.

21 However, a lawyer should never fear prosecution
22 because of advice that he or she has given to a client
23 who consults him or her, and a client should never fear
24 that its confidences will be divulged unless its purpose
25 in consulting the lawyer was for the purpose of

1 committing a crime or a fraud.

2 There is an enormous potential for abuse in
3 allowing prosecution of an attorney for the giving of
4 legal advice. I conclude that the defendant in this case
5 should never have been prosecuted and she should be
6 permitted to resume her career.

7 The institutional problem that causes me a great
8 concern is that while lawyers should not get a free pass,
9 the Court should be vigilant to permit the practice of
10 law to be carried on, to be engaged in, and to allow
11 lawyers to do their job of zealously representing the
12 interests of their client. Anything that interferes with
13 that is something that the court system should not
14 countenance.

15 For those reasons, I am going to grant the
16 Defense's motion for judgment of acquittal, and that will
17 bring this case to an end.

18 What I will do now is to bring the jury in and
19 advise them of what I have done and release them, and I
20 will then meet with them privately to explain what I have
21 done.

22 I want to again commend the attorneys in this
23 case. I practiced law a long time and been a judge for a
24 while, and it is pure pleasure to have great lawyering
25 going on on both sides in this case. It's some of the

1 best lawyering I've seen in a long time. So it's a
2 pleasure to have all the parties before me.

3 Not everybody can win the case. One person has to
4 win or one person has to lose this. In this case, I
5 conclude that justice wins by acquitting this lawyer of
6 the charges brought against her.

7 (Bring the jury in.)

8 (Jury returns at 9:40 a.m.)

9 THE COURT: Please be seated. Good morning,
10 ladies and gentlemen. As I advised you on Friday, the
11 government had rested its case and the Federal Rules of
12 Criminal Procedure authorize the defense to make a motion
13 for a judgment of acquittal at the end of the government
14 case, if the moving party believes and I conclude that
15 the evidence is insufficient to support a conviction
16 viewed in the light most favorable to the government.
17 That is known as -- is what's called a Rule 29 Motion.

18 Those motions are routinely made and rarely, if
19 ever, granted. This case is one -- is an exception, and
20 I have granted a motion by the defense for judgment of
21 acquittal of the defendant. She is acquitted, and there
22 is nothing further for the jury to do.

23 You may be perplexed by that decision, and I will
24 be glad to come back and talk to you about it. I'm sure
25 you were probably looking forward the to spending the

1 next two weeks of your life in this courthouse, but you
2 will not have to do that.

3 I would be happy to discuss this with you. So if
4 you return to the jury room so I can release the parties,
5 I'll be glad to come back and discuss the decision with
6 you. Your service is at an end, and I thank you very
7 much, for myself and for the whole court system.

8 (Jury excused at 9:42 a.m.)

9 THE COURT: All right. I will do the tradition in
10 the Fourth Circuit of coming down and greeting counsel
11 and thanking you for your work in this case.

12 (Off the record at 9:43 a.m.)

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CERTIFICATE

16 I, Tracy Rae Dunlap, RPR, CRR, an Official Court
17 Reporter for the United States District Court of
18 Maryland, do hereby certify that I reported, by machine
19 shorthand, the proceedings had in the case of UNITED
20 STATES OF AMERICA versus LAUREN STEVENS, Criminal Action
21 Number RWT-10-694 on May 10, 2011.

22 In witness whereof, I have hereto subscribed my
23 name, this 10th day of May 2011.

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___/S/___Tracy Rae Dunlap___
TRACY RAE DUNLAP, RPR, CRR
OFFICIAL COURT REPORTER

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