[Cite as *Galati v. Pettorini*, 2015-Ohio-1305.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101712

ANTHONY GALATI

PLAINTIFF-APPELLEE

vs.

TIMOTHY PETTORINI, ESQ., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-808722

BEFORE: Jones, P.J., E.A. Gallagher, J., and McCormack, J.

RELEASED AND JOURNALIZED: April 2, 2015

ATTORNEYS FOR APPELLANTS

Monica A. Sansalone
Matthew Norman
Gallagher Sharp
Sixth Floor - Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115

ATTORNEYS FOR APPELLEE

Caryn M. Groedel
Lori M. Griffin
Caryn Groedel & Associates Co., L.P.A.
31340 Solon Road
Suite 27
Solon, Ohio 44139

LARRY A. JONES, SR., P.J.:

{¶1} Defendants-appellants Timothy B. Pettorini and Critchfield, Critchfield & Johnston, Ltd. (collectively "Pettorini") appeal the trial court's judgment granting plaintiff-appellee Anthony Galati's motion to compel. For the reasons that follow, we reverse.

I. Procedural History

{¶2} In 2013, Galati filed suit against Pettorini and Pettorini's employer, the law firm Critchfield, Critchfield & Johnston, Ltd., alleging that Pettorini engaged in legal malpractice when he represented Galati in a lawsuit against American Family Insurance Company ("American Family"). Galati was one of 11 joint plaintiffs in a lawsuit captioned *Charms v. Am. Family Ins. Co., et al.*, Cuyahoga C.P. No. CV-10-731986. The 11 joint plaintiffs asserted identical causes of action against American Family in a single complaint, but each plaintiff's claims were bifurcated for purposes of trial. Galati's trial was set first. Prior to closing arguments in his trial, Galati settled with American Family on both his claims and the company's counterclaims. Pettorini continued to represent the remaining ten plaintiffs in the *Charms* matter.

{¶3} After Galati filed suit against Pettorini and requested discovery, Pettorini objected to his discovery requests, arguing he (Pettorini) had an on-going duty to his other ten clients and the disclosure of certain information and documents would impinge on the privilege owned by those clients. Galati filed a motion to compel, which Pettorini opposed. The trial court granted the motion in part.

A. The *Charms* Litigation

{¶4} In 2010, Galati and ten other plaintiffs hired attorney Pettorini to represent them against American Family in the underlying *Charms* litigation. At the time the *Charms* suit was filed, all of the plaintiffs were current or former independent insurance agents for American Family. In April 2010, Galati and the other plaintiffs signed identical representation agreements with Pettorini to join the lawsuit against American Family. The representation agreement provided, in part, that (1) the client had been advised of the nature of the complaint and agreed to have his or her name added as a plaintiff; (2) the client understood that other plaintiffs were engaging the law firm pursuant to "essentially identical" representation letters; and (3) the client understood that he or she might have received a larger recovery if the client had pursued the matter independently and the client might have unique claims that support a recovery for client that do not apply to the other plaintiffs, but the client desires to share the costs of the proceedings and willingly agrees to accept a respective share of the recovery as a "cost-efficient accommodation for the entire group."

{¶5} Prior to filing suit in the *Charms* case, Pettorini alleged he advised each plaintiff of a potential conflict of interest due to the joint representation. He further alleged that each plaintiff executed a waiver "in order to obtain the benefits of proceeding as part of a group."

{¶6} In July 2010, Pettorini filed the *Charms* lawsuit alleging that American Family's business practices involving these current or former agents constituted a breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, unfair competition, and tortious interference with business relations and/or contractual relations.

{¶7} American Family filed a motion for separate trials, which the trial court granted. It was determined that Galati's trial would proceed first.

{¶8} Galati's jury trial began in July 2012. During trial, American Family made a settlement offer that included dismissal of its counterclaims against Galati. Galati accepted the settlement offer, and his claims were settled and dismissed.

{¶9} Pettorini continued to represent the other *Charms* plaintiffs against American Family.

B. The Legal Malpractice Action

{¶10} In June 2013, Galati filed the instant lawsuit alleging that Pettorini was negligent in his representation of him during the *Charms* litigation. He alleged that Pettorini failed to assert certain causes of action against American Family, including an ERISA claim, a "whistleblower" claim, and claims for fraud, age discrimination, retaliation, and a "violation of Ohio public policy." He further alleged that Pettorini failed to retain an expert, file necessary motions, complete discovery, and prepare witnesses for trial. Galati alleged he sustained damages in excess of $2,000,000 as a result of Pettorini's negligence, intentional acts, and failure to act.

{¶11} As part of the discovery process, Galati sought numerous communications and documents from Pettorini, some of which involved the other *Charms* plaintiffs.

Because these other *Charms* plaintiffs had been or still were Pettorini's clients, the attorney argued that he was restrained from disclosing anything to Galati that involved these other *Charms* plaintiffs.[1]

{¶12} In January 2014, the trial court ordered an in camera review of the contested documents "even if they also touched upon matters relating to other *Charms* plaintiffs" but denied production of documents that related solely to Pettorini's representation of the other *Charms* plaintiffs. Specifically, the court ordered Pettorini to respond with all information relevant to plaintiff's interrogatories nos. 6-10 and produce documents responsive to plaintiff's request for production of documents nos. 2-4, 6, and 8 but, again, ordered that all materials first be turned over for an in camera inspection.

{¶13} The parties entered into a stipulated protective order. In March 2014, Pettorini filed notice of submission of interrogatory responses and documents for the court's in camera review. Pettorini notified the court that it was submitting responses to plaintiff's interrogatories nos. 6, 7, 8, and 9 and documents that were "partially responsive" to plaintiff's request for production of documents no. 2.[2]

{¶14} After the in camera inspection, and on July 1, 2014, the trial court ordered that the following information and documents be produced: (1) responses to plaintiff's

---

[1]It is undisputed that the other *Charms* plaintiffs had not waived the attorney-client privilege or otherwise consented to the release of the documents that Galati sought.

[2] The record does not indicate why Pettorini failed to submit responses and documents for plaintiff's interrogatory no. 10 or request for production of documents 3, 4, 6, and 8. Neither party has raised this issue, therefore, we will not consider it on appeal.

interrogatories nos. 7, 8, and 9; and (2) documents numbered 000001, 000003, 000004, 000005, and 000006.

{¶15} Pettorini filed a notice of appeal and raises two assignments of error for our review.

II. Assignments of Error

> I. The trial court committed reversible error by ordering the disclosure of information protected by the attorney-client privilege. Given Mr. Pettorini's joint client representation, one co-client (Mr. Galati) does not have the authority to waive the privilege as to the other ten co-clients' communications with Mr. Pettorini.
>
> II. The trial court committed reversible error by ordering the disclosure of information which contains Mr. Pettorini's mental impressions and conclusions, and where no compelling reason exists to defeat the opinion work-product privilege.

III. Law and Analysis

A. Attorney-Client Privilege

{¶16} Generally, a trial court's discovery orders are not final, appealable orders, but in the case of an order compelling the production or disclosure of material allegedly protected by attorney-client privilege, a party may bring an interlocutory appeal. *Miles-McClellan Constr. Co. v. Westerville Bd. of Edn.*, 10th Dist. Franklin Nos. 05AP-1112 – 05AP-1115, 2006-Ohio-3439, ¶ 8, citing *Shaffer v. OhioHealth Corp.*, 10th Dist. Franklin No. 03AP-102, 2004-Ohio-63, ¶ 6.

{¶17} A trial court is vested with wide discretion in rendering decisions on discovery matters. *Dandrew v. Silver*, 8th Dist. Cuyahoga No. 86089, 2005-Ohio-6355, ¶ 35, citing *Mauzy v. Kelly Servs., Inc.*, 75 Ohio St.3d 578, 592, 664 N.E.2d 1272 (1996).

But although the standard for review of discovery matters is generally whether the trial court abused its discretion, if the discovery issue involves an alleged privilege, as in this case, it is a question of law that we review de novo. *Watson v. Cuyahoga Metro. Hous. Auth.*, 8th Dist. Cuyahoga No. 99932, 2014-Ohio-1617, ¶ 24, citing *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13.

{¶18} "The attorney-client privilege is one of the oldest recognized privileges for confidential communications." *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998). "R.C. 2317.02(A) provides the exclusive means by which privileged communications directly between an attorney and a client can be waived." *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, syllabus, following *State v. McDermott*, 72 Ohio St.3d 570, 651 N.E.2d 985 (1995).

{¶19} R.C. 2317.02 provides:

> [T]he following persons shall not testify in certain respects:
>
> (A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client * * *. However, if the client voluntarily testifies or is deemed by section 2151.421 [2151.42.1] of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

{¶20} The only two statutory methods by which the privilege may be waived are express waiver and voluntary testimony by the client about the privileged matter.

McDermott at 572.

{¶21} There are also exceptions to the attorney-client privilege, which include: (1) the crime-fraud exception, (2) the lack of good faith exception, (3) the joint-representation exception, and (4) the self-protection exception. *See Squire Sanders & Dempsey, LLP v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶24-43.

> Unlike waiver, which involves the client's relinquishment of the protections of R.C. 2713.02(A) once they have attached, an exception to the attorney-client privilege falls into the category of situations in which the privilege does not attach to the communications in the first instance and is therefore excluded from the operation of the statute.

Id. at ¶ 47. Thus, in a waiver situation, the client has waived the privilege whereas in an exception situation, the privilege never attached in the first place.

{¶22} The Ohio Supreme Court explained the joint-representation exception, which provides that a client of an attorney cannot invoke the privilege in litigation against a co-client, as follows:

> Another exception * * * is when the same attorney acts for two parties having a common interest, and each party communicates with him. Here the communications are clearly privileged from disclosure at the instance of a third person. Yet they are not privileged in a controversy between the two original parties, inasmuch as the common interest and employment forbade concealment by either from the other * * * .

Givaudan Flavors Corp. at ¶ 32, citing *Emley v. Selepchak*, 76 Ohio App. 257, 262, 63 N.E.2d 919 (9th Dist.1945).

B. Work-Product Doctrine

{¶23} We next consider privilege pursuant to the work-product doctrine. Our analysis of a trial court's decision on whether communications are privileged pursuant to the work-product doctrine differs from that of attorney-client privilege. The determination of whether materials are protected by the attorney work-product doctrine and the determination of good cause are discretionary determinations to be made by the trial court. *State ex rel. Greater Cleveland Regional Transit Auth. v. Guzzo*, 6 Ohio St.3d 270, 271, 452 N.E.2d 1314 (1983). Therefore, our review of these determinations is for an abuse of discretion. *Sherwin-Williams Co. v. Motley Rice L.L.C.*, 8th Dist. Cuyahoga No. 96927, 2012-Ohio-809, ¶ 34.

{¶24} "[T]he work product doctrine 'is distinct from and broader than the attorney-client privilege."' *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir.1986), quoting *United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). While the attorney-client privilege protects only confidential communications, the work-product doctrine generally protects from disclosure documents prepared by or for an attorney in anticipation of litigation. *Id.*; *see also Hickman v. Taylor*, 329 U.S. 495, 510-512, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

{¶25} In Ohio, the work-product doctrine is set forth in Civ.R. 26(B)(3), which provides that

> a party may obtain discovery of documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative * * * only upon a showing of good cause therefor.

{¶26} The Ohio Supreme Court has stated that "a showing of good cause under Civ.R. 26(B)(3) requires demonstration of need for the materials — i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable."

Jackson, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, at ¶ 16. The party seeking discovery has the burden to demonstrate good cause for the sought-after materials. *Id.*

C. Email Correspondence

{¶27} In this case, the trial court ordered the following documents were subject to discovery, as described below:

> 000001: email from one of the *Charms* plaintiffs to Pettorini and a law firm employee; Galati is mentioned in email;
>
> 000003: email from Pettorini to all 11 *Charms* plaintiffs;
>
> 000004: email from one of the *Charms* plaintiffs to Pettorini, a law firm employee, Galati, and another *Charms* plaintiff;
>
> 0000005-000006: portion of an email from Pettorini to all 11 *Charms* plaintiffs.

{¶28} The trial court further determined that documents 000002 and 000007 fell within the scope of attorney-client privilege or work product and were not subject to discovery.[3]

{¶29} On appeal, Pettorini argues that the documents the trial court ordered disclosed are clearly covered by attorney-client privilege because, although Galati may have waived privilege, the other *Charms* clients did not.

{¶30} The burden of showing those documents are confidential or privileged rests

---

[3]Documents 000005, 000006, and 000007 consist of a single undated email from Pettorini to the 11 *Charms* plaintiffs. The entire body of the email is contained in documents 000005 and 000006. This court is perplexed why the trial court found documents 000005 and 000006 discoverable but document 000007, which consists solely of a portion of boilerplate disclosure language that was attached to the email, subject to privilege.

with the party seeking to exclude it, therefore, Pettorini has the burden to show the documents are privileged. *Li v. Olympic Steel, Inc.*, 8th Dist. Cuyahoga No. 97286, 2012-Ohio-603, ¶ 9, citing *Covington v. MetroHealth Sys.*, 150 Ohio App.3d 558, 2002-Ohio-6629, 782 N.E.2d 624, ¶ 24 (10th Dist.).

{¶31} Galati argues that Pettorini has (1) failed to show that the documents are privileged because the communications fall under the joint-representation exception to privilege, or (2) if they are privileged, any confidentiality was waived when one co-client included another co-client in correspondence to their common attorney. Galati further argues that because the communications relate to him, he should be able to use them to establish his claims and rebut Pettorini's defenses. We will deal with each of his arguments in turn.

1. Joint-Representation Exception

{¶32} Galati claims that the correspondence emails do not fall under the joint-representation exception because the exception only prohibits dissemination to third parties that are not part of the joint representation and he, Galati, was one of the *Charms* plaintiffs and therefore part of the joint representation.

{¶33} While it is true that the subject emails do not fall within the joint-representation exception, it is because the current case is between Galati and his former attorney, not between Galati and another *Charms* plaintiff. When a common attorney acts for two or more clients having a common interest, and each client communicates with the attorney, attorney-client privilege attaches to the communications and they are privileged from disclosure to a third-party. *Givaudan*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, at ¶ 32. The joint-representation exception works so that the one co-client of the common attorney cannot invoke the attorney-client privilege in subsequent litigation against another co-client; the attorney-client privilege does not attach between commonly represented clients. *See Baumgardner v. Louisiana Binding Serv.*, S.D.Ohio No. 1:11-CV-794, 2013 U.S. Dist. LEXIS 27494 (Feb. 28, 2013), *14. It matters not whether there are two clients, as cited in the example above, or 11 clients, as in the case at bar.

{¶34} Therefore, the joint-representation exception does not apply to the case at bar.

2. Joint-Client Privilege

{¶35} Joint-client or co-client privilege is separate and distinct from the joint-representation exception to attorney-client privilege. This privilege applies when multiple clients hire the same counsel to represent them on a matter of common interest. *In re Teleglobe Communications Corp.*, 493 F.3d 345, 362 (3d Cir. 2007). In *In Re Teleglobe*, the court found that the co-client rationale operated to protect confidential communications between the joint clients and their common attorney from compelled disclosure to persons outside the joint representation. *Id.* at 363. The court noted, however, that the privilege was limited by the extent of the legal matter of common interest between the co-clients. *Id.*

{¶36} While we recognize that *In re Teleglobe* is not binding on this court, both the

Federal Sixth Circuit and Ohio's Tenth Appellate District have cited *In re Teleglobe* with approval. *See Baumgardner* and *MA Equip. Leasing I, LLC v. Tilton,* 10th Dist. Franklin Nos. 12AP-564 and 12AP-586, 2012-Ohio-4668. We find *In re Teleglobe* to be instructive in this case as well.

{¶37} In *Tilton*, the court noted that "[t]he joint client doctrine overcomes what would otherwise constitute a waiver of confidentiality when communications are shared between two clients." *Id.* at ¶ 30, citing *FSP Stallion 1, LLC v. Luce*, Nev. No. 2:08-cv-01155-PMP-PAL, 2010 U.S. Dist. LEXIS 110617 (Sept. 30, 2010). Thus, when co-clients share information between or among themselves and their attorney, confidentiality is not waived and the attorney-client privilege applies to protect said information.

{¶38} Moreover, when co-clients and their common attorney communicate with one another, those communications are "in confidence" for privilege purposes. *See In Re Teleglobe* at 363. This privilege protects those communications from compelled disclosure to persons outside the joint representation.

{¶39} In order to waive the joint-client privilege, all joint clients must consent to the disclosure. *Id.*, citing Restatement of the Law 3d, Law Governing Lawyers, Section 75(2), Comment e (2000). But, the court in *In re Teleglobe* cautioned,

> A wrinkle here is that a client may unilaterally waive the privilege as to its own communications with a joint attorney, so long as those communications concern only the waiving client; it may not, however, unilaterally waive the privilege as to any of the other joint clients' communications or as to any of its communications that relate to other joint clients.

Id., citing Restatement at *id.*

{¶40} As it applies to the case at bar, each of the 11 joint *Charms* clients shared a joint attorney-client privilege, which protected their communications from compelled disclosure to persons outside the joint representation. Even though Galati was part of the joint representation, he could not and cannot unilaterally waive the privilege of the other *Charms* clients. He has admitted that he has not sought waiver from the other co-clients involved in the communications. Therefore, because he cannot unilaterally waive the privilege as to the emails, all of which involve other joint clients, he cannot show that the privilege was waived.

{¶41} Galati also cannot support his claim that any confidentiality was waived when one co-client included another co-client in correspondence to Pettorini because the communication was not made in confidence. Under the joint-client privilege, unless waived by each joint-client, the communication retains its confidential nature.

{¶42} Finally, Galati argues that because the communications involve Pettorini's representation of him in the *Charms* litigation, he should be able to use the communications to establish his claims and rebut Pettorini's defenses. But attorney-client privilege "is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). His desire to use the communications does not trump attorney-client privilege.

{¶43} In light of the above, we find that the trial court erred in finding that documents numbered 000001 and 000003-000006 were subject to discovery.

3. Interrogatories

{¶44} The trial court found that the following interrogatories were not covered by attorney-client privilege or the work-product doctrine:

> Interrogatory no. 7:
>
> Identify all witnesses who were contacted by Defendant Pettorini, their agents and/or representatives to corroborate any and all of the Plaintiffs' claims against American Family, including the date and substance of each contact, the individual(s) who contacted each such witness, and whether an Affidavit or other written statement was prepared by Defendant Pettorini for each such witness to review and sign. If no Affidavit or written statement was prepared for each such witness to sign, state why.
>
> Interrogatory no. 8:
>
> If an Affidavit was prepared for any of the witnesses identified in Defendant Pettorini's Answer to Interrogatory no. 7 above, state when the Affidavit was transmitted to each such witness, who transmitted the Affidavit to each such witness, and describe all efforts made by Defendant Pettorini to obtain the signed Affidavit from each such witness.
>
> Interrogatory no. 9:
>
> For the witnesses identified in Defendant Pettorini's Answer to Interrogatory no. 7 above for whom an Affidavit was not prepared, state the reason why an Affidavit was not prepared and who made the decision to seek and [sic] Affidavit from each such witness.

{¶45} Pettorini argues that Galati is improperly seeking disclosure of work product, specifically of the attorney's mental impressions and conclusions regarding who he had identified as a witness in the *Charms* litigation, whether to obtain affidavits from potential witnesses, and why the attorney decided not to pursue certain potential witnesses. Pettorini further argues that attorney-client privilege bars him from disclosing the information because the information Galati seeks through the three interrogatories regarding the selection of witnesses applies to each of the other clients in the *Charms* matter, not just Galati.

{¶46} Galati counters that the requested discovery is not work product, or, in the alternative, if it is work product, good cause exists for its production, it is otherwise unavailable, and it is directly at issue in this case.

{¶47} After a thorough review of the record, we have determined that it is unnecessary to determine whether the interrogatories are privileged under the work-product doctrine because, due to the unique nature of this case, the interrogatories are not discoverable. Each of the interrogatories asks Pettorini to divulge information that directly related to his work in the underlying *Charms* case, which involved ten other joint clients. Thus, for the same reasons as set forth above and pursuant to the joint-client privilege, the interrogatories are covered under attorney-client privilege.

{¶48} Therefore, the assignments of error are sustained. The following documents and responses to plaintiff's interrogatories are subject to attorney- client privilege and are not discoverable: (1) responses to plaintiff's interrogatories nos. 7, 8, and 9; and (2) documents numbered 000001, 000003, 000004, 000005, and 000006.

{¶49} Judgment reversed; case remanded.

It is ordered that appellants recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., PRESIDING JUDGE

EILEEN A. GALLAGHER, J., and
TIM McCORMACK, J., CONCUR