DIVISION ONE
FILED: 9/12/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

YOKOHAMA TIRE CORPORATION; YOKOHAMA RUBBER COMPANY, LTD.,	1 CA-SA 13-0176
Petitioners,	DEPARTMENT A
v.	Yuma County Superior Court No. S1400CV0200901305
THE HONORABLE LAWRENCE C. KENWORTHY and THE HONORABLE MARK WAYNE REEVES, Judges of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of YUMA,	**DECISION ORDER**
Respondent Judges,	
ALFREDO TALAMANTES and ELIZABETH TALAMANTES, individually and as legal guardians of ADRIAN TALAMANTES, a minor and MARIA DE LA LUZ MARTINEZ ORTIZ, the surviving wife of decedent, FILIMON ORTIZ, individually and as the statutory representative under A.R.S. § 12-612 and on behalf of MANUEL ORTIZ, JUAN JOSE ORTIZ, EFREN ORTIZ, SANDRA ORTIZ, BENITO ORTIZ, VERONICA ORTIZ, EZEQUIEL ORTIZ, LEONEL ORTIZ, ALONSO ORTIZ, and MARTIN ORTIZ, the surviving children of FILIMON ORTIZ,	
Real Parties in Interest.	

Yokohama Tire Corporation and Yokohama Rubber Company (collectively, "Yokohama") seek special action relief from the superior court's June 10, 2013 order requiring production of certain written attorney-client communications. Yokohama raises three issues: (1) the superior court erred by finding that Yokohama waived the attorney-client privilege by asserting fault of outside counsel for failing to comply with a discovery order; (2) production of privileged documents is unnecessary because the discovery/sanction issue can be resolved by means of affidavits or testimony, or alternatively, the scope of the superior court's order requiring disclosure of privileged documents should be more narrowly tailored; and (3) a proposed "mini-trial" is unnecessary to resolve the discovery/sanctions issue.

We accept for consideration the issues of attorney-client privilege waiver and the scope of the superior court's June 10, 2013 order requiring production of written attorney-client communications. We conclude that the superior court properly determined that Yokohama waived the attorney-client privilege by asserting fault of counsel for its failure to comply with a discovery order. We also conclude, however, that the scope of the superior court's order should be more narrowly tailored.

Jurisdiction is appropriate because a discovery order requiring a party to produce or divulge attorney-client

privileged communications is not immediately appealable, leaving Yokohama no equally plain, speedy, or adequate remedy by appeal once production or disclosure of privileged communication has occurred. *See Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 252, ¶ 3, 63 P.3d 282, 283 (2003); *Green v. Nygaard*, 213 Ariz. 460, 462, ¶ 6, 143 P.3d 393, 395 (App. 2006); *Sun Health Corp. v. Myers*, 205 Ariz. 315, 317, ¶ 2, 70 P.3d 444, 446 (App. 2003) ("Because an appeal offers no adequate remedy for the prior disclosure of privileged information, special action jurisdiction is proper to determine a question of privilege.").

In the underlying products-liability action, on August 22, 2011, the superior court granted a motion to compel production of documents in response to the Real Parties in Interest's First Request for Production. Two months later, the court sanctioned Yokohama for failing to comply with the August 22 order compelling production. After Yokohama filed a special action petition, this Court issued an order on July 19, 2012 vacating the sanctions imposed by the superior court and directing the superior court to hold further proceedings to determine fault as to the discovery violation.

In proceedings addressing this Court's 2012 order, the superior court found that Yokohama waived the attorney-client privilege as to fault for the discovery violation because Yokohama asserted an advice-of-counsel defense to the proposed

discovery sanctions. The court required Yokohama to produce certain privileged communications relevant to the anticipated "culprit" hearing[1]:

> The Court is going to find the relevant time period for production of documents will end on November 24th, 2011, which is the date of Mr. Sugitani's affidavit, and the Court is going to order that the documents to be provided are the Emails that are sent or received by Mr. Griffing, Mr. Goto and his firm, Mr. Freeman and his firm, and also Mr. Swedo and his firm, that discuss, mention or relate to whether the defendant should or would or how to respond or whether the plaintiffs' first Request for Production are objectionable, and the time period will begin November 2nd of 2009.

The superior court limited the scope of the emails to those that "discuss, mention or relate to whether defendant should or would or how to respond to the Request for Production and Judge Reeves' order [compelling production] or if the Emails discuss whether the Request for Production or Judge Reeves' order [compelling production] is or are objectionable." The superior court further ordered Yokohama to provide redacted copies of the emails to the Real Parties within 30 days and simultaneously provide unredacted copies to a different superior court judge who would decide redaction disputes.

---

[1] A "culprit hearing" assesses fault for sanctionable conduct as between a litigant and counsel. *Lund v. Donahoe*, 227 Ariz. 572, 581, ¶ 33, 261 P.3d 456, 465 (App. 2011).

I. Waiver of the Attorney-Client Privilege.

The superior court has broad discretion in resolving discovery matters, including rulings on the assertion of attorney-client privilege. *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 57, ¶ 12, 13 P.3d 1169, 1174 (2000). We review a ruling on waiver of the privilege de novo, however, as a mixed question of law and fact. *Twin City*, 204 Ariz. at 254, ¶ 10, 63 P.3d at 285.

A waiver is "implied when a party injects a matter that, in the context of the case, creates such a need for the opponent to obtain the information allegedly protected by the privilege that it would be unfair to allow that party to assert the privilege." *Lee*, 199 Ariz. at 61, ¶ 23, 13 P.3d at 1178. Express reliance on an advice-of-counsel defense is an implied waiver. *Id.* at 58, ¶ 17, 13 P.3d at 1175. Here, Yokohama's claim that the discovery violation resulted from its reliance on the advice of counsel served as a limited, implied waiver of attorney-client privilege as to the issue of fault for the discovery violation. *See id.* Accordingly, the superior court did not err by finding Yokohama had waived attorney-client privilege on the issue of fault for the discovery violation. *See id.* at 61, ¶ 23, 13 P.3d at 1178.

II. The Scope of Required Disclosure.

A finding of waiver of attorney-client privilege must be narrowly tailored to "provide necessary information regarding the specific issue on which waiver has been found." *Ulibarri v. Superior Court*, 184 Ariz. 382, 385, 909 P.2d 449, 452 (App. 1995). Here, the superior court determined the relevant time period necessary to determine fault for the discovery violation -- and thus for which otherwise-privileged documents are relevant -- begins on the date of the First Request for Production (November 2, 2009) and extends until the date Yokohama asserted its advice-of-counsel defense to the Real Parties' motion for sanctions (November 24, 2011).

We find that this time period is, at least initially, overly broad. The discovery order compelling production was entered on August 22, 2011, and the sanctions motion was filed on October 25, 2011. To narrowly tailor the scope of the waiver to information necessary to determine fault for the discovery violation, the production of attorney-client communications should initially be limited to emails between Yokohama and its counsel from the date of the discovery order (August 22, 2011) to the date the Real Parties sought sanctions for Yokohama's noncompliance with that order (October 25, 2011), and Yokohama should be allowed to produce affidavits in support of its advice-of-counsel defense. If the disclosures for this initial

time period prove insufficient to determine culpability, the superior court, in its discretion, may broaden the time frame and/or allow further discovery as necessary to determine fault for the discovery violation and appropriate sanctions.

Similarly, the reach of the superior court's order should be narrowly tailored to the specific discovery violation. *See id.* The relevant discovery violation at issue is not failing to comply with the First Request for Production, but rather violating the August 22, 2011 discovery order compelling production.

Accordingly,

IT IS ORDERED accepting jurisdiction of Yokohama's special action petition only as to waiver of attorney-client privilege and the scope of waiver.

IT IS FURTHER ORDERED declining jurisdiction as to whether resolving the discovery/sanction issue should be resolved by means other than the production of privileged communications, and as to whether a mini-trial/culprit hearing is appropriate.

IT IS FURTHER ORDERED denying relief as to Yokohama's claim that it has not waived the attorney-client privilege.

IT IS FURTHER ORDERED granting relief as to the appropriate scope of that waiver, as outlined above.

/S/
KENT E. CATTANI, Judge

CONCURRING:

/S/
PETER B. SWANN, Presiding Judge

/S/
JOHN C. GEMMILL, Judge