STATE OF MICHIGAN

COURT OF APPEALS

ROSE MARY DOTY,

Plaintiff-Appellee,

v

MARK DOTY,

Defendant-Appellant,

and

LOIS BERNARD and TERRI BARGERON,

Defendants.

UNPUBLISHED
August 15, 2000

No. 215991
Gladwin Circuit Court
LC No. 97-013247-CH

Before: Doctoroff, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from an order of the Gladwin Circuit Court entering a judgment in favor of plaintiff setting aside a deed and awarding attorney fees to plaintiff after a bench trial. We reverse.

Defendant first argues that the trial court improperly excluded evidence on the basis of the attorney-client privilege. We agree.

Whether the evidence at issue was covered by the attorney-client privilege is a question of law, which we review de novo. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618; 576 NW2d 709 (1998). We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). An abuse of discretion exists if an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *Id.* Any error in the admission or exclusion of evidence does not require reversal unless a substantial right of the party is affected. MRE 103(a); MCR 2.613(a); *Ellsworth, supra*.

Here, plaintiff testified that she went to see her attorney to prepare a will but did not go to see him for the purpose of preparing a deed. Plaintiff denied that she requested her attorney to prepare the deed in question and denied ever receiving it or knowing about it until she received a tax bill with the words "et al" on it. Critical to the determination of the central issue in this case – whether plaintiff signed the deed in question – was the credibility of plaintiff's denial that she signed the deed. The attorney's testimony regarding what documents plaintiff asked him to prepare and whether he drafted the deed, as the face of the deed recites, would have served to undermine plaintiff's credibility in terms of both truthfulness and in terms of her powers of recollection. Therefore, the attorney's testimony was relevant and admissible if not otherwise inadmissible under the rules. MRE 401.

The attorney-client privilege attaches to direct communication between a client and her attorney as well as communications made through their respective agents. *Reed Dairy, supra* at 618. The scope of the privilege is narrow and attaches only to confidential communications by the client to her advisor that are made for the purpose of obtaining legal advice. *McCartney v Attorney General*, 231 Mich App 722, 731; 587 NW2d 824 (1998). Furthermore, the privilege applies only where necessary to achieve its purpose. *Id.* The attorney-client privilege is designed to permit a client to confide in his attorney, knowing that his communications are safe from disclosure. *Id.* at 730. The rationale behind the privilege is that if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. *Id.* at 731, citing *Fisher v United States*, 425 US 391, 403; 96 S Ct 1569; 48 L Ed 2d 39 (1976). The mere presence of an attorney-client relationship, however, does not give rise to a presumption of confidentiality and the circumstances surrounding the communication must be assessed to determine whether the communication was of a sort intended to be confidential or secret. See 8 Wigmore on Evidence (McNaughton rev ed, 1961), § 2311, p 600; McCormick on Evidence (4th ed 1992), § 91, p 128.

It is well established that the presence of a third party during communications between a client and her attorney destroys the privilege, *Hartford Fire Ins Co v Reynolds*, 36 Mich 502, 504 (1877), unless the third party is an agent of the client or an agent of the attorney. *Lindsay v Lipson*, 367 Mich 1, 7-8; 116 NW2d 60 (1962); *Reed Dairy, supra* at 618; *Grubbs v Kmart Corp*, 161 Mich App 584, 589; 411 NW2d 477 (1987). An "agent" is a person that has been given "express or implied authority to represent or act on behalf of another person, who is called his principal.'" *Stratton-Cheeseman Management Co v Dep't of Treasury*, 159 Mich App 719; 407 NW2d 398 (1987), quoting *Stephenson v Golden*, 279 Mich 710, 734-735; 276 NW2d 849 (1937).

Here, the trial court made no findings either during a hearing on the attorney's ex parte motion for a protective order, or during trial when the privilege was asserted, with respect to whether the circumstances of the communications between plaintiff and her attorney in the presence of both defendant and Barbara Doty, were the sort intended to be confidential or whether defendant and his wife were present as plaintiff's agents. While plaintiff argues that defendant and Barbara Doty were present as her agents, there is no evidence in the record demonstrating that they were present as plaintiff's agents. The trial court's findings of fact indicated that plaintiff was as "sharp as a tack," that

she knew what was going on around her, and that she was able to handle her own affairs. These circumstances are contrary to the trial court's finding that defendant and Barbara Doty were acting as plaintiff's agents. But see *Grubbs, supra* (parents of minor child held to be child's agents for purposes of the attorney-client privilege where child could not bring suit in her own name and parents were, of necessity, acting as child's agents). In the absence of any evidence demonstrating that both defendant and his wife were acting as plaintiff's agents when they visited the attorney's office, we conclude that the trial court erred in finding that plaintiff's communications with the attorney during that visit were protected by the attorney-client privilege. Accordingly, the trial court abused its discretion in excluding the attorney's testimony on the basis of the attorney-client privilege.

We further conclude that the error was not harmless. At the hearing on the motion for a protective order, defendant's attorney indicated that the attorney would testify that he prepared the deed, that the deed was prepared at plaintiff's request, that it would have been his practice to counsel her against preparation of the deed, and that he would have prepared the deed only at her insistence. Had the court heard such testimony, the court may have found plaintiff's testimony to the contrary unbelievable. This testimony also would have buttressed the testimony of defendant and his wife regarding what took place at the attorney's office such that the court could find their testimony more credible. Therefore, we conclude that the trial court's error in excluding Phillips' testimony was not harmless.

We therefore reverse the trial court's order entering judgment in favor of plaintiff and remand for a new trial.

We need not address defendant's argument regarding attorney fees due to our conclusion that the trial court abused its discretion in excluding Phillips' testimony on the basis of the attorney-client privilege.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ David H. Sawyer
/s/ Mark J. Cavanagh