

STATE OF MICHIGAN
COURT OF APPEALS

WARNER NORCROSS & JUDD, L.L.P.,

Plaintiff-Appellant,

v

POLICE & FIRE RETIREMENT SYSTEMS OF
THE CITY OF DETROIT, RDD INVESTMENT
CORPORATION, RONALD ZAJAC, P.C., F.
LOGAN DAVIDSON, P.C., ROMULUS DEEP
DISPOSAL LIMITED PARTNERSHIP, REMUS
JOINT VENTURE and ENVIRONMENTAL
DISPOSAL SYSTEMS, INC.,

Defendants-Appellees.

UNPUBLISHED
February 23, 2012

No. 300866
Wayne Circuit Court
LC No. 09-014899-CK

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals by leave granted an order denying its motion to compel discovery in this breach of contract action. Because the trial court abused its discretion by determining, without sufficient basis and without conducting an in camera review, that the documents sought were privileged, we reverse and remand for further discovery consistent with this opinion.

This case arises out of an alleged breach of contract that Remus Joint Venture (“Remus”) and Environmental Disposal Systems, Inc. (“EDS”), entered into with plaintiff law firm. Plaintiff claims that it represented Remus and EDS in obtaining environmental licenses and permits for a waste disposal project, and that all defendants remain liable for the fees incurred. Plaintiff asserts that defendants entered into a prohibited transfer of the property to defeat their fee claims. The merits of the case are not before us. This case involves several other entities, including: (1) Romulus Deep Disposal Limited Partnership, which provided capital and support for the waste disposal project; (2) Police and Fire Retirement Systems of the City of Detroit (“PFRS”), which provided over \$40 million in capital to the project; and (3) RDD Investment Corporation (“RDD”), which now owns the property and permits related to the project.

The parties entered in response to plaintiff’s interrogatories and notices to produce a voluntary process by which defendants would prepare a discovery privilege log of documents they would withhold from discovery. Plaintiff argues that the trial court abused its discretion by

denying its motion to compel defendants to demonstrate that the documents that they withheld from discovery are protected under either the attorney-client or work-product privileges. We review for an abuse of discretion a trial court's decision denying a discovery request. *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011). “[A]n abuse of discretion occurs only when the trial court’s decision is outside the range of reasonable and principled outcomes.” *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). The applicability of the attorney-client or work-product privilege is a question of law that this Court reviews de novo. *Augustine*, 292 Mich App at 419.

After defendants provided a privilege log, plaintiffs narrowed their request for documents to a time frame of September 28, 2006 through November 7, 2006, a period of 41 days of documents. On a subsequent motion to compel discovery, the trial court then ordered compliance with a privilege log as outlined in the order. Thereafter, plaintiff moved for an order compelling defendants to provide a privilege log as previously ordered. Plaintiff argues that the trial court abused its discretion by refusing to compel defendants to provide a discovery log specifically explaining, in sufficient detail, why each withheld document is privileged such that the court and plaintiff may independently verify defendants’ claim. Defendants, on the other hand, contend that the privilege log that they provided was sufficient under the circumstances of this case. Thus, the parties essentially disagree on what a party must show to establish that a privilege applies.

MCR 2.302(B)(1) provides the general standard regarding the scope of discovery:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

This Court has characterized this standard as “an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case.” *Reed Dairy Farm v Consumers Powers Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). As stated in the court rule, matters that are privileged are not discoverable.

The attorney-client privilege protects confidential communications between a client and attorney, as well as communications made through their agents, when the communications are made for the purpose of obtaining legal advice. *Augustine*, 292 Mich App at 420. The attorney-client privilege is narrow in scope and protects only communications; it does not protect the underlying facts from discovery, even if those facts are included in a communication. *Reed Dairy Farm*, 227 Mich App at 619-620. The client may waive the attorney-client privilege by disclosing the communication to a third-party. *Leibel v Gen Motors Corp*, 250 Mich App 229, 242; 646 NW2d 179 (2002). When a client is an organization, the privilege extends only to the organization’s agents and employees authorized to speak on behalf of the organization regarding the subject matter of the communication. *Reed Dairy Farm*, 227 Mich App at 619. “Although

either the attorney or the client can assert the privilege, only the client may waive the privilege.” *Augustine*, 292 Mich App at 420 (quotation marks, brackets, and citation omitted).

Similarly, the work-product doctrine protects notes, documents, and other tangible materials from discovery if prepared in anticipation of litigation. *Augustine*, 292 Mich App at 420. An exception exists if a party demonstrates a substantial need for the work product and shows that obtaining the information elsewhere would constitute an undue hardship. *Id.* at 421. This exception applies, however, only to factual, and not deliberative, work product. *Id.* “Like the attorney-client privilege, a party may waive work-product protections. *Id.*”

In *Augustine*, 292 Mich App at 414, the trial court awarded the plaintiff attorney fees under the no-fault act. The defendant appealed, and this Court remanded to the trial court to apply the framework set forth in a Michigan Supreme Court case decided after the defendant filed its appeal. *Id.* at 414-415. On remand, the trial court granted the defendant’s request for an evidentiary hearing regarding the amount of the attorney fees. *Id.* at 415. The defendant requested that the trial court allow its expert to examine the plaintiff’s entire litigation file. *Id.* Although the defendant was willing to review a redacted version of the file, the court refused to consider the defendant’s request because of its concern that the defendant’s attorney might obtain strategy information that could be used against the plaintiff’s attorneys in future cases. *Id.* at 416, 422. The expert, therefore, was unable to offer a complete assessment regarding the reasonableness of the plaintiff’s attorney fees. *Id.* at 418, 422. Ultimately, the trial court awarded the plaintiff \$250,000 in attorney fees. *Id.* at 418.

On appeal, this Court held that the trial court’s blanket refusal to consider allowing the defendant to review a redacted version of the litigation file was highly unreasonable and amounted to an abuse of discretion. *Augustine*, 292 Mich App at 422. This Court reasoned that the defendant’s expert was unable to offer a complete opinion “without some materials from which to extrapolate[.]” and that the testimony of the plaintiff’s attorneys “was replete with speculation [and] conjecture” because the attorneys lacked any specific memory regarding the billable time spent on the plaintiff’s case. *Id.* at 422-423. This Court stated that the plaintiff’s attorneys could have provided logs, reports, summaries, and spreadsheets that corroborated their billing statements with all mental impressions, thoughts, and strategies completely redacted. *Id.* at 422.

Similarly, in *Ostoin v Waterford Twp Police Dep’t*, 189 Mich App 334, 339; 471 NW2d 666 (1991), this Court held that the trial court abused its discretion by categorically denying the plaintiff’s discovery request without conducting an in camera review of the personnel files “to determine whether they contain relevant, nonprivileged material subject to discovery[.]” This Court stated that factual material relevant to the plaintiff’s failure-to-train claim “could be extracted from the files by an in camera inspection similar to the court’s in camera review of the personnel files of the four involved officers.” *Id.*

In accordance with this precedent, we hold that the trial court’s blanket refusal to require defendants to justify their asserted privilege constituted an abuse of discretion. The trial court did not conduct an in camera review of the documents and did not have sufficient information regarding the documents to determine whether they were privileged. Without information regarding a particular document’s author, recipients, and subject matter, the court was unable to

assess the applicability of the attorney-client privilege or work-product doctrine in a principled way. The information provided fails to show, for each withheld document, that the parties intended the document to remain confidential, or that the purpose of the document was to obtain or provide legal advice.

Contrary to defendants' argument, the privilege log provided to plaintiff did not establish that the documents sought were privileged. The log merely listed broad subject-matter categories, some of which do not appear to fall within any privilege or protective rule. For example, one entry covering numerous documents states that the documents contain notes and impressions regarding "drafting, negotiation and execution of loan, mortgage and other transactional documents related to PFRS's investment in the facility." This broad category appears to largely relate to business matters, and the documents sought may not contain legal advice. Further, the entries do not identify to whom defendants have disclosed the documents, effectively precluding plaintiff from establishing that defendants waived the privilege through disclosure. Additionally, while the work-product doctrine protects an attorney's notes and impressions in a document, it only does so if the document was prepared in anticipation of litigation. Some of the documents that defendants cite relate back to 1992, well before this litigation was anticipated. Moreover, even if the documents contain privileged or protected communications, the trial court could have ordered that redacted versions be provided to allow plaintiff to discover the nonprivileged material contained within the documents. Because the trial court appears to have based its ruling on the mistaken belief that all documents containing any communications between a client and attorney are privileged, its ruling constituted an abuse of discretion.

Further, we note that the documents may be highly relevant to plaintiff's claim. The trial court's ruling precluded plaintiff from discovering information pertinent to whether Remus and EDS breached their contract with plaintiff, whether defendants acted as a partnership or joint venture, and whether RDD was a successor entity. The documents may contain information indicative of whether defendants fraudulently approved the transfer of assets to RDD and whether attorneys Zajac and Davidson advised and assisted defendants in transferring all of the real and personal property related to the project to RDD for nominal value in violation of the Uniform Fraudulent Transfer Act ("UFTA"), MCL 566.31.

In addition, the ruling denied plaintiff the opportunity to argue that the crime-fraud exception to the attorney-client privilege applies. Defendants argue that, because the UFTA does not require a showing of EDS's intent, the documents are not relevant to establish the crime-fraud exception. This argument misinterprets the basic premise of the crime-fraud exception. The attorney-client privilege "does not protect communications made for the purpose of perpetrating a fraud." *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 519; 309 NW2d 645 (1981). To establish the exception, the party seeking discovery "must show that there is a reasonable basis to (1) suspect the perpetration or attempted perpetration of a crime or fraud and (2) that the communications were in furtherance thereof." *People v Paasche*, 207 Mich App 698, 707; 525 NW2d 914 (1994). Thus, a communication is not privileged if the communication itself was made for the purpose of, or in furtherance of, a crime or fraud. The communication, however, need not actually prove an underlying crime or fraud, or any element thereof. So long as the communication is relevant, if its purpose was to perpetrate a crime or fraud, the attorney-client privilege does not protect the communication.

Thus, in this case, although the UFTA may not require a showing of intent, the communications made to further the alleged fraudulent transfer may aid plaintiff in proving that defendants are jointly liable under a joint partnership or successorship theory and that all defendants are therefore liable for the breach of contract. In sum, the party's purpose in making the communication is the relevant inquiry in determining the applicability of the exception.

Because the parties entered into a voluntary alternative method for identification of privileged documents that has not brought clarity to the determination as to which documents are privileged such that the merits of the case can be addressed, the process in the absence of an alternative agreement should be abandoned. Instead the court should order, in the absence of an alternative agreement by the parties, the 41 days of referenced documents produced to the court for in camera review as to privilege.

We reverse and remand for further discovery consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Patrick M. Meter
/s/ Pat M. Donofrio