11-26-2018

Gus H. Small et al., Order Regarding Expert Discovery Dispute

John J. Goger
Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

GUS H. SMALL, as and only as Administrative Trustee of the Trust for Richard Charles Bunzl and His Lineal Descendants, The Trust for Suzanne Irene Bunzl and Her Lineal Descendants, and The Trust for the Lineal Descendants of Walter Henry Bunzl; BUNZL TRUSTS INVESTMENTS, LLC f/k/a Coronado Investments, LLC; and BUNZL TRUST PROPERTIES, LLC f/k/a Capital Piedmont Partners, LLC, Plaintiffs, v. WILLIAM C. LANKFORD, JR. and MOORE STEPHENS, TILLER, LLC, Defendants.	CIVIL ACTION NO. 2016CV280892 Bus. Case Div. 4

ORDER REGARDING EXPERT DISCOVERY DISPUTE

The above styled matter is before the Court on a discovery dispute raised in correspondence submitted to the Court regarding expert discovery. Specifically, Plaintiffs have asserted objections to the following requests for the production of documents included in a Subpoena Duces Tecum served upon Mary Radford, a testifying expert retained by Plaintiffs in this action:

> **Request 6**: Your entire file related to your expert engagement in the above-styled lawsuit.
>
> **Request 7**: Any and all correspondence (including emails, letters, text messages, phone calls, etc.) you exchanged with counsel, parties,

witnesses, and non-parties pertaining to your engagement in the above-styled lawsuit.

Request 10: Any drafts or working copies of any reports, memorandum, or any other written report or summary of your opinions you formed in your engagement in the above-styled lawsuit.

Request 11: Any and all written reports, opinions, drafts, summaries, expert reports, or other memoranda you have drafted related to your opinions or review of issues present in the above-styled lawsuit.

("Disputed Expert Requests").

In their response to the Disputed Expert Requests, Plaintiffs object on the basis they seek "privileged opinion work product."[1] In correspondence exchanged between counsel and submitted to the Court, Plaintiffs take the position that "[a]ny memoranda or drafts prepared by Ms. Radford, or provided to Ms. Radford is protected by attorney work product."[2] Related to this discovery dispute Plaintiffs have also submitted privilege logs for correspondence, emails and memoranda/research that have been withheld from production, referencing documents that predate the filing of this action.

"The Georgia Civil Practice Act provides for 'discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.'" McKinnon v. Smock, 264 Ga. 375, 376, 445 S.E.2d 526, 527 (1994) (citing O.C.G.A. §9–11–26(b)(1)). Plaintiffs' counsel's correspondence and privilege logs raise objections to the Disputed Requests based on attorney client privilege and the work product doctrine. Notably,

> the purpose of the work-product doctrine is different from that of the attorney-client privilege. While the attorney-client privilege is intended to protect the attorney-client relationship by protecting communications between clients and attorneys, the work-product doctrine directly protects the adversarial system by allowing attorneys to prepare cases without concern that their work will be used against their clients.

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1 Plaintiffs' Response and Objection to Subpoena Duces Tecum to Mary Radford, p. 4.

2 Letter from Richard A. Wingate to Johannes S. kingma and Shannon M. Sprinkle (dated Oct. 31, 2018).

McKesson HBOC, Inc. v. Adler, 254 Ga. App. 500, 503, 562 S.E.2d 809, 813 (2002) (citing Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1427–1428 (3rd Cir.1991).

With respect to the assertion of the attorney-client privilege, O.C.G.A. §24-5-501(a)(2) "exclude[s] from evidence on grounds of public policy…[c]ommunications between attorney and client." Accordingly, only confidential communications between a party's counsel and their client are covered under the privilege. Further, "[t]he attorney-client privilege extends only to confidential communications made for the purpose of facilitating the rendition of legal services to the client." S. Guar. Ins. Co. of Georgia v. Ash, 192 Ga. App. 24, 28, 383 S.E.2d 579, 583 (1989). *See also* Georgia Cash Am., Inc. v. Strong, 286 Ga. App. 405, 413, 649 S.E.2d 548, 555 (2007) ("[A party's] suggestion that the fact that an attorney might have reviewed or commented upon a document automatically protects the document under the attorney-client privilege is unsupported by any authority and, in fact, conflicts with prior opinions by this Court").

As to the work product doctrine, O.C.G.A. §9-11-26(b)(3) provides:

> Subject to paragraph (4) of this subsection [related to expert discovery], a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this subsection and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

See also McKinnon v. Smock, 264 Ga. 375, 381 n. 2, 445 S.E.2d 526, 530 (1994) ("'Opinion work product' has been described as including such items as an attorney's legal strategy,

intended lines of proof, evaluation of the case's strengths and weaknesses, and the inference drawn from interviews of witnesses") (citing Sporck v. Peil, 759 F.2d 312, 316 (3rd Cir.1985)).

However, O.C.G.A. §9-11-26(b)(3) is "subject to" paragraph 4 of §9-11-26 which governs expert discovery and authorizes parties to obtain "[d]iscovery of facts known and opinions held by experts…acquired or developed in anticipation of litigation or for trial", that is otherwise discoverable, through a variety of methods including the production of documents. As to the interplay between O.C.G.A. §9-11-26(b)(3) and O.C.G.A. §9-11-26(b)(4) and having considered the Disputed Expert Requests at issue in the case at bar, the Court finds McKinnon instructive:

> Determining whether correspondence from an attorney to an expert is protected from disclosure requires an evaluation of the interplay between O.C.G.A. § 9-11-26(b)(3), which protects opinion work product, and O.C.G.A. § 9-11-26(b)(4), which permits discovery of the facts known and opinions held by an expert…Section 9-11-26(b)(3) and (b)(4) appear in conflict when, as here, a party seeks material which originated with the attorney representing the opposition and which may contain facts relied on by the expert…
>
> The protection afforded opinion work product creat[es] an environment in which counsel [is] free to think dispassionately, reliably, and creatively both about the law and the evidence in the case and about which strategic approaches to the litigation are likely to be in [his] client's best interests…The protection shields an attorney's preparation from disclosure because there is a "higher value" to be served in protecting the thought processes of counsel…
>
> With these principles in mind, we conclude that (b)(3) is "subject to" (b)(4) only to the extent of the first sentence of (b)(3). That is, one seeking discovery of the facts known and opinions held by an expert acquired or developed in anticipation of litigation or for trial may do so without exhibiting a substantial need for the material and establishing the undue hardship that will result should the seeker have to employ other means to develop the evidence. However, discovery seeking the facts known and opinions held by the expert is subject to (b)(3)'s provision against the disclosure of "the mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation." Thus, correspondence from an attorney to an expert is

> protected from disclosure to the extent that the correspondence contains the opinion work product of the attorney. Should a dispute arise over whether a particular document does contain protected work product material, the trial court must conduct an in camera review to ensure that mental impressions, conclusions, opinions, or legal theories of a party's attorney or representative are not disclosed.

McKinnon, 264 Ga. at 376–78 (citations and punctuation omitted). *See also* Stephens v. Tr. For Pub. Land, 475 F. Supp. 2d 1299, 1306 (N.D. Ga. 2007) ("Plaintiff argues that the materials withheld constitute privileged work product because Mr. Dabney was operating, not in his capacity as Plaintiff's expert, but rather in his capacity as consultant. While the Court appreciates the distinction Plaintiff attempts to draw, courts have generally held that where an individual serves as both an expert and as a consultant, documents which are related to the expert's role as an expert must be produced, and that any ambiguity as to the role played by the expert when reviewing or generating documents should be resolved in favor of the party seeking discovery").

Importantly, the burden of establishing the existence of a privilege rests on the party asserting the privilege. *See* Georgia Cash Am., Inc. v. Strong, 286 Ga. App. 405, 412, 649 S.E.2d 548, 554 (2007); Gen. Motors Corp. v. Conkle, 226 Ga. App. 34, 46, 486 S.E.2d 180, 191 (1997). Moreover, Uniform Superior Court Rule 5.5 provides:

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party shall:
> a. Expressly make the claim; and
> b. Describe the nature of the documents, communications, or tangible things not produced or disclosed and do so ***in a manner that, without revealing information itself privileged or protected, will enable other parties to assess such claim.***

(Emphasis added).

Here, having considered the correspondence exchanged between counsel and the large number of documents being withheld according to the privilege logs provided, the breadth of the assertion of the attorney-client and work product privileges in this case is troubling and raises a concern that the analysis that went into the assertion of the privileges was not very thorough. Similarly, on their face the scope of the Disputed Expert Requests appears broad (*e.g.,* the expert's "entire file related to [the] expert engagement", "any and all correspondence…exchanged with counsel", etc.) such that Defendants would be well served to consider tailoring their requests to more narrowly state the discoverable documents being requested.

In the final analysis, the distinctions between discoverable expert materials and documents protected under the attorney client privilege and work product doctrine are not particularly complicated and counsel should be able to make an appropriate distinction. Further, motions to compel what ultimately may be a sizeable number of documents could prove to be time consuming and very expensive for all parties. Indeed, if Defendants have to file motions to compel and the Court finds a privilege was not properly asserted as to a large number of documents, the case for an award of attorney's fees under O.C.G.A. §9-11-37 would likely be a strong one.

Given all of the above and in an effort to promptly and more efficiently address this discovery dispute, the Court orders as follows:

- Defendants, within five (5) days of the entry of this order, shall reconsider and, if/as necessary, tailor their Disputed Expert Requests.
- Thereafter and within fifteen (15) days of the entry of this order, Plaintiffs/Ms. Radford, shall supplement their production and/or amend and supplement their

related privilege logs with the guidance of and in accordance to the above legal authorities, including describing the nature of the documents or communications being withheld with sufficient detail to enable the other parties and the Court to assess the privilege claimed with respect to each document withheld from production.

- Thereafter if any dispute remains as to the expert discovery sought following Plaintiffs/Ms. Radford's supplemental production and/or amended/supplemented privilege logs, counsel for the parties shall meet and confer within thirty (30) days of the entry of this order.
- If any dispute remains as to the expert discovery sought following such conferral, Defendants may thereafter, if they deem it necessary, proceed with a motion to compel as appropriate. If necessary, disputed documents shall be submitted to the Court for *in camera* review.

SO ORDERED this 16 day of November, 2018.

JOHN J. GOGER, JUDGE
Fulton County Superior Court
Business Case Division
Atlanta Judicial Circuit

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