

FILED

2017 APR 14 PM 12:25 **COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

RAE WOODS
CLERK OF COMMON PLEAS
CLERMONT COUNTY, OHIO

JBS EXCAVATING, LLC :
Plaintiff : **CASE NO. 2016 CVH 01603**
vs. : **Judge McBride**
CDK CONSTRUCTION, LLC, ET AL. : **DECISION/ENTRY**
Defendants :

Finney Law Firm, LLC, Brian C. Shrive and Justin C. Walker, counsel for the plaintiff JBS Excavating, LLC, 4270 Ivy Pointe Blvd., Suite 225, Cincinnati, Ohio 45245

The Fogelman Law Firm LLC, Adam R. Fogelman, counsel for the defendants CDK Construction, LLC and Chris Knipper, 285 E. Main Street, 2nd Floor, Batavia, Ohio 45103

This cause is before the court for the determination of whether the attorney-client privilege applies to certain portions of the defendant Chris Knipper's testimony. This issue was raised at the evidentiary hearing which commenced on March 3, 2017, and the hearing was continued in progress for the court to address this issue.

Upon consideration of the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The present case stems from a dispute between a general contractor and a subcontractor regarding payments on a construction project. The plaintiff JBS Excavating, LLC filed a complaint against the defendants CDK Construction, LLC and Chris Knipper on November 14, 2016. The plaintiff is asserting claims for breach of contract and fraud.

On January 18, 2017, the plaintiff moved for a default judgment against the defendants. The defendants then filed a motion to answer out of time on February 10th. The defendants also filed separate affidavits from Chris Knipper on February 10th and March 2nd. The plaintiff filed a motion in opposition to the defendants' motion to answer out of time on February 23rd.

On March 3rd, the court commenced an evidentiary hearing on the defendants' motion to file out of time. At that hearing, the defendant Knipper, who is the sole owner of CDK Construction, LLC, testified generally as to when he discovered this litigation was pending and how he went about retaining counsel. At multiple points during the hearing, issues arose concerning Knipper's claim of attorney-client privilege.

The defendant Knipper testified as to the dates on which he believed he first tried to contact an attorney to represent him in this case. Knipper testified that he contacted attorney Dayle Donithan and that she informed him that she could not undertake his case because her caseload was too high. Knipper further testified that Donithan referred him to his present counsel, Adam Fogelman. Knipper then testified as to the

approximate dates when he contacted attorney Fogelman, when Fogelman returned his phone call, when he met with Fogelman, and when he was able to secure Fogelman's representation. On cross examination, Knipper was asked whether either attorney had advised him that he should file a request for an extension of time to answer the complaint. Knipper responded that neither attorney instructed him to do so.

After defense counsel made multiple objections to plaintiff's counsel's questions on cross examination on the basis of the attorney-client privilege, the court decided to continue the hearing in order that the attorney-client privilege issues, including whether such privilege was waived, could be argued and resolved. The court requested that the parties brief the attorney-client privilege issue.

On March 10th, both parties filed memoranda on the attorney-client issue, and upon the submission of the last memorandum, the court took this matter under advisement.

The defendant maintains that the attorney-client privilege applies to Knipper's testimony, and that because he did not testify to the communications he had with counsel, he did not waive his privilege.¹

The plaintiff "seeks to test the truth" of some of Knipper's testimony, including: "(i) that Knipper immediately sought counsel after "discovering" the complaint in early January 2017; (ii) that attorney Donithan told Knipper that she could not represent him because she was too busy; (iii) that he contacted his present counsel prior to January 18, 2017; and (iii) [sic] that at no time did either Donithan or his present counsel suggest to Knipper that an extension of time to respond should be requested."² The plaintiff

¹ Defs. Mem. at pg. 4.

² Pls. Mem. at pg. 5.

contends that the attorney-client privilege does not apply as to these matters, and that even if it does, the defendant Knipper, and by extension the defendant CDK Construction LLC, waived their privilege as to these matters.

LEGAL STANDARD

The scope of discovery is set forth in Civ.R. 26:

"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 any other party. * * *."³

Under Civ.R. 26, the concept of relevancy for discovery is "not limited to the issues in the case, but to the subject matter of the action, the latter being broader than the former."⁴ "Generally, a party may obtain discovery regarding any matter concerning the pending litigation," aside from privileged matters.⁵ "The regulation of discovery is committed to the sound discretion of the trial court * * *."⁶ As such, the "admission or exclusion of relevant evidence is within the court's sound discretion."⁷

³ (Emphasis added.) Civ.R. 26(B).

⁴ *Nilavar v. Osborn*, 137 Ohio App.3d 469, 499, 738 N.E.2d 1271 (2d Dist. 2000), quoting Klein & Darling, Civil Practice (1997) 6, Section 26-1.

⁵ See *Crosby v. Rose*, 4th Dist. Pike No. 97CA594, 1998 WL 51603, *5 (Feb. 11, 1998), citing Civ.R. 26(B)(1). See *First Bank of Marietta v. Mitchell*, 4th Dist. Washington No. 82 X 5, 82 X 14, 1983 WL 3307, *12 (Nov. 29, 1983) (Citation omitted.) ("The Civil Rules and the commentators are in unanimous agreement that the scope of discovery under Civ.R. 26(B)(1) is not limited to matters which are admissible into evidence, but extend to all matters not privileged, which is relevant to the subject matter involved in the pending action.")

⁶ *Air-Ride, Inc. v. DHL Express (USA), Inc.*, 12th Dist. Clinton No. CA2008-01-001, 2008-Ohio-5669, ¶ 7, quoting *Henderson Elec. Co. of Ohio, Inc. v. Elan Constr. Mgt. Serv.* 92 Ohio App.3d 98, 101, 634 N.E.2d 267 (1st Dist. 1993). See *Nilavar*, 137 Ohio App.3d at 499, citing Klein & Darling, Civil Practice (1997) 6, Section 26-1.

⁷ *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524, ¶ 18.

LEGAL ANALYSIS

Under Evid.R. 501, “[t]he privilege of a witness, person, state or political subdivision thereof shall be governed by statute enacted by the General Assembly or by principles of common law as interpreted by courts of this state in the light of reason and experience.”⁸ The attorney-client privilege “is one of the oldest recognized privileges for confidential communications.”⁹ The 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.”¹⁰ As with other privileges, the “burden of showing that evidence ought to be excluded under the attorney-client privilege rests upon the party asserting the privilege.”¹¹

Ohio’s attorney-client privilege is governed both by statute, which provides for “a testimonial privilege,” and common law, “which broadly protects against any dissemination of information obtained in the confidential attorney-client relationship.”¹²

⁸ Evid.R. 501.

⁹ *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 21, quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998).

¹⁰ (Internal citation omitted.) *State ex rel. Toledo Blade*, 2009-Ohio-1767 at ¶ 21, quoting *Swidler*, 524 U.S. 399.

¹¹ *Maddox v. Greene Cty. Bd. of Commrs.*, 2d Dist. Greene No. 2013-CA-71, 2014-Ohio-1541, ¶ 5, quoting *MA Equip. Leasing, L.L.C. v. Tilton*, 980 N.E.2d 1072, 2012-Ohio-4668, ¶ 21 (10th Dist.). See *Shaffer v. OhioHealth Corp.*, 10th Dist. Franklin No. 03AP-102, 2004-Ohio-63, ¶ 8, quoting *Waldmann v. Waldmann*, 48 Ohio St.2d 176, 178, 358 N.E.2d 521 (1976) (“The burden of proof rests with the party asserting the existence of privilege.”).

¹² *State ex rel. Dawson*, 2011-Ohio-6009 at ¶ 27, citing *State ex rel. Toledo Blade*, 2009-Ohio-1767 at ¶ 24. See *State ex rel. Toledo Blade*, 2009-Ohio-1767 at ¶ 24, quoting *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 900, ¶ 18 (holding same).

RC 2317.01 “is a mere testimonial privilege precluding an attorney from testifying about confidential communications.”¹³

Because the present case does not involve the testimonial privilege, as no attorney is testifying,¹⁴ the attorney-client privilege in question is the common law privilege, which is broader and protects against disclosure of information obtained in a confidential attorney-client relationship.¹⁵ The attorney-client privilege protects both legal analysis and advice, as well as communications between an attorney and client that “that would facilitate the rendition of legal services or advice.”¹⁶ Under the common law attorney-client privilege, “(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless

¹³ *State ex rel. Toledo Blade*, 2009-Ohio-1767 at ¶ 24, quoting *State ex rel. Leslie*, 2005-Ohio-1508 at ¶ 24. See *Maddox*, 2014-Ohio-1541 at ¶ 5, quoting *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487, ¶ 7 (“On its face, R.C. 2317.02(A) involves a testimonial privilege and only precludes an attorney from testifying on matters covered by the attorney-client privilege.”). See R.C. 2317.05(A) (“The 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 concerning the attorney’s advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily reveals the substance of attorney-client communications in a nonprivileged context or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject. * * *”).

¹⁴ *Grace v. Mustruserio*, 182 Ohio App.3d 243, 2007-Ohio-3942, 912 N.E.2d 608, ¶ 17 (1st Dist.) (“A plain reading of the statute [R.C. 2317.02(A)] clearly limits the statute’s application to cases in which a party is seeking to compel testimony of an attorney for trial or at a deposition—as opposed to cases where a party is seeking to compel production of nontestimonial documents.”).

¹⁵ *State ex rel. Toledo Blade*, 2009-Ohio-1767 at ¶ 24, quoting *State ex rel. Leslie*, 2005-Ohio-1508 at ¶ 24. See *MA Equip. Leasing I, L.L.C. v. Tilton*, 980 N.E.2d 1072, 2012-Ohio-4668, ¶ 19 (10th Dist.), citing *State ex rel. Leslie*, 2005-Ohio-1508 at ¶ 18 (“The attorney-client privilege in Ohio is governed by R.C. 2317.02(A) and, in cases not addressed there, by common law.”).

¹⁶ *State ex rel. Toledo Blade*, 2009-Ohio-1767 at ¶ 27, quoting *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991).

the protection is waived.”¹⁷ To determine whether the privilege applies, courts “must balance the public’s interest in confidentiality against the need for discovery in the efficient administration of justice.”¹⁸ As such, “[t]he determination whether a communication should be afforded the cloak of privilege depends on the circumstances of each case * * *.”¹⁹

The term “communication,” as relating to the attorney-client privilege, encompasses “information relating to the representation” of the client.²⁰ In turn, “the word ‘representation’ is important—the attorney-client privilege exists only when the communication is for the purpose of requesting or receiving legal advice and is intended to be confidential.”²¹ As such, the attorney-client privilege “only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney * * *.”²²

Relevant to this case, “[w]here a person approaches an attorney with the view of retaining services to act on the former’s behalf, an attorney-client relationship is created, and communications made to such attorney during the preliminary conferences prior to the actual acceptance or rejections by the attorney of the employment are privileged

¹⁷ *State ex rel. Leslie*, 2005-Ohio-1508 at ¶ 21, quoting *Reed v. Baxter*, 134 F.3d 351, 355-356 (6th Cir. 1998). See *Prefection Corp. v. Travelers Cas & Sur.*, 153 Ohio App.3d 28, 2003-Ohio-2750, 790 N.E.2d 817, ¶ 12 (8th Dist.), quoting *Fausek v. White*, 956 F.2d 126, 129 (6th Cir. 1992) (“(1) [w]here legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by his legal advisor, (8) except the protection be waived.”).

¹⁸ *Carver v. Deerfield Twp.*, 139 Ohio App.3d 64, 76, 742 N.E.2d 1182 (11th Dist. 2000), citing *Henneman v. Toledo*, 35 Ohio St.3d 241, 245-246, 520 N.E.2d 207 (1988).

¹⁹ *Ciazza v. Mercy Med. Ctr., Inc.*, 5th Dist. Stark No. 2012-CA-83, 2012-Ohio-3940, ¶ 16, citing *Lemley v. Kaiser*, 6 Ohio St.3d 258, 264, 452 N.E.2d 1304 (1983).

²⁰ *State v. Montgomery*, 997 N.E.2d 579, 2013-Ohio-4193, ¶ 21 (8th Dist.), citing Prof.Cond.R. 1.6, comment 2.

²¹ *Montgomery*, 2013-Ohio-4193 at ¶ 21, citing *State v. Post*, 32 Ohio St.3d 380, 387, 513 N.E.3d 754 (1987).

²² *Upjohn Co. v. U.S.*, 449 U.S. 383, 395, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

communications."²³ Moreover, the privilege applies not only to individual clients, but also to corporate clients as well.²⁴

The attorney-client privilege is not absolute and can be waived.²⁵ Only the client can waive this privilege.²⁶ For the common law privilege, a client waives the privilege either "expressly or by conduct implying a waiver."²⁷ A client waives the privilege when the "client discloses communications with his or her attorney to a third party."²⁸ "Because a client's voluntary disclosure of confidential communications is inconsistent with an assertion of the privilege, voluntary disclosure of privileged communications to a third party waives a claim of privilege with regard to communications on the same subject matter."²⁹ "The 'same subject matter' standard is, however, to be applied narrowly, rather than expansively."³⁰

The plaintiff "seeks to test the truth" of some of Mr. Knipper's testimony, including: "(i) that Knipper immediately sought counsel after 'discovering' the complaint

²³ *State ex rel. Nix v. Cleveland*, 83 Ohio St.3d 379, 383, 700 N.E.2d 12 (1998), quoting *Taylor v. Sheldon*, 172 Ohio St. 118, 173 N.E.2d 892 (1961), paragraph one of the syllabus.

²⁴ *State ex rel. Leslie*, 2005-Ohio-1508 at ¶ 22.

²⁵ *Montgomery*, 2013-Ohio-4193 at ¶ 24, citing *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533, ¶ 47.

²⁶ *State ex rel. Leslie*, 2005-Ohio-1508 at ¶ 21. See *Shaffer*, 2004-Ohio-63 at ¶ 10, citing *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 213, 744 N.E.2d 154 (2001) ("It is well-settled that the holder of the privilege is the client and not the attorney, and only the client has the right to invoke and waive the privilege.").

²⁷ *Grace*, 2007-Ohio-3942 at ¶ 20, citing *Jackson*, 2006-Ohio-4968 at ¶ 25. A client may impliedly waive the attorney-client privilege through "affirmative acts." *Grace*, 2007-Ohio-3942 at ¶ 21.

²⁸ *Hollingsworth v. Time Warner Cable*, 157 Ohio App.3d 539, 2004-Ohio-3130, 812 N.E.2d 976, ¶ 6, (1st Dist.), citing *Mid-American Natl. Bank & Trust Co. v. Cincinnati Ins. Co.*, 74 Ohio App.3d 481, 599 N.E. 699 (6th Dist.).

²⁹ *MA Equip. Leasing I, L.L.C.*, 2012-Ohio-4668 at ¶ 20, citing *Hollingsworth v. Time Warner Cable*, 157 Ohio App.3d 539, 2004-Ohio-3130, 812 N.E.2d 976, ¶ 65 (1st Dist.). See *State v. Post*, 32 Ohio St.3d 380, 386, 513 N.E.2d 754 (1987) ("[A] client's disclosure to a third party of communications made pursuant to the attorney-client privilege breaches the confidentiality underlying the privilege, and constitutes a waiver thereof.").

³⁰ *Hollingsworth*, 2004-Ohio-3130 at ¶ 65, quoting *Gomez v. Towne Bancorp.*, N.D. Ohio Nos. 3:98CV7436, 3:98CV7575, 2000 WL 1183024 (June 1, 2000).

in early January 2017; (ii) that Ms. Donithan told Knipper that she could not represent him because she was too busy; (iii) that he contacted his present counsel prior to January 18, 2017; and (iii) [sic] that at no time did either Ms. Donithan or his present counsel suggest to Knipper that an extension of time to respond should be requested.”³¹ The plaintiff contends that the attorney-client privilege does not apply to these categories of testimony, but that even if it does, the defendant Knipper, and by extension CDK Construction LLC, waived their privilege as to these matters.

Because the attorney-client privilege only protects “communications” between a client and the client’s attorney, the privilege does not protect the defendant Knipper from answering inquiries about when he sought counsel, both as to Ms. Donithan and Mr. Fogelman.³² Simply, when Mr. Knipper sought counsel is not a communication with his attorneys, and as such the attorney-client privilege does not protect Knipper from testifying as to that information. Therefore, defense counsel may properly inquire into the timeline during which Mr. Knipper sought and retained counsel.

Next, the plaintiff argues that Knipper has waived any privilege he may have had regarding his conversation with Ms. Donithan about when and why she could not represent him. The court agrees. Although Knipper ultimately did not retain Ms. Donithan, his communications with her would have been covered by the attorney-client privilege.³³ However, a client such as Knipper waives his privilege when he “discloses communications with his or her attorney to a third party.”³⁴ Knipper did just that when

³¹ Pls. Mem. at pg. 5.

³² *State ex rel. Toledo Blade*, 2009-Ohio-1767 at ¶ 24, quoting *State ex rel. Leslie*, 2005-Ohio-1508 at ¶ 24.

³³ *State ex rel. Nix*, 83 Ohio St.3d at 383.

³⁴ *Hollingsworth*, 2004-Ohio-3130 at ¶ 6, citing *Mid-American Natl. Bank & Trust Co.*, 74 Ohio App.3d 481.

he repeatedly testified throughout the hearing that Donithan could not represent him because she was too overwhelmed by her current caseload. Accordingly, the court finds that the plaintiff may question Knipper as to his understanding of why Ms. Donithan would not represent him and when that communication occurred. However, the questioning of Knipper relative to his communications with Donithan may not exceed the scope of why she did not represent him.³⁵

Lastly, the court finds that the attorney-client privilege protects from dissemination any communications that Knipper may have had with either attorney concerning their advice to him on how to proceed in this case. Accordingly, the plaintiff may not question Knipper on the substance of that advice. In particular, the plaintiff would like to question Mr. Knipper regarding his testimony that the two attorneys did not suggest to him that he should seek an extension of time to answer the complaint. Mr. Knipper's inquiries with attorneys into what actions he should take on this case are clear examples of communications that fall under the common law attorney-client privilege.³⁶

The plaintiff argues that, even if the privilege does apply, Knipper waived it due to his voluntary testimony at the evidentiary hearing. However, Knipper did not waive his privilege regarding advice from his attorneys because he did not divulge confidential communications he had with his attorneys. Instead, he confirmed the *absence* of certain communications with his attorneys. In other words, Mr. Knipper did not make a "voluntary disclosure of privileged communications" that he had with the two attorneys

³⁵ See *Hollingsworth*, 2004-Ohio-3130 at ¶ 65, quoting *Gomez*, 2000 WL 1183024 ("The 'same subject matter' standard is, however, to be applied narrowly, rather than expansively.").

³⁶ See *Prefection Corp.*, 2003-Ohio-2750 at ¶ 12, quoting *Fausek*, 956 F.2d at 129 ("(1) [w]here legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by his legal advisor, (8) except the protection be waived.").

because he testified that no such communications occurred.³⁷ Therefore, any communications that Mr. Knipper had with his attorneys regarding legal actions he should take in this case are still protected by the attorney-client privilege, and the plaintiff may not inquire into those communications.

CONCLUSION

For the foregoing reasons, the court finds as follows:

- (1) Plaintiff's counsel may inquire about when Chris Knipper sought and retained counsel;
- (2) Plaintiff's counsel may inquire into the reasons why Dayle Donithan did not represent Chris Knipper and CDK Construction, LLC; and
- (3) Plaintiff's counsel may not inquire into any legal advice that Dayle Donithan or Adam Fogelman may have provided to Chris Knipper.

Counsel are directed to conference by telephone and to contact the Assignment Commissioner (513-732-7108) within five days of the date of this decision in order to schedule the continuation of the hearing on the defendants' motion for leave to file answer out of time and the plaintiff's motion for default judgment.

IT IS SO ORDERED.

³⁷ *MA Equip. Leasing I, L.L.C.*, 2012-Ohio-4668 at ¶ 20, citing *Hollingsworth*, 2004-Ohio-3130 at ¶ 65; *Post*, 32 Ohio St.3d 380 at 386.

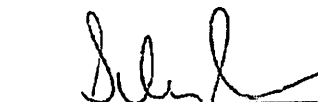
DATED: 4-13-17



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this 14th day of April 2017 by e-mail to Brian C. Shrive, Attorney for the Plaintiff, at brian@finneylawfirm, and to Adam R. Fogelman, Attorney for the Defendants, at AdamFogelman@fogelmanfirm.com.



Judicial Assistant to Judge McBride