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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KING COUNTY CAUSE NO. 10-2-27795-1 SEA

PHILIP D. MCKIBBEN, individually and for and on behalf of LLC
EVERETT I, a Washington limited liability company, and P.D. & M.K. I,
LLC, a Washington limited liability company,

Plaintiffs below and Respondents,

v.

LEROY CHRISTIANSEN and JUDY CHRISTIANSEN, husband and
wife and the marital community composed thereof; FRANK
COLACURCIO, JR. and "JANE DOE" COLACURCIO, husband and
wife and the marital community composed thereof; STEVEN M.
FUESTON and "JANE DOE" FUESTON, husband and wife and the
marital community composed thereof; DAVID C. EBERT and
MICHELLE EBERT, husband and wife and the marital community
composed thereof,

Defendants and Appellants.

REVIEW FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE SUZANNE M. BARNETT

**APPELLANTS CHRISTIANSEN, FUESTON, AND EBERT'S
OPENING BRIEF**

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I. INTRODUCTION

Petitioners and Defendants below Leroy Christiansen, Steve Fueston, and David Ebert (“Defendants”), and their criminal counsel in *United States v. Colacurcio, et al*, Case Nos. 08-87 RSM & 09-209 RAJ (“Criminal Counsel”), seek reversal of the portion of a January 25, 2012 trial court order (“Order”) that requires them to disclose core attorney-client privileged communications and work product without first determining whether these privileges apply. This Court granted discretionary review to address the trial court’s privilege ruling.

Respondent and Plaintiff below Philip D. McKibben (“McKibben”), Frank Colacurcio, Jr.,¹ and Defendants are all members and/or managers of limited liability companies called “LLC Everett I” (the “LLC”) and P.D. M.K., LLC (collectively, the “LLCs”). CP 4; 20–21; 745–46. The LLC was involved in the operation of a strip club named Honey’s, where dancers were alleged to have engaged in illegal activity. *Id.* As a result, Defendants and the LLC were federally indicted and subsequently plead guilty to the some of the charges against them. *Id.*

In July 2010, McKibben, an unindicted coconspirator, filed the instant action against Defendants, alleging Defendants breached duties to

¹ Mr. Colacurcio, Jr. is a defendant below, but is not a petitioner before this Court.

him by managing the LLCs illegally. CP 4; 20–21; 745–46. In July and November 2011, McKibben served discovery requests that, on their face, seek privileged communications falling into two categories:

(1) communications between Defendants (who are also members of the LLC, of which McKibben is a member/manager) or their Criminal Counsel, and the LLC’s independent attorney concerning charges against the LLC, and (2) communications between and among the Defendants and their individual Criminal Counsel. When Defendants and their Criminal Counsel objected to producing the latter category—privileged communications McKibben is not entitled to see—McKibben moved to compel their production.

In accord with his consistent efforts to muddle this important distinction, McKibben submitted a proposed order with his reply (to which Defendants were denied the opportunity to respond), which lumped together these categories of communications. CP 450–51. On January 25, 2012, the trial court adopted McKibben’s proposed order. CP 452–53. Bizarrely, although it ordered disclosure of *all* privileged materials (not just those McKibben is entitled to see), it deferred ruling on the “application of privilege” for a later date, and stated, without explanation, that “disclosure of these communications shall not constitute a waiver of privilege.” *Id.* In short, the Court put the cart before the horse.

The Order is flawed in at least two fundamental ways. First, it requires Defendants and Criminal Counsel to disclose facially privileged or protected materials without first determining whether any privileges or protections apply. This is pure legal error. Second, it requires Defendants and Criminal Counsel to comply with discovery requests which, on their face, call for core attorney-client and joint defense privileged communications and work product that McKibben has no right to see. Because this aspect of the trial court's order is manifestly unreasonable and based on untenable grounds, the trial court abused its discretion in entering it. Defendants ask this Court to reverse the trial court and hold that McKibben is not entitled to discovery on Defendants' privileged communications with their Criminal Counsel or related work product.

II. ASSIGNMENT OF ERROR

The trial court erred in compelling Defendants and Criminal Counsel to produce documents in response to discovery requests which, on their face, require production of attorney-client and joint defense privileged communications and work product, without first determining whether a privilege protects the documents from disclosure, and when, in any event, McKibben did not meet his burden to require disclosure.

Issues Pertaining to Assignment of Error

1. Did the trial court commit legal error requiring reversal when it required Defendants and Criminal Counsel to disclose facially privileged and protected documents without first determining whether a privilege protects the documents from disclosure?

2. In the alternative, did the trial court necessarily abuse its discretion in ordering disclosure without first determining whether a privilege or other protection from discovery applied because such a decision is based on an erroneous view of the law?

3. Even if the trial court engaged in the proper analysis, did the trial court abuse its discretion in compelling Defendants and Criminal Counsel to respond to discovery requests which, *on their face*, require production of attorney-client and joint defense privileged communications and work product when McKibben failed to meet his heavy burden to show entitlement to such materials because such a decision is manifestly unreasonable or based on untenable grounds?

III. STATEMENT OF THE CASE

Defendants, McKibben, and Frank Colacurcio, Jr., are each members/managers of the LLCs. CP 4; 27; 745; 772. From 2000 to 2009, the LLCs were involved in the operation of Honey's strip club, where dancers were alleged to have engaged in illegal activity. CP 4-5; 745-46.

Defendants, the LLC itself, and Colacurcio Jr. were federally indicted on June 23, 2009, and charged with conspiracy to commit RICO, use of interstate facilities in aid of racketeering, and engaging in money laundering and mail fraud. *Id.* McKibben, an unindicted coconspirator, was a manager of the LLCs and shared responsibility for LLC governance. CP 4–5; 27; 215; 393–94; 397; 402–03; 411; 745–46; 772.

In spring 2010, Defendants, each of whom was represented by separate counsel, negotiated plea agreements with the Government. CP 5–7; 22; 129–41; 143–56; 158–71; 746; 766. And by majority vote of its members, the LLC, which was represented by its own independent criminal counsel, negotiated a plea agreement and pleaded guilty to some of the charges against it. CP 6; 22; 747; 766. Although McKibben participated in the plea discussions among the members regarding the LLC’s plea agreement, he did not vote in favor of accepting the plea agreement. CP 7; 24; 749; 768–69.

McKibben filed the instant action against Defendants on July 30, 2010, claiming Defendants breached a duty to him by managing the LLCs illegally. CP 1–17; 742–61. Defendants, among other things, assert that McKibben was fully aware of, and indeed participated in, the activities taking place at Honey’s. CP 18–32; 762–77.

A. McKibben Requests Production of Privileged Materials

On November 2, 2011, McKibben sent a subpoena duces tecum to

each Criminal Counsel, demanding production of attorney-client and joint defense communications, and work product. Those subpoenas sought:

[A]ll records of communication in [*United States v. Colacurcio, et al*, 09-209 RAJ] between **you and (a) your client**, or (b) the United States Attorney's Office for the Western District of Washington, or (c) an attorney for LLC Everett I, **or (d) an attorney for any other defendant(s)**, regarding or relating in any way to any plea negotiations or agreements in the above criminal matter, **including, but not limited to, all related joint defense communication and work product.**

CP 194–95 (emphasis added).

McKibben likewise served his First Discovery Requests to Defendants, asking Defendants to produce confidential communications related to plea negotiations. At issue here are Requests for Production (“RFPs”) 5 & 6:

REQUEST FOR PRODUCTION NO. 5: Produce copies of all communications, documents and **work product** related to the Joint Defense agreement in *United States v. Colacurcio, et al*, Case Nos. 08-87 RSM & 09-209 RAJ, including, but not limited to, all valuations of properties, buildings and fixtures owned by the Companies.

REQUEST FOR PRODUCTION NO. 6: Produce copies of all documents and communications identified in your answers to Interrogatory 9,^[2] including, but not limited to,

² Interrogatory No. 9 states, in pertinent part:

Identify all documents and communications between or among you, your attorneys and/or co-defendant[s] ..., [their] attorneys, the civil and criminal attorneys for LLC Everett I and the Government attorneys regarding plea negotiations, the plea

all proposed or actual provisions of any plea agreement that involved LLC Everett I's alleged culpability and sanctions.

CP 50–51; 68–69; 88–89 (emphasis added).

Broken down, the subpoenas require Criminal Counsel to produce communications regarding **any** plea negotiations (not just those of the LLC): (1) between Criminal Counsel and their respective clients (Defendants); (2) among Criminal Counsel, excluding the separate counsel for the LLC; (3) between Criminal Counsel and the Government; and (4) between Defendants and/or their Criminal Counsel, and counsel for the LLC. CP 218. Although the RFPs to Defendants are not a model of clarity, they at least arguably also require Defendants to produce communications among Criminal Counsel—even when counsel for the LLC was not involved—(“all communications, documents and work product related to the Joint Defense agreement”)and communications between Defendants and their individual Criminal Counsel discussing the LLC plea even if the LLC's own criminal counsel was not involved (“all proposed or actual provisions of any plea agreement that involved LLC Everett I”). CP 50–51; 68–69; 88–89.

agreements and the global plea in *United States v. Colacurcio, et al*, Case No. 09-209 RAJ.

CP 51–52; 69–70; 89–90.

B. Defendants Agree to Provide Some, But Not All, of These Privileged Materials

Defendants complied with their discovery obligations by producing responsive documents McKibben was entitled to see: communications with the Government, and communications among Defendants and/or Criminal Counsel where those communications also included counsel for the LLC (because, although protected by the joint defense privilege, McKibben is entitled to view them as a manager/member of the LLC and his viewing them does not waive the privilege). CP 214–24. Defendants and Criminal Counsel timely and clearly objected to providing attorney-client privileged communications between Defendants and their Criminal Counsel, or joint defense privileged communications among Criminal Counsel, excluding counsel for the LLC. CP 100–26.

The parties met and conferred on December 9, 2011, but could not resolve the privilege issue. CP 211. The parties agreed that McKibben would bring the issue before the trial court. *Id.*

C. McKibben Moves to Compel Production of the Privileged Materials Sought by RFPs 5 & 6 and the Subpoenas

On January 5, 2012, McKibben moved to compel Defendants and Criminal Counsel to comply with the subpoenas and RFPs 5 & 6. CP 33–40. He rested his motion to compel on two arguments relating to the privilege.

First, McKibben cursorily mentioned that the requested communications are not privileged because “[t]here is no expectation of

privacy or confidentiality for communications by member-managers relevant to LLC actions,” and that they fall within an undefined “fiduciary exception” to the attorney-client privilege. CP 37–38. McKibben cited no authority supporting such an exception nor did he present any evidence to demonstrate that any such exception applied. *Id.*

Second, he argued without any support that Defendants waived their attorney-client privilege:

The Defendants have already waived all privileges that may attach to the undisclosed communications by communicating between and among themselves and the LLC. The Defendants have not met their burden to produce evidence of a valid exception to waiver, including a joint defense agreement or an outline of matters of common interest and joint defense.

CP 38; *see also* CP 420. This was the full scope of McKibben’s waiver argument, which was unsupported by any authority or any evidence.³

Defendants responded to the motion by agreeing to produce documents related to non-privileged communications and those privileged communications with separate counsel for the LLC that McKibben was entitled to see without waiving the privilege. CP 214–24. Additionally, Defendants objected to producing privileged communications: (1) between Defendants and their respective Criminal Counsel; and (2) among Criminal Counsel, excluding counsel for the LLC. *Id.*

McKibben significantly shifted his position on reply. CP 418–22.

³ His motion likewise requested a privilege log, which is inconsistent with his demand for full production of *all* privileged documents. CP 33–39.

He submitted an amended proposed order suggesting an alternative to the relief he originally sought. The new order required Defendants and Criminal Counsel to disclose all materials sought by the subpoenas and RFPs 5 & 6, states that disclosure of these materials does not waive any privileges, restricts McKibben from disseminating the disclosed materials, and reserves the “application of privilege” for a later date. CP 450–51. Defendants were not given an opportunity to respond to the amended proposed order.

D. The Trial Court Orders Production of the Privileged Materials

On January 25, 2012, the trial court signed McKibben’s proposed order, thereby requiring Criminal Counsel and Defendants to produce *all* materials—including indisputably attorney-client and joint defense privileged materials and work product—requested in the subpoenas and RFPs 5 & 6. CP 452–53. The trial court’s Order specifically compelled the production of this privileged information *without making a determination as to whether any privilege applied*. The trial court stated that it deferred “ruling on the application of privilege without prejudice to either party.” CP 453. The trial court further stated, without any explanation, that “disclosure of these communications shall not constitute a waiver of privilege.” *Id.*

E. This Court Grants Defendants’ and Criminal Counsel’s Motions for Discretionary Review and an Emergency Stay of the Trial Court Order

Defendants and Criminal Counsel filed a notice of discretionary review on February 14, 2012, CP 454–59, and an emergency motion for

stay of the Order. This Court granted the stay pursuant to RAP 8.1(b).
February 15, 2012 Order.

On February 29, 2012, Defendants and Criminal Counsel filed a motion for discretionary review, seeking review of the portion of the Order that required Defendants and Criminal Counsel to produce facially privileged and protected communications,⁴ without first determining whether a privilege protects the documents from disclosure, let alone evaluating whether McKibben has met his burden to require disclosure of privileged documents. CP 452–53; *see also* CP 519–45; CP 710–39.

On March 9, 2012, while the stay was in effect and the motion for discretionary review was pending, McKibben inexplicably filed a motion in the trial court to stay the Order McKibben himself had sought (and which was already stayed by this Court’s order) and sought another ruling on the privilege issues. CP 460–72. Defendants and Criminal Counsel opposed the motion arguing that, if McKibben agreed the Order was flawed, he should seek to vacate it, not stay it. CP 587–88. (Of course, by asking the trial court to rule on the issue of privilege, McKibben implicitly conceded that the proposed order he submitted is fundamentally flawed. *Id.*) On March 21, 2012, the trial court denied McKibben’s motion. CP 740–41.

On March 23, 2012, this Court accepted discretionary review.

⁴ That is, communications (1) between Defendants and their respective Criminal Counsel (because they are attorney-client privileged), and (2) among Criminal Counsel, excluding counsel for the LLC (because they are joint defense privileged and McKibben is not within the privilege).

March 23, 2012 Order. Defendants and Criminal Counsel have produced communications: (1) with the Government,⁵ and (2) between Defendants and/or Criminal Counsel and the LLC.⁶ They now seek reversal of the unlawful portions of the Order that requires production of communications (3) between Defendants and their respective Criminal Counsel (because they are attorney-client privileged), and (4) among Criminal Counsel, excluding counsel for the LLC (because they are joint-defense privileged and McKibben is not within the privilege). This brief was filed within the time period required by RAP 10.2(a).

IV. SUMMARY OF ARGUMENT

The trial court here ordered Defendants and Criminal Counsel to produce documents protected by the attorney-client and joint defense privilege and the work product doctrine. In so doing, the trial court committed at least two fundamental errors, both of which require reversal.

First, the trial court erred when it ordered disclosure of documents subject to a claim of privilege, joint defense, or work product protection without addressing whether they are subject to disclosure. In other words,

⁵ The parties agree that communications between the Defendants or their Criminal Counsel and the government regarding plea negotiations are not privileged. *See* CP 460–61.

⁶ The parties agree that McKibben is entitled to see the materials from the LLC's counsel and communications between the LLC's counsel and others because there was no expectation that those would remain confidential as to McKibben. CP 468. Although the joint defense privilege protects communications involving counsel for the LLC, McKibben is entitled to see these documents because he is within the privilege. With respect to these LLC communications, the Order makes sense: it allowed McKibben to view the documents, confirmed that his viewing the documents did not waive the LLC's privilege, and permitted the parties to later argue whether the LLC's privilege should be waived.

the trial court simply abdicated its role in analyzing whether the documents were discoverable. The trial court's application (or, in this case, failure to apply) the attorney-client privilege statute and the work product doctrine is pure legal error, not a sound exercise of discretion, and mandates reversal.

Second, even if the trial court had engaged in the required analysis to determine whether the documents were subject to discovery—which it did not—the Order still should be reversed. Ordering disclosure of documents in response to discovery requests that *on their face* demand production of an attorney's communication with his client and that attorney's work product when the requesting party has presented no evidence to show that an exception, such as waiver, to the protections from discovery apply constitutes an abuse of the trial court's discretion in managing discovery.

V. ARGUMENT

A. Standard of Review

The Court reviews the trial court's interpretation of the attorney-client privilege statute de novo. *Cedell v. Farmers Ins. Co. of Wash.*, 157 Wn. App. 267, 272, 237 P.3d 309 (2010), *rev. granted*, 171 Wn.2d 1005 (2011) (citing *Barry v. USAA*, 98 Wn. App. 199, 204, 989 P.2d 1172 (1999)). Similarly, the trial court's definition of work product is a question of law the Court reviews de novo. *Soter v. Cowles Publ'g Co.*,

131 Wn. App. 882, 891, 130 P.3d 840 (2006), *aff'd*, 162 Wn.2d 716, 174 P.3d 60 (2007) (“*Soter I*”); *see also Pappas v. Holloway*, 114 Wn.2d 198, 209, 787 P.2d 30 (1990) (reviewing trial court’s ruling on scope of work-product protection de novo).⁷

Provided the trial court used the appropriate legal framework to make the determination, in the attorney-client privilege and work product contexts, the Court reviews the trial court’s ultimate decision to permit or deny discovery for abuse of discretion. *Cedell*, 157 Wn. App. at 272 (reviewing the trial court’s application of the fraud exception to the attorney-client privilege for abuse of discretion); *Pappas*, 114 Wn.2d at 209 (reviewing the trial court’s determination of whether a party met its burden to show substantial need for the work product for abuse of discretion). “A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.” *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). “A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Id.*

⁷ “[W]hether a particular document falls within the definition of work product under that interpretation is a finding of fact,” which is reviewed for substantial evidence. *Soter*, 131 Wn. App. at 891 (citing *Dawson v. Daly*, 120 Wn.2d 782, 792, 845 P.2d 995 (1993)). Because the discovery requests at issue here, on their face, seek documents which are “work product,” no factual determinations were necessary or made here. Any responsive documents to a request for an attorney’s “work product” are necessarily “work product.”

B. The Trial Court Erred, As a Matter of Law, in Compelling Disclosure of Documents Subject to a Claim of Privilege, Joint Defense, or Work Product Protection Without First Determining Whether they Are Subject to Disclosure

The Order is fundamentally flawed in one obvious way: It requires Defendants and Criminal Counsel to produce documents in response to discovery requests when those documents were not only subject to a claim of privilege, joint defense, or work product protections, but when the requests, *on their face and by definition*, seek privileged communications and work product. No finding of waiver was made. Indeed, to the contrary, the trial court concluded that any production of privileged documents would not waive the privilege. No case law supports the notion that, when faced with a motion to compel that is opposed on the basis of privilege, the trial court may abandon its role to determine whether the subject documents are protected from discovery. This is pure legal error—indeed, in a similar vein, no case law suggests that the trial court has discretion to order production and leave for later the issue of whether the documents were actually exempt from discovery due to the attorney-client privilege or the work product doctrine. Such a process defeats the very purpose of the attorney-client and joint defense privileges and the work product doctrine.

It is well-settled that the civil rules and Washington cases protect privileged information—even highly relevant information—from discovery. *E.g.*, CR 26(b)(1) (“Parties may obtain discovery regarding any matter, *not privileged*, which is relevant.” (emphasis added)); CR 26(b)(4) (preventing discovery of work product); CR 26(b)(5) (privilege claw back rule); *Dietz v.*

Doe, 131 Wn.2d 835, 843, 935 P.2d 611 (1997) (recognizing that “the privilege sometimes *results in the exclusion of evidence otherwise relevant and material*” (emphasis added)). Here, McKibben served discovery requests that, on their face and by definition, sought privileged communications and work product. CP 42–61; 62–79; 80–98; 193–94. Defendants clearly, specifically, and timely objected to those discovery requests, claiming they were undiscoverable under the attorney-client and joint defense privileges, and work product protection. CP 100–27; 197–207. McKibben moved to compel. CP 33–40.

When faced with a discovery motion in which there is a claim of privilege, joint defense, or work product protection, trial courts follow a simple and well known process. First, the trial court must determine whether the information sought is within the scope of the privilege or work product protections. Second, if raised by the party seeking discovery, the trial court must determine whether any exceptions or waivers require disclosure in spite of the privilege or work product protection.

The *Cedell* case is illustrative here. In *Cedell*, an insurance bad faith case, the insured (Cedell) appealed a trial court’s decision compelling the insurance company (Farmers) to produce documents it withheld as attorney-client privileged and work product. *See Cedell*, 157 Wn. App. at 275. There, the trial court concluded that its factual findings supported a good faith belief that Farmers engaged in wrongful conduct sufficient to invoke the fraud exception to the attorney-client privilege and ordered in-camera review of Farmers’ redacted documents. *Id.* at 271. After review, the trial

court concluded that Farmers was not entitled to the attorney-client privilege or work product protections. *Id.* at 271–72. The appellate court reversed, finding that the trial court abused its discretion by ordering disclosure of confidential and privileged information without a sufficient factual showing to invoke the fraud exception to the attorney-client privilege. *See id.* at 272.

Importantly, the *Cedell* court recognized and followed the appropriate privilege analysis. It first determined the existence of a privilege, and then determined whether an exception to that privilege applied. *See id.* at 275–76 (citing *Escalante v. Sentry Ins. Co.*, 49 Wn. App. 375, 393–94, 743 P.2d 832 (1987), *rev. denied*, 109 Wn.2d 1025 (1998), *overruled on other grounds by Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001); and *Barry*, 98 Wn. App. at 202–04).

In this case, the trial court failed to engage in the proper privilege analysis. Defendants and their Criminal Counsel responded to McKibben’s motion by setting forth and clearly defining the different categories of privileged communications and explained, based on case law, which categories McKibben was entitled to see and which he was not. CP 415–17. The discovery requests, by themselves, provided the facts necessary to enable the trial court to determine that the attorney-client privilege statute and the work product doctrine protected the disputed documents from discovery. CP 42–61; 62–79; 80–98; 194–95. Indeed, the requests—on their face and by definition—seek attorney-client and joint defense privileged communications and work product; thus, any documents that are responsive to these portions of the requests would necessarily fall within those

privileges and protections. On the other hand, McKibben provided no evidence for his arguments that the privileges had been waived or were otherwise inapplicable. CP 33–40; 418–23. With McKibben’s reply, CP 418–23, the trial court was poised to apply the parties’ respective arguments and evidence to the well-defined law.

But rather than undertake that analysis, the trial court abdicated its responsibility and adopted McKibben’s proposed order and ordered disclosure of *all* privileged materials (not just those McKibben is entitled to see), deferred ruling on the “application of privilege” for a later date, and stated, without explanation, that “disclosure of these communications shall not constitute a waiver of privilege.” CP 453. In doing so, it required production of vast amounts of facially privileged material *without* determining whether a privilege protects the documents from disclosure and *without* evaluating whether McKibben met his burden to require disclosure of privileged documents.⁸

McKibben has not cited, and Defendants cannot find, a case in which a court has done what the trial court did here: order counsel to disclose (even potentially) privileged material—*without his client’s consent*—but decline to rule whether it is privileged and, if so, whether an exception applies. Nor has McKibben cited a case in which disclosure of privileged communications

⁸ The trial court further erred in adopting McKibben’s argument to defer ruling on the application of privilege—an argument first raised in reply—without an opportunity for Defendants to respond. *Cf. Dickson v. U.S. Fid. & Guar. Co.*, 77 Wn.2d 785, 787–88, 466 P.2d 515 (1970).

to an opposing party who is not within the privilege does not constitute a waiver.⁹ In all the trial court and appellate briefing thus far, McKibben has failed to provide a single case suggesting that a party can maintain or safeguard a privilege after turning privileged documents over to the opposition. This failure is telling.

In sum, the trial court's Order fails to recognize well-settled law. Once the disclosure bell has been rung, it cannot be un-rung. The trial court's failure to properly conduct the appropriate analysis of the privilege statute and work product doctrine is pure legal error that mandates reversal.

C. Trial Court Abused its Discretion By Requiring Disclosure and Production of Facially Privileged Documents and Work Product McKibben Has No Right to See

As demonstrated, the trial court's decision to order massive disclosure of—even questionably—privileged communications and work product without ruling on the issue of privilege or its exceptions is deeply flawed. But even if the trial court had engaged in the appropriate privilege analysis—which it did not—the trial court's decision to require Defendants to respond to discovery requests that *on their face* demand production of an attorney's communication with his client and that attorney's work product constitutes an abuse of the trial court's discretion

⁹ Indeed, it is well-known that voluntary disclosure of privileged communications in response to discovery requests waives the privilege. *See* RCW 5.60.060(2); *Dietz*, 131 Wn.2d at 850 (recognizing that deliberate disclosure of privileged materials in response to discovery requests waives the privilege); 5A KARL B. TEGLAND, WASH. PRAC. & PROC., § 501.23; 14 KARL B. TEGLAND, WASH. PRAC. & PROC., § 13:15.

in managing discovery. In short, because any documents that are responsive to the problematic aspects of the discovery requests at issue in this appeal are, by definition, attorney-client or joint defense privileged or work product, the trial court's task was a simple one limited to determining whether McKibben presented sufficient evidence to overcome those protections. Here, McKibben failed to meet his burden; he failed to present any evidence or argument demonstrating an exception to any of these privileges or protections applied. *See supra* Section III.C; *see also infra* Section V.C.2. Thus, any order requiring discovery under such circumstances constitutes a clear abuse of the trial court's discretion.

Yet even setting aside these flaws, the Order does not serve any useful function. The Order not only requires disclosure of privileged communications and work product that are not relevant to the material issues for trial, but wholly fails to protect against harmful side effects of disclosure. It is for these reasons (and others set forth below) that the Order constitutes an abuse of discretion that mandates reversal.

1. The Trial Court's failure to engage in the appropriate privilege analysis is based on an erroneous view of the law

As demonstrated in Section V.B *supra*, the trial court's decision to order massive disclosure of—even questionably—privileged communications and work product without ruling on the issue of privilege

is an error of law, which is reviewed de novo. But to the extent the Court construes this as a discretionary issue, it is also clear the trial court abused its discretion. As discussed above, the Order reflects such a fundamental misunderstanding of the attorney-client privilege statute and work product doctrine as to necessarily be based on an “erroneous view of the law.” *Fisons*, 122 Wn.2d at 339.

The proper application of the attorney-client privilege and work product doctrine is an important issue—not just to the individual Defendants and Criminal Counsel but to our adversarial system as a whole. Given the fact that privileged documents and work product are supposed to enjoy near absolute confidentiality, the application of the privilege and work product protections is crucial to maintaining that confidentiality. The attorney-client privilege and work product doctrines are, at their cores, privileges against disclosure. Compelled disclosure cuts to the heart of the confidentiality interests that the privilege is supposed to protect. As such, the trial court’s improper application must be reversed.

2. Even if the trial court had engaged in the appropriate analysis—which it did not—compelling disclosure of the communications at issue here is an abuse of discretion

Even if the trial court had engaged in the required analysis to determine whether the documents were subject to discovery—which it did not—the trial court still abused its discretion. Ordering disclosure of documents in response to discovery requests that *on their face* demand production of an attorney’s communication with his client and that

attorney's work product constitutes an abuse of the trial court's discretion in managing discovery. It is undisputed that the trial court ordered disclosure without making *any* findings on privilege, its exceptions, or waiver. CP 464. For this reason alone, the trial court abused its discretion. *See Cedell*, 157 Wn. App. at 279 (holding the trial court abused its discretion when it ordered disclosure and production of materials without "finding a foundation in fact for a claim of civil fraud").

But given that the discovery requests, on their face, seek exactly what the attorney-client and joint defense privileges and work product doctrine seek to protect, the abuse of discretion in this case is especially obvious. Indeed, any documents responsive to the challenged portions of the discovery requests at issue are, by definition, privileged and work product. Thus, had the trial court engaged in the proper analysis, there is only one reasonable conclusion based on the evidence before the trial court: the motion to compel should have been denied. Accordingly, Defendants respectfully request that this Court reverse the Order and hold that any documents responsive to the challenged portions of the discovery requests at issue are facially privileged or protected, and thus not discoverable.

a. Work product

The civil rules protect material defined as attorney work product from discovery. CR 26(b)(4). Under CR 26(b)(4), documents prepared in anticipation of litigation are not discoverable, unless the requesting party demonstrates a substantial need for the requested documents and an inability

to obtain the information without undue hardship. *See Pappas*, 114 Wn.2d at 209 (extended discussion of the work product rule). “The goal of that privilege is ‘to protect the adversary process’ by insuring that neither party pirates the trial preparation of another party.” *See Harris v. Drake*, 116 Wn. App. 261, 269, 65 P.3d 350 (2003), *aff’d*, 152 Wn.2d 480, 99 P.3d 872 (2004) (quoting 6 JAMES WM. MOORE ET AL., MOORE’S FED. PRAC. § 26.70[6] [a] (3d Ed. 2002)); *see also In re Detention of Williams*, 106 Wn. App. 85, 22 P.3d 283 (2001), *aff’d in part, rev’d in part on other grounds*, 147 Wn.2d 476, 55 P.3d 597 (2002). Work product protections do not end upon termination of the underlying litigation; those materials remain protected in a subsequent litigation. *See Harris*, 116 Wn. App. at 281; *see also Limstrom v. Ladenburg*, 136 Wn.2d 595, 613, 963 P.2d 869 (1998) (“The work product rule continues to protect materials prepared in anticipation of litigation even after the litigation has terminated.”).

The discovery requests here specifically requested “work product” of Defendants’ Criminal Counsel. In pertinent part, the subpoenas demanded:

[A]ll records of communication in [*United States v. Colacurcio, et al*, 09-209 RAJ] between you and [others] ... regarding or relating in any way to any plea negotiations or agreements in the above criminal matter, **including, but not limited to, all related ... work product.**

CP 193–95 (emphasis added). Similarly, McKibben’s discovery requests sought “copies of all communications, documents and work product related to the Joint Defense agreement” CP 50–51; 68–69; 88–89.

Because the discovery requests specifically seek documents *defined as* work product, any relevant work product would need to be produced in response.

Accordingly, in order to overcome the work product protection that attaches to such materials, McKibben had the burden to show a compelling need for the information or an inability to obtain it by other means, both of which are required to fall within an exception to the work product doctrine. *See Dever v. Fowler*, 63 Wn. App. 35, 48, 816 P.2d 1237 (1991); *see also Pappas*, 114 Wn.2d at 209 (“To justify disclosure, a party must show the importance of the information to the preparation of his case and the difficulty the party will face in obtaining substantially equivalent information from other sources if production is denied.”). In determining whether a party has shown “substantial need” within the meaning of CR 26(b)(4), the trial court “should look at the facts and circumstances of each case in arriving at an ultimate conclusion.” *Dever*, 63 Wn. App. at 48 (quoting *Pappas*, 114 Wn.2d at 210).

Although given ample opportunity, McKibben presented no evidence or argument demonstrating his entitlement to work product. CP 33–40; 418–23. Indeed, neither his motion nor his reply even acknowledged the standard he needed to meet. *Id.* Faced with discovery requests that called specifically for “work product” and a movant who

doctrine. *Soter I*, 131 Wn. App. at 903 (citing *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004)). Codified at RCW 5.60.060(2), the privilege provides a two-way protection of all communications and advice exchanged between an attorney and his client. See RCW 5.60.060(2); *Soter I*, 131 Wn. App. at 903; see also *Dietz*, 131 Wn.2d at 842. It applies to “any information generated by a request for legal advice,” *Soter I*, 131 Wn. App. at 903, and “extends to documents that contain privileged communication,” *Soter v. Cowles Publ’g Co.*, 162 Wn.2d 716, 745, 174 P.3d 60 (2007) (*Soter II*). The attorney-client privilege encourages clients to communicate freely and openly with their attorneys without fear of compulsory discovery. *Cedell*, 157 Wn. App. at 273. A subpoena asking for attorney-client privileged information is “defective on its face” and “invalid.” See *Dike v. Dike*, 75 Wn.2d 1, 9–10, 448 P.2d 490 (1968) (finding a subpoena “defective on its face” and “invalid” because it required the attorney to testify without the client’s consent on matters arising out of the attorney-client relationship)).

By specifically requesting communications between a lawyer and a client regarding or relating to plea negotiations in what was then an ongoing criminal case, the subpoenas (and to a lesser extent RFPs 5 & 6) obviously seek attorney-client privileged communications. See CP 378 (asking for “all records of communication ... **between you and (a) your client** ... regarding or relating in any way to plea negotiations ...). Thus, any communications responsive to this request fall within the attorney-client privilege definition: it is undisputed that these communications were

made between Defendants and their Criminal Counsel in the course of Criminal Counsels' representation of the Defendants regarding plea negotiations. Even McKibben himself concedes that some of the documents sought are privileged. CP 461 (“[c]ommunications regarding Defendants individual liability are covered by the attorney-client privilege.”). In short, because any documents that are responsive to the problematic aspects of the discovery requests at issue in this appeal are, by definition, attorney-client privileged, the record before the trial court showed that the privilege applied.

Accordingly, in order to require disclosure, McKibben had the burden to demonstrate that some exception to privilege applied. *See, e.g., Cedell*, 157 Wn. App. at 276–77 (requiring the party seeking discovery to make a two-step showing that fraudulent conduct exists to overcome the privilege); *see also Barry*, 98 Wn. App. at 205–06 (same). Although given ample opportunity, McKibben presented no evidence (and not even a substantive argument) demonstrating an exception to the attorney-client privilege applied. CP 33–40; 418–23.

(2) Joint-defense privilege

The “joint defense” or “common interest” privilege protects confidential communications exchanged between a client or his or her attorney, and an attorney who represents another party engaged in a common defense as to those outside their group. *Broyles v. Thurston Cnty.*, 147 Wn. App. 409, 443, 195 P.3d 985 (2008); *see also Sanders v. State*, 169 Wn.2d

827, 853, 240 P.3d 120 (2010). The joint defense privilege is not an expansion of the attorney-client privilege, but rather an exception to waiver. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 757, 213 P.3d 596 (2009) (“The presence of a third person during the communication waives the privilege, unless the third person ... has retained the attorney on a matter of ‘common interest.’” (citations omitted)).

The discovery requests, by themselves, again show that responsive communications between Defendants and any Criminal Counsel (excluding the LLC’s own independent counsel) are joint defense privileged. Indeed, the subpoenas (and to a lesser extent, RFPs 5 & 6), *on their face*, require Criminal Counsel to give McKibben joint defense privileged communications. *See* CP 378 (demanding “all records of communication ... between you and ... (d) an attorney for any other defendant(s), [including] **all related joint defense communication**” (emphasis added)). In other words, the discovery requests directly ask for information McKibben has no right to see because (as an *unindicted* co-conspirator whose sole interest in the criminal case lies with the LLC) he does not share in the common interest the Defendants (as *indicted* co-conspirators) shared: seeking to dispose of the individual charges against them for similar behavior.

The joint defense privilege was developed for this exact purpose:

The intragroup sharing of communications, documents, and advice is protected. If there exists a community of legal interests, and the parties find there is some benefit to collectively receive legal advice and strategy, these parties will commingle information and advice and consort to draft

a legal stratagem which satisfies this goal.

See Lugosch v. Congel, 219 F.R.D. 220 (N.D.N.Y. 2003) (citing James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631 (1997)).

Accordingly, any communications among Criminal Counsel (excluding counsel for the LLC) that are responsive to the discovery requests at issue in this appeal are, by definition, joint defense privileged. Indeed, McKibben conceded in reply to his motion to compel that “[t]hese communications are likely protected by the attorney-client and joint defense privileges.” CP 420. Again, in order to require disclosure, McKibben had the burden to demonstrate that the privilege had been waived or that some other exception applied. McKibben presented no evidence or argument demonstrating an exception to the joint-defense privilege applied. CP 33–40; 418–23.

c. Waiver

To strip a document of privilege by waiver, the party seeking discovery must show the holder waived the privilege. *In re Marriage of Briscoe*, 134 Wn.2d 344, 354, 949 P.2d 1388 (1998) (“The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled[, and] the burden [of proof] is on the party claiming waiver.” (quoting *Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980))). In deciding waiver issues, Washington courts have emphasized policy considerations implicated in each individual case. *See, e.g., State v.*

Balkin, 48 Wn. App. 1, 5, 737 P.2d 1035 (1987). These cases require a balancing of societal interests against the interests served by the privilege. *Id.* Accordingly, when faced with Defendants' and Criminal Counsel's claim of attorney client and joint defense privilege, McKibben had the burden to present the trial court with sufficient evidence to prove waiver.

McKibben did not present *any* evidence that any Defendant (or his respective attorney) waived the attorney-client or joint defense privileges as to their confidential communications. As described above, the only statements he made to the trial court regarding waiver were:

The Defendants have already waived all privileges that may attach to the undisclosed communications by communicating between and among themselves and the LLC. The Defendants have not met their burden to produce evidence of a valid exception to waiver, including a joint defense agreement or an outline of matters of common interest and joint defense.

CP 38; *see also* CP 420. Notably absent from this conclusory argument is any evidence to support McKibben's claim. Nor is there any evidence that any work product protections were waived.

Without case law or evidence establishing waiver, communications between Defendants (individually) and their Criminal Counsel are not discoverable. The trial court abused its discretion in compelling Defendants and Criminal Counsel to respond to McKibben's invalid discovery requests that sought obviously privileged and work product communications and materials when McKibben failed to present any evidence of waiver.

3. The Order does not serve any useful function

Trial courts have discretion to manage the discovery process to promote “full disclosure of relevant information while protecting against harmful side effects.” *Gillett v. Connor*, 132 Wn. App. 818, 822, 133 P.3d 960 (2006). Here, the Order does neither.

First, the information at issue on appeal is not relevant to the case. As mentioned above, McKibben has claimed a need for this information based on his theory that, in the plea negotiations with the Government, the Defendants traded away the rights of the LLC in exchange for more favorable deals for themselves. CP 465. The information relevant to that theory would be the actual negotiations with the Government (which have been produced), not the Defendants’ communications with their Criminal Counsel or associated work product that was never part of the actual plea negotiations with the Government.

Second, it goes without saying that Defendants will be irreparably harmed if required to produce privileged documents McKibben has no right to see. Practically speaking, requiring a party to turn over documents to the opposition that are later determined to be privileged would be like trying to un-ring a bell. Once disclosed, any further proceedings would be tainted by disclosure of privileged communications made in confidence or documents prepared in anticipation of litigation, defeating the entire purpose of the privilege statute and work product protection.

McKibben cannot seriously argue—as he has done before—that the trial court’s order is a “protective order” that in some way protects

Defendants against waiving any privileges. CP 463–64. Indeed, there is nothing “protective” about it. The trial court’s order means that McKibben will have access to indisputably privileged and work product materials, the content of which cannot be unlearned. That information, once disclosed, cannot be taken back: it would be impossible to “un-ring the bell,” so to speak, on opposing counsel’s review of the privileged communications and work product. If this case proceeds to trial, further proceedings would be tainted by the improper disclosure of privileged communications and work product.

Because Defendants face irreparable and substantial injury if forced to comply with the Order, the Order is manifestly unreasonable and an abuse of discretion. The Court should reverse the aspect of the trial court’s order that requires disclosure of unquestionably privileged and work product documents, but “defers ruling on the application of privilege” for a later date, because it blatantly fails to protect against the “harmful side effects” of discovery. *Gillett*, 132 Wn. App. at 822. To rule otherwise would be to let stand a trial court decision that inhibits, rather than encourages, free communications between clients and their attorneys, without fear that it will be later used against them. *Dietz*, 131 Wn.2d at 842. To protect against these harmful side effects, Defendants ask this Court to reverse.

VI. CONCLUSION

For the reasons stated above, the trial court erred in requiring

Defendants and Criminal Counsel to disclose unquestionably privileged and work product communications without first determining whether the privilege applies. Defendants and Criminal Counsel respectfully request the Court reverse the trial court decision and hold that the materials at issue in this appeal are not discoverable in this matter. In the alternative, the Court should vacate the trial court's decision requiring disclosure.

DATED this 17th day of June, 2012.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on June 7, 2012, I caused to be served upon counsel of record, at the addresses stated below, via the methods of service indicated, a true and correct copy of the foregoing document:

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