2014 IL App (5th) 130273-U

NO. 5-13-0273

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

BILL DAILY and CARDIOTHORACIC SURGERY ASSOCIATES, P.C.,	)	Appeal from the Circuit Court of St. Clair County.
Plaintiffs-Appellees,	)	
v.	)	No. 09-L-405
GREENSFELDER, HEMKER & GALE, P.C.,	)	
Defendant-Appellant	)	Honorable Vincent J. Lopinot,
(SSM Healthcare St. Louis, Inc., Defendant).	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Welch and Justice Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: In a suit against a law firm by its former client regarding the firm's representation of a different client in matter on which it had previously represented both clients, attorney-client privilege and work product doctrine did not apply to documents related to that matter, even those generated after the firm no longer represented the former client, because the common representation exception applied and the firm had a continuing duty to disclose to its former client information related to matters on which it provided representation.

¶ 2 Defendant law firm Greensfelder, Hemker & Gale, P.C. (Greensfelder), represented both plaintiff medical practice Cardiothoracic Surgery Associates, P.C.

(CSA), and defendant healthcare facility operator SSM Healthcare St. Louis (SSM) in negotiating and drafting a service contract between CSA and SSM. Subsequently, a dispute arose between the two parties over that contract. Greensfelder continued to represent SSM in litigation over the dispute. After the parties settled, CSA and its president, plaintiff Dr. Bill Daily, filed the instant suit alleging breach of fiduciary duty and conspiracy. Greensfelder appeals an order of the trial court ordering it to produce various documents related to its representation of SSM, arguing that the documents are protected by the attorney-client privilege and the work product doctrine. At trial, the plaintiffs argued that both the crime/fraud exception and the common representation exception applied. On appeal, Greensfelder argues that neither exception applies. We affirm.

¶ 3 SSM is a nonprofit owner and operator of several healthcare facilities, including the four St. Louis area facilities at issue in this litigation–SSM DePaul, SSM Kirkwood, St. Mary's, and St. Joseph's. Greensfelder is a law firm that represented the plaintiffs, CSA and Dr. Daily, from the time CSA was formed in 1996 until May 2004. Greensfelder also represented SSM at all relevant times.

¶ 4 According to the allegations of the plaintiffs' second amended complaint, CSA entered into employment contracts with Dr. David Theodoro in July 1997 and Dr. Seiichi Noda in May 1998. Both employment contracts contained identical noncompete clauses, which provided that the doctors would not practice within 30 miles of CSA's office in Swansea, Illinois, for one year after the end of their employment with CSA. Greensfelder represented CSA at this time, and the contracts were drafted by Greensfelder attorneys.

¶ 5 In 2003, CSA and SSM entered into negotiations for a service agreement under which CSA would become the exclusive provider of cardiovascular surgery services at SSM's SSM DePaul facility. At the time, both CSA and SSM were clients of Greensfelder. CSA agreed to allow Greensfelder attorneys to represent both entities in negotiating and drafting the service agreement.

¶ 6 The DePaul agreement went into effect in September 2003. The contract included a nonsolicitation clause, which provided that SSM would not employ any CSA physician or other employee without the written consent of CSA until at least 18 months after the termination of the agreement. The contract was drafted by a Greensfelder attorney.

¶ 7 The complaint further alleged that the parties subsequently expanded their relationship to include three other St. Louis area facilities. In 2004, they entered into a service agreement for the SSM Kirkwood facility. The Kirkwood agreement contained a nonsolicitation clause identical to the one in the DePaul agreement. In July 2006, CSA became the exclusive provider of cardiovascular surgery at SSM's St. Mary's and St. Joseph's facilities. However, negotiations for a service agreement for those facilities were still in progress at this time. As noted previously, Greensfelder still represented SSM at this time, but no longer represented CSA. Negotiations broke down early in 2007.

¶ 8 In February 2007, Dr. Theodoro and Dr. Noda, who were the anchor surgeons at DePaul and Kirkwood, filed a lawsuit against CSA in St. Louis County along with their counterparts at St. Joseph's and St. Mary's. They sought a declaratory judgment holding that the noncompete clauses in their employment contracts were unenforceable. The

physicians retained counsel other than Greensfelder, and SSM was not initially a party to the lawsuit. In March 2007, however, SSM filed a motion to intervene in the physicians' lawsuit. SSM sought a declaratory judgment finding the noncompete clauses in the physicians' employment contracts *and* the nonsolicitation clauses in its service contracts with CSA unenforceable. Greensfelder represented SSM in seeking to intervene in the matter. As discussed earlier, the contract clauses at issue were drafted by Greensfelder attorneys at a time when it represented both CSA and SSM.

¶ 9 In May 2007, CSA filed a motion to disqualify Greensfelder as counsel based on its prior joint representation of CSA and SSM in drafting the contracts at issue. The St. Louis County court never ruled on that motion. The matter settled on May 16, 2007.

¶ 10 The plaintiffs filed the instant suit in July 2009. In it, they alleged that Greensfelder breached its fiduciary duty to the plaintiffs by (1) representing adverse parties in a substantially similar matter without first obtaining the plaintiffs' consent, (2) using information obtained during Greensfelder's representation of the plaintiffs to the plaintiffs' disadvantage, (3) coordinating strategy with the attorneys representing the physicians even before formally filing a petition to intervene in their suit, and (4) including itself as a party released by the settlement agreement. The plaintiffs further alleged that SSM conspired with Greensfelder to interfere with the attorney-client relationship between Greensfelder and CSA and to induce Greensfelder to breach its fiduciary duty to the plaintiffs as former clients.

¶ 11 During discovery in the instant litigation, the plaintiffs sent Greensfelder requests to produce a complete copy of its "SSM file," which it defined as "all work done on

behalf of SSM" for the St. Louis County litigation. Greensfelder contended that the material requested was immune from discovery pursuant to the attorney-client privilege or work product doctrine. Thus, it produced a lengthy privilege log. The plaintiffs filed a motion to compel, seeking discovery of all of the documents in the privilege log dated after October 4, 2006, the date on which the plaintiffs alleged Greensfelder began coordinating strategy with counsel for Dr. Theodoro and Dr. Noda.

¶ 12 After a hearing into the matter, the trial court entered a written order granting the plaintiffs' motion to compel. The court found that there were questions of fact "as to common representation." The court ordered Greensfelder to produce all documents related to the DePaul contract, all documents dated on or after October 4, 2006, and all undated documents. Greensfelder filed a motion to reconsider, which the court denied. Greensfelder then requested a finding of friendly contempt, which the trial court granted. This appeal followed, pursuant to Supreme Court Rule 304(b)(5) (eff. Feb. 26, 2010).

¶ 13 Greensfelder argues on appeal that the trial court erred in ordering it to produce these materials. Greensfelder contends that neither the crime/fraud exception nor the common representation exception applies. We find that the common representation exception applies. As such, we need not consider the parties' arguments regarding the crime/fraud exception.

¶ 14 There are three components to Greensfelder's argument that the court erred in finding the common representation exception applicable. Greensfelder argues that (1) the exception is not applicable under the facts of this case because SSM and CSA did not have a common interest during the period both were represented by Greensfelder, (2) all

of the requested documents were generated subsequent to the termination of Greensfelder's representation of the plaintiffs, and (3) because the court found that there were questions of fact regarding common representation, it did not make the factual finding necessary to find the exception applicable. Alternatively, Greensfelder argues that the court should have ordered an *in camera* inspection of the documents. We find none of these arguments persuasive.

¶ 15 We first note that the parties agree that this case involves a choice-of-law issue between Missouri and Illinois law. However, they also agree that there is no conflict between the law of the two states on the relevant issues. The parties also agree that this court reviews *de novo* a trial court's determination regarding the applicability of a privilege. See *Garvy v. Seyfarth Shaw LLP*, 2012 IL App (1st) 110115, ¶ 29, 966 N.E.2d 523.

¶ 16 The attorney-client privilege exists to facilitate and promote full and honest communications between attorneys and their clients without the fear that confidential information will be disclosed to others. *People v. Radojcic*, 2013 IL 114197, ¶ 39, 998 N.E.2d 1212, 1221. Although the privilege serves an important purpose, it is important to recognize that because evidentiary privileges prevent the disclosure of relevant information and evidence, they are at odds with the general duty Illinois litigants have to disclose relevant information in discovery. *Radojcic*, 2013 IL 114197, ¶ 41, 998 N.E.2d 1212. As our supreme court has stated, "it is the privilege, not the duty to disclose, that is the exception." *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178, 190, 579 N.E.2d 322, 327 (1991) (citing *Consolidation Coal Co. v.*

Bucyrus-Erie Co., 89 Ill. 2d 103, 117-18, 432 N.E.2d 250, 256 (1982)). Thus, all privileges must be strictly construed and confined to their narrowest limits. *Waste Management, Inc.*, 144 Ill. 2d at 190, 579 N.E.2d at 327.

¶ 17 The attorney-client privilege applies only to communications that the client expressly makes confidential or reasonably believes will be kept confidential in light of the circumstances. *Waste Management, Inc.*, 144 Ill. 2d at 190, 579 N.E.2d at 327. It is this limit that gives rise to the common representation exception. An attorney owes a duty of loyalty to his or her clients. This includes a duty to keep each client informed of any matters related to the attorney's representation of that client which might have an impact on the client's interests. Ill. R. Prof. Conduct (2010) R. 1.7 cmt. 31 (eff. Jan. 1, 2010). When an attorney represents two clients in the same matter, the attorney thus has a duty to keep each client informed of matters that might otherwise be protected from disclosure by the attorney-client privilege. As such, the privilege generally does not attach to communications related to matters on which the attorney is representing both clients. Ill. R. Prof. Conduct (2010) R. 1.7 cmt. 30 (eff. Jan. 1, 2010). This is because both commonly represented clients should reasonably expect that the attorney will "owe the same duty of loyalty" to both clients. *Mueller Industries, Inc. v. Berkman*, 399 Ill. App. 3d 456, 465, 927 N.E.2d 794, 804 (2010), *abrogated on other grounds by Radojcic*, 2013 IL 114197, ¶ 62, 998 N.E.2d 1212. Under such circumstances, a client cannot reasonably expect communications related to that matter to be kept confidential from the other client. *Mueller Industries, Inc.*, 399 Ill. App. 3d at 465, 927 N.E.2d at 804.

¶ 18 Greensfelder first argues that the common representation exception is inapplicable under the circumstances of this case because the interests of CSA and SSM were not identical during the period of dual representation. As Greensfelder points out, this exception typically arises in situations where an attorney or law firm simultaneously represents parties with interests more closely aligned than those of the parties involved here at the time of representation–for example, insurance carriers and their insureds (see, *e.g.*, *Waste Management, Inc.*, 144 Ill. 2d at 193-94, 579 N.E.2d at 328) or companies and their employees (see, *e.g.*, *Mueller Industries, Inc.*, 399 Ill. App. 3d at 464, 927 N.E.2d at 803). In *Waste Management, Inc.*, the court emphasized the common interest between insureds and insurers in finding the exception applicable in that context. See *Waste Management, Inc.*, 144 Ill. 2d at 194, 579 N.E.2d at 329 (explaining that the exception applies when an attorney "acts for the mutual benefit of both the insured and the insurer," even if the attorney was not retained by the insurer, because "the commonality of interests *** creates the exception").

¶ 19 We believe that Greensfelder's reliance on this language in *Waste Management, Inc.* is misplaced. There, the insureds retained counsel and settled claims brought against them without the participation of their insurers. The insurers denied coverage. *Waste Management, Inc.*, 144 Ill. 2d at 186, 579 N.E.2d at 325. In subsequent litigation over the question of coverage, the insurers requested production of files in the underlying lawsuits. The insureds refused to produce the files, arguing that they were protected by the attorney-client privilege and work product doctrine. *Waste Management, Inc.*, 144 Ill. 2d at 187, 579 N.E.2d at 325.

¶ 20 On appeal from an order compelling discovery, the insureds argued that the common representation exception was inapplicable because the insurers did not provide a defense or participate in the underlying actions. *Waste Management, Inc.*, 144 Ill. 2d at 194, 579 N.E.2d at 328. In response to this argument, our supreme court observed that the interests of the insured and insurer in the underlying litigation were identical. As the court explained, "In a limited sense, counsel for insureds did represent both insureds and insurers in both of the underlying litigations since [the] insurers were ultimately liable for payment if the plaintiffs *** received either a favorable verdict or settlement." *Waste Management, Inc.*, 144 Ill. 2d at 194-95, 579 N.E.2d at 329. In other words, the exception applied there in spite of the fact that the insurers were never actually clients of the attorneys representing the insureds because the interests of the two parties were so intertwined. Here, by contrast, Greensfelder actually represented both the plaintiffs and SSM on the DePaul contract.

¶ 21 Significantly, the *Waste Management, Inc.* court did *not* hold that the common representation applies *only* when the interests of both commonly represented parties are identical or very nearly identical at the time of the representation, a question it was not called upon to decide. Indeed, the court explicitly acknowledged that the exception usually applies where an "attorney has provided joint *or simultaneous* representation" to the parties involved. (Emphasis added.) *Waste Management, Inc.*, 144 Ill. 2d at 194, 579 N.E.2d at 328.

¶ 22 Greensfelder contends, however, that the exception has never been held "to apply to parties on opposite sides of negotiations," as occurred in this case. We are not

persuaded. Although we are not aware of any published decisions involving the precise set of circumstances involved in the case before us, the Illinois Rules of Professional Conduct do directly address this situation. An attorney may represent parties involved in negotiations if the parties are "generally aligned in interest even though there is some difference in interest among them." Ill. R. Prof. Conduct (2010) R 1.7 cmt. 28 (eff. Jan. 1, 2010). In doing so, the attorney works "to resolve potentially adverse interests by developing the parties' mutual interests." Ill. R. Prof. Conduct (2010) R. 1.7 cmt. 28 (eff. Jan. 1, 2010). In determining whether representation is appropriate under such circumstances, the attorney needs to consider the effect common representation will have on client confidentiality. This is because, as previously discussed, privilege does not attach to communications related to matters subject to the common representation. Ill. R. Prof. Conduct (2010) R. 1.7 cmt. 30 (eff. Jan. 1, 2010). Greensfelder offers no reason these rules should not apply to the case at hand.

¶ 23 As we discussed earlier, whether the privilege applies depends upon the reasonable expectations of the client. As in *Mueller Industries, Inc.*, we do not believe that SSM could reasonably have expected its communications to Greensfelder attorneys related to the DePaul contract–a matter on which it knew Greensfelder represented the plaintiffs–would not be disclosed to the plaintiffs. SSM and its employees should have understood that Greensfelder owed the plaintiffs the same duty of loyalty it owed SSM regarding this matter. See *Mueller Industries, Inc.*, 399 Ill. App. 3d at 465, 927 N.E.2d at 804. We note that this is true regardless of whether it is clear from the record that the parties actually understood that the attorneys would not be able to keep their

communications confidential from the other client. See *Mueller Industries, Inc.*, 399 Ill. App. 3d at 465, 927 N.E.2d at 804. Thus, we need not consider Greensfelder's contention that the parties here believed their communications would be kept confidential from each other.

¶ 24 Greensfelder next contends that the common representation exception is inapplicable because the documents requested were generated three years after Greensfelder's representation of the plaintiffs ceased. However, an attorney has an ongoing duty of loyalty to a former client with respect to matters on which the attorney represented that client. See Ill. R. Prof. Conduct (2010) R. 1.7 cmt. 33 (eff. Jan. 1, 2010); R. 1.9 (eff. Jan. 1, 2010). In fact, this is one of the reasons attorneys should act with caution before representing clients whose interests are likely to become adverse in the future. See Ill. R. Prof. Conduct (2010) R. 1.7 cmt. 30 (eff. Jan. 1, 2010). Because the requested documents directly relate to the DePaul contract, a matter on which Greensfelder attorneys provided simultaneous representation to CSA and SSM, they fall within the common representation exception.

¶ 25 Greensfelder further argues that the court erred in treating the exception as applicable without expressly making factual findings to support a determination that the exception applies. In support of this argument, Greensfelder points to the following language in the court's order: "There is a question as to the exact relationship between Greensfelder and the other two entities that it represented. The boundaries of that relationship are not clear to the Court. There is a question of fact as to common representation." We note, however, that the relevant facts are not in dispute.

Greensfelder acknowledges that it represented both the plaintiffs and SSM in negotiating and drafting the DePaul contract, despite its attempt to characterize this representation as something other than common representation. We may affirm the trial court's ruling on any basis appearing in the record. *Brooks v. McLean County Unit District No. 5*, 2014 IL App (4th) 130503, ¶ 18, 8 N.E.3d 1203. Here, the court reached the correct decision even though it may have erroneously believed there were questions of fact remaining. We may therefore affirm its ruling.

¶ 26 Greensfelder argues, in the alternative, that the court should conduct an *in camera* inspection of the documents in its privilege log to determine whether they fall within the exception. We disagree. The plaintiffs requested only documents related to contracts which were drafted for them by Greensfelder attorneys. The request thus limits the material to be disclosed to documents that come within the common representation exception. There is thus no need for the court to review them to determine whether privilege applies.

¶ 27 Finally, we note that this case involves claims of both privilege and work product. The two doctrines are not interchangeable. The work product doctrine affords broader protection than the attorney-client privilege. *Waste Management, Inc.*, 144 Ill. 2d at 196, 579 N.E.2d at 329. However, even this broader protection is not absolute. See *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). Production of documents protected from disclosure under the work product doctrine may be ordered where the party seeking discovery shows that it is impossible to obtain the same information from other sources. *Waste Management, Inc.*, 144 Ill. 2d at 196, 579 N.E.2d at 330 (citing *Monier v. Chamberlain*,

35 Ill. 2d 351, 360, 221 N.E.2d 410, 416 (1966)). Here, the basis of the plaintiffs' suit is the fact that Greensfelder represented SSM in litigation involving a matter on which it previously represented the plaintiffs. Because the representation itself is at issue, it is impossible to conceive of any other source from which the plaintiffs might obtain the relevant information.

¶ 28 In addition, we note that the purposes of work product protection are to enable an attorney to prepare a case thoroughly and to prevent a less diligent opponent from "taking undue advantage of the former's efforts." *Waste Management, Inc.*, 144 Ill. 2d at 196, 579 N.E.2d at 329 (citing *Hickman*, 329 U.S. at 511). These purposes will not be thwarted by the order to compel entered in this case. For these reasons, we conclude that the court properly ordered production of the documents Greensfelder asserted were subject to the work product doctrine.

¶ 29 For the foregoing reasons, we affirm the court's order compelling discovery.

¶ 30 Affirmed.