

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OHIO CASUALTY INSURANCE CO. : CIVIL ACTION  
: :  
v. : :  
: :  
THE SOUTHLAND CORPORATION, :  
AMERICAN MOTORISTS INSURANCE :  
and DALLER, GREENBERG & :  
DIETRICH, L.L.P. : NO. 98-CV-6187

**MEMORANDUM & ORDER**

**J. M. KELLY, J.**

**FEBRUARY , 2000**

Presently before the Court are three motions to compel. Defendants Edward A. Greenberg and Daller, Greenberg & Dietrich, L.L.P. (“Greenberg”) and Defendant American Motorists Insurance Company (“AMICO”) seek to compel Plaintiff, Ohio Casualty Insurance Corporation (“Ohio Casualty”), to produce documents reflecting communications between Phillip Mattie (“Mattie”) and Ohio Casualty’s attorneys. Ohio Casualty seeks to compel documents related to Greenberg’s representation of Mattie in the underlying litigation that is the subject of this case.

**I. FACTUAL & PROCEDURAL BACKGROUND**

The Southland Corporation (“Southland”) entered into a franchise agreement with Mattie in January 1987. Southland and Mattie were sued in February 1996 by Gerald and Donna Schaffer, who alleged Mr. Schaffer was injured after he tripped over plastic newspaper bands in Mattie’s store. Southland’s insurance company, AMICO, retained the same counsel, Defendant Greenberg of the firm Daller, Greenberg & Dietrich, L.L.P., for Southland’s and Mattie’s

defense. The case eventually proceeded to trial, where the jury found the defendants liable to the Schaffers for \$2.3 million dollars. The trial court then dismissed the case against Southland. Mattie was left solely responsible for the judgment. The Schaffers settled their case against Mattie for \$1.45 million, with Southland contributing \$500,000.00 pursuant to an indemnity agreement with Mattie and Mattie's excess insurance carrier, Plaintiff Ohio Casualty, contributing the balance. Ohio Casualty has brought this action as Mattie's subrogee. The Complaint alleges that the acts of AMICO and Greenberg in handling the Schaffer litigation were designed to shift most of the ultimate liability to Mattie.

## II. DISCUSSION

Based upon the Pennsylvania Supreme Court's stated policy of requiring attorneys to answer for the injuries their representation causes, Hedlund Mfg. Co. v. Weiser, Stapler & Spivak, 539 A.2d 357, 359 (Pa. 1988), this Court previously predicted the Pennsylvania Supreme Court would extend the reasoning it stated in Hedlund to subrogation cases. Ohio Casualty Ins. Co., v. The Southland Corp., No. 98-6187, 1999 WL 236733, \*2-\*4 (E.D. Pa. Apr. 22, 1999). A subrogee stands in the shoes of the subrogor, and exercises the rights it inherited from the subrogor. Holloran v. Larrieu, 637 A.2d 317, 322 (Pa. Super. Ct. 1994).

The attorney client privilege is defined by state law. Fed. R. Evid. 501. In Pennsylvania, the privilege is codified at 42 Pa. Cons. Stat. Ann. § 5928 (West 1982).<sup>1</sup> Greenberg and AMICO

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<sup>1</sup>Section 5928 states:

In a civil matter counsel shall not be competent to testify to confidential communications made to him by his client, nor shall the client be compelled to disclose the same, unless in either case this privilege is waived upon the trial by the client.

would have the Court take a very narrow view of the attorney client privilege and accept only the statutory language as a definition. Greenberg argues against production of the Schaffer file. Greenberg contends that Ohio Casualty, as a subrogee to Mattie's rights, cannot waive Mattie's privilege and obtain Greenberg's underlying litigation file for the representation of Mattie and Southland. Conversely, on their own Motions, the Defendants contend that because Ohio Casualty's attorneys do not have an attorney client relationship with Mattie, they are entitled to any documents reflecting conversations with Mattie. The difficulty of these issues is exacerbated by the insertion of a subrogee into the typical attorney client mixture. There appears to be scant precedent on the availability of the attorney client privilege in a subrogation action and the disqualification cases cited by Defendants to not appear to address the questions presented by these motions. It is apparent, however, that were Mattie to be asserting this claim on his own behalf, he would be entitled to the privilege as to his communications with his current attorneys and also he would be entitled to production of his underlying litigation file from Greenberg.

The attorney client privilege is waived when a party puts its attorney's advice into issue in a case. Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994). By putting the attorney's advice and actions into issue, it is necessary to review the relevant advice and actions. See generally Livingstone v. North Belle Vernon Boro., 91 F.3d 515, 537 (3d Cir. 1996) (holding that civil rights plaintiff who asserted that she relied upon advice of counsel in waiving right to sue had put counsel's advice into issue, thereby waiving privilege). Pennsylvania has rejected "the concept of the attorney client relationship to be used as a shield by an attorney to protect him or her from the consequences of legal malpractice." Hedlund, 539

A.2d at 359.

The underlying theme in finding the attorney client privilege was waived, where the very issue in the case arises from the attorney client relationship, is need. As subrogee, Ohio Casualty needs Greenberg's litigation file as much as if Mattie were the plaintiff. The injury suffered by the actions alleged in this case is no less real because Mattie chose to purchase an excess insurance policy, hence Ohio Casualty is allowed to step in as the real party in interest in this case. Spreading risk through insurance and allowing subrogation actions undeniably advances the operation of the economy. To close the door to proving the malpractice of an attorney by a subrogee by asserting the attorney client privilege of the injured subrogor would effectively deny the subrogor the ability to prove, or even investigate, the attorney's malpractice. Accordingly, the attorney client privilege is waived and Greenberg is ordered to produce the litigation file to Ohio Casualty.

Greenberg also asserts that the litigation file contains attorney work product, without identifying the specific documents that should be so protected. Attorney work product is discoverable where the party seeking discovery has substantial need for the discovery and there is no other source available to obtain the discovery without undue hardship. Fed. R. Civ. P. 26(b)(3). Here, Greenberg's litigation file represents the only source of Greenberg's present sense impressions of the Schaffer litigation and are therefore an essential element of Ohio Casualty's case. Therefore, the litigation file is discoverable despite the work product doctrine.

Symmetry would suggest that communications between Mattie and Ohio Casualty's attorneys would be privileged because of the extension of the attorney client privilege through subrogation. The purpose of the attorney client privilege, however, is to encourage the free flow

of information between client and attorney. United States v. Zolin, 491 U.S. 554, 562 (1989).

Here, there is no indication of a free flow of information between Mattie and Ohio Casualty. In fact, Mattie has not signed a subrogation agreement. Because there is no purpose to be served by the attorney client privilege, it would be inappropriate to extend the privilege under the present circumstances. Of course, communications between Ohio Casualty and its attorneys remain privileged.

Greenberg and AMICO also seek to obtain work product prepared in anticipation of this litigation. They have not demonstrated either a substantial need for impressions of Mattie's statements or undue hardship in obtaining the information because Mattie is available for deposition. Defendants, therefore, are not entitled to documents identified as work product.

Both parties have rattled their respective sabers in seeking sanctions for the costs of these motions. Both parties have taken colorable positions in this unsettled area of the law. Sanctions are not appropriate in this case and will not be awarded against either party.

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ORDER

AND NOW, this day of February, 2000, upon consideration of Defendant Edward A. Greenberg and Daller, Greenberg & Dietrich, L.L.P.'s ("Greenberg") Motion to Compel Production of Documents (Document No. 44) and Plaintiff Ohio Casualty Insurance Company's ("Ohio Casualty") Response thereto; Defendant American Motorists Insurance Company's Motion to Compel to Produce Certain Documents (Document No. 45) and Ohio Casualty's Response thereto; and Plaintiff Ohio Casualty's Motion to Compel Production of Underlying Litigation File (Document No. 39); and Greenberg's response thereto, it is ORDERED:

1. Defendant Edward A. Greenberg and Daller, Greenberg & Dietrich, L.L.P.'s Motion to Compel is DENIED.
2. Defendant American Motorists Insurance Company's Motion to Compel is DENIED.
3. Plaintiff Ohio Casualty Insurance Company's Motion to Compel is GRANTED.

4. The Cross-Motions for Sanctions are DENIED.

BY THE COURT:

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JAMES McGIRR KELLY, J.