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**Canarelli v. Eighth Jud. Dist. Ct., 136 Nev., Adv. Op. 29 (May 28, 2020)**

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ATTORNEY-CLIENT PRIVILEGE: FIDUCIARY EXCEPTION, COMMON-INTEREST  
EXCEPTION, SUBSTANTIAL-NEED EXCEPTION

**Summary**

This is an appeal from the district court's order determining that certain documents, in whole and part, concerning a trust were not subject to attorney-client privilege under fiduciary and common-interest exceptions, nor were they subject to the work-product doctrine under the substantial-need exception. Plaintiffs sought a writ of prohibition to prevent the court from compelling the production of the disputed documents as well as a writ of mandamus to find the documents as undiscoverable and order their return or destruction. The Nevada Supreme Court reversed on all counts and established that no fiduciary exception that exists to attorney-client privilege in the state of Nevada; under Nevada law, only 5 exceptions exist to attorney-client privilege under NRS 49.115 and the Court declined to judicially create a sixth.<sup>2</sup>

**Background**

Scott Canarelli, a beneficiary of the Scott Lyle Graves Canarelli Irrevocable Trust, initially began this suit against Lawrence Canarelli and Heidi Canarelli (Scott's parents) who served as the family trustees as well as Frank Martin (Serving as a Special Administrator for the Estate of Edward Lubbers, an independent trustee), alleging that the trustees unlawfully withheld Trust distributions.

A letter sent by Scott's attorney in 2012 claimed that the trustees were demanding receipts from Scott's purchases in a way that was per se bad faith and threatened to sue the trustees. After the letter was received, Lubbers listed "Scott - Lawsuit threatened" on one of the business entities' meeting agendas. In 2013, Scott's parents resigned from their roles, leaving Lubbers as the successor family trustee and he quickly entered into a purchase agreement exceeding \$25 million to sell off the Trust's ownership in Lawrence and Heidi's business entities. In response, Scott filed a petition requesting the court to compel Lubber to provide all information related to the agreement as well as an inventory and accounting for the Trust. Lubbers retained two attorneys after this and communicated with them via phone and email multiple times over the course of the litigation, including a phone call on October 14, which included a discussion on "responses to petition" just two days before a response was filed. Scott also filed a supplemental petition asserting breach of fiduciary duty against all three of the original trustees.

There are two groups of disputed documents in this case. The first were inadvertently disclosed during discovery and contained Lubbers' notes on the October 14th call, one document of notes in preparation for it and the other taken contemporaneously during it. The attorneys on the call confirmed in declarations that discussion on potential responses did, in fact occur, and that

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<sup>1</sup> By Kelsey DeLozier.

<sup>2</sup> NEV. REV. STAT. §49.115 (2020).

Lubbers also discussed other related matters including possible defense strategies. The second group of documents disputed contain Lubbers' notes taken during a December 19th meeting with the other trustees, counsel, Scott, and an independent trust appraiser.

Scott moved for a determination of privilege, with the discovery commissioner finding that each of the disputed documents contained Lubbers' notes and eventually ruling that a portion of the Group 1 documents were protected by attorney-client privilege and the work product doctrine, but that other portions were discoverable. Those parts containing factual statements or information unrelated to the trust were not protected and it was said that to the extent these statements dealt with the privileged communications or work product, they were, nonetheless, still discoverable under fiduciary and common interest exceptions to attorney-client privilege as well as the substantial need exception to the work-product doctrine. The Group 2 documents were also deemed discoverable under the substantial need exception. The district court adopted most of these findings, with just a slight dispute as to the Group 1 documents (deeming a document that the commissioner felt was discoverable in its entirety to only have a portion that was discoverable). As a result, petitioners filed for a writ of prohibition to prevent the court from compelling the production of the disputed documents and a writ of mandamus to find them as undiscoverable and order their return or destruction.

## **Discussion**

### *The Group 1 Documents are Protected by Attorney-Client Privilege*

The Court first decides that attorney-client privilege is indeed applicable to the Group 1 documents, as long as the content of the notes was previously or is subsequently communicated between a client and their attorney, the notes will be communications subject to attorney-client privilege even if they are not physically delivered. It then determines that the district court abused its discretion when it found that petitioners did not prove that the notes were communicated to counsel, as supported by billing records and declarations by Lubbers' lawyers indicating that the Oct. 14th call contained discussions surrounding Scott's petitions. The Court also held that an abuse of discretion occurred in regard to finding that the factual information contained in the Group 1 documents was not subject to attorney-client privilege. While the documents contained factual information, facts communicated to obtain legal advice are still protected by the privilege; the information in the Group 1 documents was relayed in order to obtain legal advice and, therefore, fell under attorney client privilege.

While Scott argued that these documents, despite being subject to attorney-client privilege, were still discoverable under the fiduciary exception and common-interest exception, the Court rejected both of these arguments. In other states, the fiduciary exception provides that a fiduciary, such as a trustee, is unable to assert attorney-client privilege against beneficiaries on matters of trust administration. Nevada, however, does not include the exception in NRS 49.115, where it expressly lists the 5 exceptions recognized in the state to attorney-client privilege and the Court chooses to defer to the decision of the state to no include such an exception in the statute.<sup>3</sup> The

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<sup>3</sup> *Id.*

common-interest exception is, in fact, one of the 5 statutory exceptions, but the Court denies its applicability in this instance. The exception is limited by 49.115(5) when an attorney is retained or consulted in common and the communication is relevant to a matter of common interest.<sup>4</sup> In this case the attorneys were not retained or consulted in common and an attorney representing a trustee as a fiduciary does not result in an attorney-client relationship between the attorney and the beneficiary. This is further bolstered by the fact that Lubbers' communications with his attorneys were not relevant to a matter of common interest, as he was in fact adverse to Scott at the time when he communicated with them and did so for his own protection rather than a matter of common interest.

*The Group 2 documents are protected by the work-product doctrine*

The work product doctrine prevents a party from discovering documents that can be fairly said to have been prepared in anticipation of litigation by or for another party.<sup>5</sup> For protected work product to be discoverable, the party must show a substantial need for the materials in its case and that it can't without undue hardship obtain their substantial equivalent any other way; the party seeking the discovery must bear the burden and just an assertion of the need will not be enough. The Court finds that the lower court abused its discretion in finding the Group 2 documents unprotected as the Group 2 documents were prepared in anticipation of litigation, thus falling under the work-product doctrine, and because Scott was at the meeting and could also depose other attendees for anything that he may have missed, he does not have a substantial need for the Group 2 documents.

**Conclusion**

Most notably in this case, the Court declared the fiduciary exception to attorney-client privilege to not exist in the state of Nevada under current law. It also found the lower court to have abused its discretion in declaring both groups of documents to have not been protected, with the Court instead deeming them as undiscoverable. The petition for prohibition is granted, prohibiting the district court from compelling or allowing the production of the disputed documents.

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<sup>4</sup> NEV. REV. STAT. § 49.115(5) (2020).

<sup>5</sup> Nev. R. Civ. P. 26(b)(3)(A).