5-3-2018

Cotter, Jr. v. Dist. Ct., 134 Nev. Adv. Op. 32 (May 3, 2018) (en banc)

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Cotter, Jr. v. Dist. Ct., 134 Nev. Adv. Op. 32 (May 3, 2018) (en banc)[1]

WORK-PRODUCT PRIVILEGE: ADOPTING THE COMMON INTEREST RULE

Summary

The Court adopted the common interest rule as an exception to waiver of the work-product privilege. The common interest rule requires that the "transferor and transferee [must] anticipate litigation against a common adversary on the same issue or issues" and to "have strong common interests in sharing the fruit of the preparation efforts."[2]

Background

Petitioner James Cotter served as the CEO and Chairman of the Board of Directors of Reading International, Inc. (Reading) from approximately 2000 to 2014 and upon termination filed a complaint alleging breach of fiduciary duty against Margaret Cotter, Ellen Cotter, Guy Adams, Edward Kane, Douglas McEachern, William Gould, Judy Codding, and Michael Wrotniak (real parties in interest) who are all members of the Board of Directors for Reading. Like Mr. Cotter, there were some Reading shareholders (intervening plaintiffs) who filed a derivative action, now consolidated with Mr. Cotter's action, asserting breach of fiduciary duty against real parties in interest.

The district court, during discovery and after a motion from real parties in interest to compel petitioner to produce a supplemental privilege log, ordered petitioner to revise his privilege log and held off a ruling on the production of any communication between Lewis Roca Rothgerber LLP, counsel for petitioner, and Robertson & Associates, counsel for intervening plaintiffs. 350 communications were produced, and a supplemental privilege log labeled approximately 150 emails between the attorneys for petitioner and the intervening plaintiffs as work-product because they contained mental impressions of matters related to the case.

The real parties in interest argued the when the petitioner shared communication with the intervening plaintiffs it effectively waived the work-product privilege because the communication was disclosed to a third-party. Real parties in interest filed a motion to compel production of the emails and after oral arguments, which did not include an *in camera* review of the emails. The district court determined petitioner failed to show common interest between himself and the intervening plaintiffs, thus petitioner was ordered to produce the emails. This petition for writ followed.

Discussion

The court exercised their jurisdiction for writ relief because without it, it would compel disclosure of the petitioner's privileged communication and "petitioner would have no effective remedy, even by subsequent appeal." The court reviews legal questions de novo and gives deference to the district court's findings of fact.[3]

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[1] By Paloma M. Guerrero.

[2] United States v. Am. Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980).

[3] Williams v. Eighth Judicial Dist. Court, 127 Nev. 518, 525, 262 P.3d 360, 365 (2011).

Real parties in interest argued petitioners waived the work-product privilege when they shared the communications with the intervening plaintiffs. Petitioner argued work-product privilege applied and that no waiver of the privilege occurred because he shares common interest in litigation with the intervening plaintiffs. Additionally, real parties in interest argued no common interest existed between petitioner and the intervening plaintiffs.

The work-product privilege "protects an attorney's mental impressions, conclusions, or legal theories concerning the litigation, as reflected in memoranda, correspondence, interviews, briefs, or in other tangible and intangible ways."[4] It exists to safeguard the attorney's preparations for trial from being disclosed during discovery.

Similar to many jurisdictions, the Court adopted the common interest rule as an exception to waiver of the work-product privilege for disclosing communications to third parties. This allows attorneys to share their work product with each other, when they have the same interests, without waiving the work-product privilege. Application of the common interest rule requires that the "transferor and transferee [must] anticipate litigation against a common adversary on the same issue or issues" and "have strong common interests in sharing the fruit of the trial preparation efforts."[5]

Common interest "may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interest in litigation."[6] Waiver of the privilege still applies when "it has substantially increased the opportunities for potential adversaries to obtain the information."[7]

Here, the record demonstrates that petitioner and the intervening plaintiffs were all shareholders of Reading and asserted similar claims against real parties in interest. Intervening plaintiffs never filed a claim against petitioner; further, it is also unlikely they would disclose work-product material to the real parties in interest. Thus, the Court concluded petitioner and intervening plaintiffs anticipated litigation against a common adversary on similar issues—breaches of fiduciary duty— and both parties shared a "sufficiently strong common interest in litigation."

Conclusion

The Court granted petitioner's writ of prohibition and instructed the district court to refrain from compelling disclosure of the emails until it reviews the emails *in camera* to evaluate whether they contain impressions, conclusions, opinions, and legal theories of counsel, pursuant to the work-product privilege.

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[4] Wardleigh, 111 Nev. at 357, 891 P.2d at 1188; *see also* NRCP 26(b)(3).
[5] Am. Tel. & Tel. Co., 642 F.2d. at 1299.
[6] United States v. Gonzalez, 669 F.3d 974, 979 (9th Cir. 2012);
[7] Wynn Resorts, 133 Nev., Adv. Op. 52, 399 P.3d at 349 (internal quotation and citation omitted).