

IN THE STATE OF MISSOURI
JACKSON COUNTY DISTRICT COURT
AT INDEPENDENCE,
MISSOURI

SAMUEL K. LIPARI)
(Assignee of Dissolved)
Medical Supply Chain, Inc.))
Plaintiff)

**MOTION TO COMPEL PRODUCTION
OF DISCOVERY REQUESTS**

vs.)

GENERAL ELECTRIC COMPANY,)
GENERAL ELECTRIC CAPITAL)
BUSINESS ASSET FUNDING CORP.,)
GE TRANSPORTATION SYSTEMS)
GLOBAL SIGNALING, L.L.C.)
Defendants)

Case No. 0616-cv07421

SECOND MOTION TO COMPEL PRODUCTION OF DISCOVERY REQUESTS

Comes now the petitioner, Samuel K. Lipari ("plaintiff") appearing *pro se* and respectfully submits the following second motion to compel production of the plaintiff's discovery requests.

1. Plaintiff served notice of requests for production on the defendants on January 19, 2007.
2. On February 24th, 2007 the plaintiff received a late response from the defendants to his request for production of documents.
3. The response was a blanket objection to all three production requests. See Attachment 1 Defendants Response to Plaintiff's Requests for Production of Documents, Attachment 2 Defendants Response to Plaintiff's Requests for Production of Insurance Documents and Attachment 3 Defendants Response to Plaintiff's Requests for Production of Attorney Client Privilege Documents.
4. No documents were produced by the defendants.
5. No documents were identified as be protected by privilege.

SUGGESTION IN SUPPORT OF SECOND MOTION TO COMPEL

The defendants consistently object to the plaintiff's definitions and instructions which conform to the required showing with specificity Defendants must make to have documents excluded from discovery. See *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66 at pg. 70 (Mo. App. S.D., 1997) and *Tipton v. Barton*, 747 S.W.2d 325, 332 (Mo. Ct. App. 1988) which are discussed *infra*.

The court may order any party to produce documents or papers which contain evidence relevant to the subject matter involved in the pending action. Rule 56.01. The tendency is to broaden the scope of discovery when necessary to expedite justice and guard against surprise, however the evidence requested must appear relevant and material, or tend to lead to the discovery of admissible evidence. *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 327 (Mo.App.E.D. 1985). It is the affirmative duty and obligation of the trial judge to prevent subversion of pre-trial discovery into a "war of paper" for whatever reason. *Anheuser*, 692 S.W.2d at 328.

The GE defendants produced no documents as required by the federal court case management conference even though the GE defendants wrongfully removed this action to federal court. Upon remand, the GE defendants have failed to produce any documents in response to the Plaintiff's three production requests. The GE defendants in their untimely objection have resorted to an impermissible blanket assertion of privilege against producing documents or even privilege logs.

Missouri Courts Prohibit Assertion of A Blanket Privilege

Blanket assertions of privilege are disfavored:

Health Midwest Development v. Daugherty, 965 S.W.2d 841 (Mo.banc 1998), the Supreme Court of Missouri equated the statutory peer review privilege to other privileges when, in analyzing section 537.035, it characterized all privileges as impediments to the truth and declared that, as such, they are to be strictly

construed. *Id.* at 843[32]. In a similar vein, the *Daugherty* court held that "the general principles that govern [other] privileges[]" are to be used in interpreting section 537.035. *Id.* at 843. *Dixon v. Darnold*, 939 S.W.2d 66, 70-71 (Mo.App. 1997) (holding rule against blanket assertion of work product privilege sufficiently analogous to be applied when hospital attempts to make blanket assertion of peer review privilege)."

State ex rel St. John's Regional Medical Center v. Dally, 2002 MO 1367 at ¶31 (MOCA, 2002) The Supreme Court of Missouri held in *Friedman*, 668 S.W.2d at 80, that " blanket assertions of privilege' will not suffice to invoke its protection."

The defendants have not identified any of the documents requested by the plaintiff that are privileged, nor have they described the circumstances leading to the documents being protected:

"Where the party opposing a discovery is in control of facts peculiarly within that party's knowledge, as was the case in the instant proceedings, and it is asserting a privilege or immunity from the discovery request, the burden of proof must necessarily shift from the proponent of discovery to the opponent of discovery. See 1 MO. CIVIL TRIAL PRACTICE, § 5.61 (MOBAR 2D ED.1988) ; see also discussion of blanket assertion of privilege *State ex rel. Friedman v. Provaznik*, 668 S.W.2d 76, 80 (Mo. banc 1984), *infra*.

State ex rel. Dixon v. Darnold, 939 S.W.2d 66 at pg. 70 (Mo. App. S.D., 1997). Missouri courts sometimes turn to federal courts interpreting F.R. Civ. P. Rule 26(b) to resolve privilege disputes:

"Few Missouri cases discuss this facet of the discovery process. However, the general scope of discovery set by Rule 56.01(b)(1) is similar to Rule 26(b) of the Federal Rules of Civil Procedure. Therefore, cases interpreting the federal rule are instructive in this area. See 1 MO. CIVIL TRIAL PRACTICE, § 5.3 (MOBAR 2D ED.1988); see also Rule 34 of the Federal Rules of Civil Procedure, relating to production of documents."

Dixon, 939 S.W.2d 66 at pg. 70 (Mo. App. S.D., 1997). The predominant view of the federal courts is that "for a communication to be privileged, it must have been made for the purpose of securing legal advice." *In re Ford Motor Co.*, 110 F.3d 954, 965 (3rd Cir. 1997) (emphasis added); see also *In re Subpoena Duces Tecum*, 731 F.2d 1032, 1037 (2nd Cir. 1984). Thus, "[t]he privilege does not protect an

attorney's business advice." *U.S. v. Chevron Texaco Corp.*, 241 F. Supp.2d 1065, 1076 (N.D. Ca. 2001); see also *U.S. v. Philip Morris, Inc.*, 2004 U.S. Dist. LEXIS 27026 at *16-17 (D.C.D.C.); *Women's Interart Center, Inc. v. N.Y.C. Econ. Dev.*, 223 F.R.D. 156, 160 (S.D.N.Y. 2004). With respect to internal communications involving in-house counsel, a party "must make a 'clear showing' that the 'speaker' made the communications for the purpose of obtaining or providing legal advice." *Chevron Texaco Corp.*, 241 F. Supp.2d at 1076 (quoting *In re Sealed Case*, 737 F.2d 94 (D.C. Cir. 1984)). If legal and business advice are inextricably intertwined, "the legal advice must predominate over the business advice, and not be merely incidental, for the communications to be protected by the attorney client privilege." *Philip Morris, Inc.*, 2004 U.S. Dist. LEXIS 27026 at *16. The proponent of the privilege must make "a clear showing that the communication was intended for legal advice." *Id.* at *17.; see also *Chevron Texaco Corp.*, 241 F. Supp.2d at 1076.

Missouri Courts Require Specificity Showing Claimed Privilege

In resolving a dispute over the confidentiality of billing records the court in *Cypress Media, Inc. v. City of Overland Park*, 997 P.2d 681 (Kan. 2000) looked to the Missouri Appeals decision *Tipton v. Barton*, 747 S.W.2d 325 and concluded that only disclosures related to obtaining informed legal advice are protected:

"*Cypress Media* first noted that the attorney-client privilege applies only where necessary to achieve its purpose. * * * [I]t protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege. *Id.* at 689 (quoting *Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569 (1976)). Three cases, *Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127, 130 (9th Cir. 1992); *Beavers v. Hobbs*, 176 F.R.D. 562, 564-65 (S.D. Iowa 1997); and *Burton v. R.J. Reynolds Tobacco Co.*, 170 F.R.D. 481, 484 (D. Kan. 1997), were cited as examples of the view that, where the narrative descriptions in billing statements provide only general descriptions of the nature of the services performed and do not reveal the subject of confidential communications with any specificity, they are not privileged.

Cypress Media, 997 P.2d at 691. *Cypress Media* also relies on *Tipton v. Barton*, 747 S.W.2d 325, 332 (Mo. Ct. App. 1988) (concerning "billing statements [that] do not include detailed entries which advise, analyze or discuss privileged communications"), and *ERA Franchise Sys., Inc. v. N. Ins. Co. of N.Y.*, 183 F.R.D. 276, 280 (D. Kan. 1998) ("information regarding clients' fees is not protected by attorney-client privilege because payment of fees is not a confidential communication between attorney and client"), to support its holding that "all narrative statements in attorney fee statements are not per se privileged *á* *." *Cypress Media*, 997 P.2d at 693."

City Pages v. State, 2003 MN 144 at ¶¶ 43, 44 (MNCA, 2003)

Where a privilege is asserted and then challenged, the burden rests upon the party claiming the privilege to establish that the material is, in fact, not discoverable. *In re Perrier Bottled Water Litigation*, 138 F.R.D. 348, 351 (D.Conn.1991) (citing *In re Shopping Carts Antitrust Litigation*, 95 F.R.D. 299, 305 (S.D.N.Y.1982)); *Nutmeg Insurance Co. v. Atwell, Vogel & Sterling*, 120 F.R.D. 504, 510 (W.D.La.1988); 23 AM.JUR.2D Depositions and Discovery § 29 (1983). The party claiming the privilege must supply the court with sufficient information to enable the court to determine that each element of the privilege is satisfied. *Kelling v. Bridgestone/Firestone, Inc.*, 157 F.R.D. 496, 497 (D.Kan.1994); *F.T.C. v. Shaffner*, 626 F.2d 32, 37 (7th Cir.1980). A failure of proof as to any element of the privilege causes the claim of privilege to fail. *Kelling*, 157 F.R.D. at 497; *Bulk Lift Intern., Inc. v. Flexcon & Systems, Inc.*, 122 F.R.D. 482, 492 (W.D.La.1988).

The GE Defendants Have Not Shown The Elements Of Privilege

To successfully invoke the attorney-client privilege, the following elements must be established:

(1) the asserted holder of the privilege is or sought to become a client;

(2) the person to whom the communication was made (a) is [a] member of a bar of a court, or his or her subordinate and (b) in connection with this communication is acting as a lawyer;

(3) the communication relates to a fact of which the attorney was informed (a) by his or her client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort;

(4) the privilege has been (a) claimed and (b) not waived by the client.

State v. von Bulow, 475 A.2d 995, 1004 (R.I.1984) (quoting *United States v. Kelly*, 569 F.2d 928, 938 (5th cir.), cert. denied, 439 U.S. 829 (1978)). Of course, the burden of establishing the existence of the attorney-client privilege rests on the party seeking to prevent disclosure of protected information. *Id.* at 1005.

We also note that in the context of assertions of work product privilege, the Supreme Court of Missouri held in *Friedman*, 668 S.W.2d at 80, that " 'blanket assertions of privilege' will not suffice to invoke its protection." In *Faith Hosp.*, 706 S.W.2d at 856, the Supreme Court of Missouri denied prohibition relief against a trial court's order overruling a hospital's objections to the discoverability of certain incident reports prepared by the hospital. The Court stated that the record "contains only the bare allegation that these reports were prepared [in anticipation of litigation]. [The hospital has] made no attempt to describe the report or the circumstances under which they were made. Blanket assertions of the work-product privilege will not suffice to invoke its protection. " *Id.* (Emphasis added)."

State ex rel. Dixon v. Darnold, 939 S.W.2d 66 at pg. 70 (Mo. App. S.D., 1997).

Documents requested by the plaintiff were clearly not attorney client privileged: The weight of authority supports the proposition that merely carbon copying communications made between two non-attorneys to corporate in-house counsel is "clearly insufficient to establish the privilege. . . ." See *In re Avantel*, 343 F.3d at 320-21; see also *Yurik v. Liberty Mutual Ins. Co.*, 201 F.R.D. 465, 471 (D.C. Az. 2001) (holding that the defendant failed to offer any legal authority establishing that the attorney-client privilege extends to communications which are carbon copied to house counsel); *Cont'l Ill.*, 1989 U.S. Dist. LEXIS 13004. *Nat'l Bank and Trust Co. of Chicago v. Indemnity Ins. Co. of N. Am.*, 1989 U.S. Dist. LEXIS 13004 at *8 (N.D. Ill. 1989) (stating that a letter carbon copied to an attorney fell beyond the scope of the attorney-client privilege because it was not

primarily directed to an attorney, did not seek legal advice, and merely served to keep the attorney informed of the content of the letter); *Royal Surplus Lines Ins. v. Sofamor Danek Group*, 190 F.R.D. 463, 475 (W.D. Tenn. 1998) ("Simply sending a carbon copy to in-house counsel does not cloak a routine business communication with attorney-client privilege. The communication must have been for the purpose of securing legal advice."). It is also true, however, that carbon copying a document to an attorney does not automatically disqualify it from being protected by the attorney-client privilege. See *In re Avantel*, 343 F.3d at 321. Thus, the proper focus of the inquiry must be placed on the subject matter of the communication, i.e., whether the communication was made for the purpose of securing or acting upon legal advice. *Id.*; see also *Royal Surplus Lines Ins.*, 190 F.R.D. at 475; *Amway Corp. v. Proctor & Gamble Co.*, 2001 U.S. Dist. LEXIS 4561 at *22-23 (W.D. Mich. 2001).

The Defendants impermissibly exclude documents the Plaintiff is entitled to on spurious relevance objections

The plaintiff is entitled to every document relevant to every paragraph of his complaint and every anticipated defense or indemnification.

"Courts in Missouri have long recognized that the rules relating to discovery were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits and to provide a party with access to anything that is "relevant" to the proceedings and subject matter of the case not protected by privilege. *State ex rel. Kawasaki Motors Corp., U.S.A. v. Ryan*, 777 S.W.2d 247, 251 (Mo.App.1989). It is not grounds for objection that the information may be inadmissible at trial, but it is sufficient if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Rule 56.01(b)(1)."

State ex rel. Plank v. Koehr, 831 S.W.2d 926 at 927 (Mo., 1992).

"Rule 57.03(b)(4), Missouri's counterpart to Rule 30(b)(6) of the Federal Rules of Civil Procedure, states that a party

may in his notice ... name as the deponent a public or private corporation ... and describe with reasonable particularity the

matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf ... The persons so designated shall testify as to matters known or reasonably available to the organization ...

In addition to this rule, Rule 56.01(b) states that a party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in a pending action. Read together, these rules establish the allowable breadth of discovery in cases where one of the parties is a corporation.

State ex rel. Plank v. Koehr, 831 S.W.2d 926 at 928 (Mo., 1992).

LAW FIRMS ARE AGENTS OF THE DEFENDANTS

The defendants lawfirms are their agents and all documents not protected by privilege between the defendants and their employees and the identified law firms are subject to discovery. Furthermore, documents by in the possession of the defendants' agents are discoverable through the plaintiffs request for production served upon the defendants. It hardly could be claimed that any documents disclosed in prior litigation would remain "confidential" - an essential element of the attorney-client privilege. See generally von Bulow, 475 A.2d 995 (R.I. 1984).

This jurisdiction has clearly established attorneys are agents of their clients:

"The attorney-client relationship is one of agency. *Sappington v. Miller*, 821 S.W.2d 901, 904 (Mo.App.1992). As an agent of the client, an attorney acts as the client's alter ego and not for the attorney personally. *McLaughlin v. McLaughlin*, 427 S.W.2d 767, 768 (Mo.App.1968).

Macke Laundry Service Ltd. Partnership v. Jetz Service Co., Inc., 931 S.W.2d at 176 (Mo. App.W.D., 1996).

The public policy interest in adjudicating all claims that could have been brought in a single action requires the plaintiff to discover additional parties to the present action that may be precluded from a future action under res judicata. Law firms as agents of the defendants may by their conduct have made themselves necessary defendants:

That is not to say that an attorney, as an agent, can never be held liable for conspiracy with a client, the attorney's principal. Under general agency law, an agent can be liable for conspiracy with the principal if the agent acts out of a self-interest which goes beyond the agency relationship. *Metts*, 618 S.W.2d at 702. *Byers Bros. Real Estate & Ins. Agency, Inc. v. Campbell*, 329 S.W.2d 393, 397 (Mo.App.1959) (real estate agent liable as a co-conspirator under facts demonstrating that agent was acting for own personal benefit). In addition, an attorney may be liable even though the attorney is acting within the scope of the attorneyclient relationship, under the general principles of law governing attorney liability."

Macke, 931 S.W.2d at 176.

CONCLUSION

Whereas because the defendants have produced no discovery and have not identified specific records protected from discovery by privilege, the plaintiff respectfully requests that the court order the defendants to produce all requested records or specifically identify records sought to be excluded so they may be examined in camera.

Respectively submitted,

Samuel K. Lipari
Pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 27th day of February, 2007, by first class mail postage prepaid to:

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