COMMONWEALTH OF MASSACHUSETTS

Appeals Court SJC 11759

No. ~~2014-J-310~~ 14P1308

BRISTOL COUNTY

JOHN DAROSA, ET AL.,
PLAINTIFF,

v.

CITY OF NEW BEDFORD,
DEFENDANT/THIRD-PARTY PLAINTIFF/PETITIONER,

v.

MONSANTO COMPANY, ET AL.,
THIRD-PARTY DEFENDANTS/RESPONDENTS.

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT

AMICUS BRIEF FOR MASSACHUSETTS MUNICIPAL ASSOCIATION

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STATEMENT OF ISSUES

1. Whether the work product of a municipal attorney is exempt from mandatory disclosure under the public records law, either categorically or pursuant to the "deliberative process" exemption.

2. Whether the public records law violates Article 30 of the Massachusetts Declaration of Rights to the extent it mandates the disclosure of documents protected by the work product doctrine and not otherwise subject to an exemption.

3. Whether documents exchanged between a municipal attorney and a litigation expert are protected as derivative attorney-client communications.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Massachusetts Municipal Association ("MMA") is a nonprofit, nonpartisan association that provides advocacy, training, publications, research and other services to Massachusetts cities and towns. As a statewide organization, the MMA brings Massachusetts municipalities and municipal officials together to establish unified policies, to advocate such policies, and to ensure the effective delivery of municipal

services to community residents. The MMA is governed by a 35-member Board of Directors (the "Board") composed of municipal officials from across the Commonwealth - mayors, selectmen, councilors, municipal managers and finance committee members - who are elected by their peers to represent Massachusetts communities. The Board holds eight regular meetings per year, followed by a regular meeting of the Local Government Advisory Commission (comprised of Board members) with the Governor. Throughout the year, the MMA sponsors numerous conferences and workshops on a variety of subjects and issues of importance to municipalities and municipal officials and, every January, hosts the MMA Annual Meeting & Trade Show, the largest gathering of municipal officials in New England.

The MMA and its membership are interested in ensuring that the communications of city solicitors and town counsel with outside experts, consultants and third parties, particularly those communications conducted for the purpose of rendering legal advice to municipalities and municipal officials, are appropriately protected from disclosure under Massachusetts law. While the Massachusetts public

records law serves a valuable social purpose in providing greater public access to information regarding the actions of public officers and public institutions, it should not hamper or otherwise compromise the ability of municipal attorneys to provide confidential legal advice to their clients or to safeguard from disclosure attorney work product used or generated in framing such advice.

STATEMENT OF FACTS

The MMA adopts the statement of facts set forth in the brief of the City of New Bedford.

STATEMENT OF PROCEEDINGS

The MMA adopts the statement of proceedings set forth in the brief of the City of New Bedford.

ARGUMENT

I. THE WORK PRODUCT DOCTRINE PROTECTS THE CITY OF NEW BEDFORD'S DOCUMENTS FROM DISCOVERY.

A. Background

The roots of the work product doctrine can be traced to Hickman v. Taylor, 329 U.S. 495 (1947), where the Supreme Court held that written statements and mental impressions contained in the files and mind of opposing counsel are not discoverable in litigation

absent a showing of substantial need by the requesting party. Id., 329 U.S. at 509-510. Not only do such materials fall outside the arena of permissible discovery, but their production, warned the Court, "contravenes the public policy underlying the orderly prosecution and defense of legal claims." Id., 329 U.S. at 510.[1] As codified in Massachusetts, the work product doctrine advances that public policy by protecting from discovery all documents "prepared in anticipation or for trial by or for another party or by or for that other party's representative . . .," absent a showing of necessity. Mass. R. Civ. P. 26(b)(3); Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 314 (2009). "Representative" includes a party's "attorney, consultant, indemnitor, insurer or agent . . . ." Mass. R. Civ. P. 26(b)(3).

The purpose of the work product doctrine is "to promote the adversary system by safeguarding the

[1] "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." Hickman, 329 U.S. at 511.

fruits of an attorney's trial preparation from the discovery attempts of the opponent." U.S. v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980) (*citing* Hickman, 329 U.S. at 510-11). *See also* In re Grand Jury Proceedings, 604 F.2d 798, 801 (3rd Cir. 1979) (doctrine prevents disclosure of "attorney's legal theories, research, and certain factual material gathered in preparation for proper representation of the client"); U.S. v. Adlman (Adlman I), 68 F.3d 1495, 1501 (2nd Cir. 1995) (doctrine "establish[es] a zone of privacy for strategic litigation planning and . . . prevent[s] one party from piggybacking on the adversary's preparation"). Thus, the work product doctrine "enhance[s] the vitality of an adversary system of litigation by insulating counsel's work from intrusions, inferences, or borrowings by other parties . . . ." Comcast, 453 Mass. at 311-12 (citations omitted); *see also* Hickman, 329 U.S. at 511; Ward v. Peabody, 380 Mass. 805, 817 (2012).

The scope of the protection afforded under the doctrine depends on the type of work product at issue - "fact" or "ordinary" work product, or "opinion" work product. *See* Comcast, 453 Mass. at 311, 314; *see also* In re Grand Jury Subpoena, 220 F.R.D. 130, 145 (D.

Mass. 2004). Pursuant to the Massachusetts Rules of Civil Procedure, fact work product is discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Mass. R. Civ. P. 26(b)(3). Even greater protection is afforded to opinion work product. McCarthy v. Slade Assocs., Inc., 463 Mass. 181, 194 n. 28 (2012). "In ordering discovery of [work product] when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Mass. R. Civ. P. 26(b)(3). In other words, opinion work product - *i.e.*, mental impressions, conclusions, etc. - is only discoverable in extremely unusual circumstances. *See* Chambers v. Gold Medal Bakery, Inc., 464 Mass. 383, 391 n. 22 (2013) ("Opinion work product . . . is generally not open to discovery."); Hickman, 329 U.S. at 510 ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of

an attorney."); Mass. R. Civ. P. 26, Reporter's Notes (1973) ("discovery, except in extremely unusual circumstances, may not be had of an attorney's mental impressions and similar intellectual work-product.")

Finally, the work product doctrine is intended to protect both attorneys and clients. *See* In re Grand Jury Proceedings, 604 F.2d 798, 801 (3rd Cir. 1978). As the Third Circuit Court of Appeals noted, "[i]t is not realistic to hold that it is only the attorney who has an interest in his work product or that the principal purpose of the privilege to foster and protect proper preparation of a case is not also of deep concern to the client, the person paying for that work." Id. Based on such reasoning, the Third Circuit held that a client may assert the work product doctrine to the extent his or her interests may be affected by any disclosure. *See* id.

B. Judge Moses' Order Erroneously Rejects Work Product Protection for Municipalities.

The lower court held that attorneys employed by municipalities are not entitled to protection under the work product doctrine because their work qualifies as "public records" within the meaning of G.L. c. 4, § 7, unless such work fits within an enumerated

exemption to the public records law. Relying on General Electric Co. v. Department of Environmental Protection, 429 Mass. 798 (1999), Judge Moses found that no enumerated exemption applied to the work product of New Bedford's attorneys. Therefore, their work product was discoverable. Order, p. 3; Record Appendix, p. 245. Specifically, "documents received by the city solicitor, as an employee of the City [of New Bedford], would constitute public records unless fitting within an enumerated exception defined by the public records law (which exceptions do not include work product) or is protected by the attorney-client privilege." Id. In reaching this decision, Judge Moses acknowledged that independent counsel retained by the City in connection with the same litigation *would* be entitled to the protection of the work product doctrine, because she would not be a City employee. Id. "[B]ut for the public records law, [the City's expert materials] would clearly constitute attorney work product, and would be subject to a heightened standard for disclosure as codified in Mass. R. Civ. P. 26(b)(3)." Order, p. 7; Record Appendix, p. 249.

Judge Moses further ruled that the materials at issue were likewise unprotected by the attorney-client

privilege. Id. More precisely, he held that the derivative attorney-client privilege does not apply to the City's materials because the information sought by the City "was not necessary to secure and facilitate the communication between the attorney and the client." Id.

Judge Moses' Order effectively places municipalities at an unfair disadvantage from the outset of litigation. Indeed, constrained by his interpretation of the public records law, he expressly recognized that municipal counsel are forced to compete on a playing field tilted in favor of their opponents. *See* Order, p. 7; Record Appendix, p. 249. Moreover, by distinguishing between in-house municipal counsel (who are subject to the requirements of the public records law) and outside municipal counsel (who are not subject to the same law), the lower court created an artificial distinction affecting the rights of all municipal clients. *See* Order, p. 3; Record Appendix, p. 245. In contrast to a city solicitor who receives expert materials and must thereafter disclose them as public records (barring any applicable exemption), *outside* municipal counsel is still entitled to invoke the protection of the work product

doctrine. Id. Thus, the rights of a municipal client effectively turn (sometimes fortuitously) on the identity of its attorney's employer. The court's Order results in an unworkable solution, as it will require a hearing to determine the merits of every claim for work product protection raised by a public entity client, followed by a case-by-case inquiry into the independence of counsel and exactly who (be it an insurer or the public entity itself) is paying for the legal services rendered.

Judge Moses' Order should be reversed on three grounds. First, as the Supreme Judicial Court ("SJC") recently recognized in the Fremont and Suffolk Construction cases, the failure to exempt certain materials from the mandate of the public records law may, under certain circumstances, render the law unconstitutional. *See* Com. v. Fremont Inv. & Loan, 459 Mass. 209, 213-14 (2011) (refusing to accept "an interpretation of the public records law that would override the traditional authority of courts to enter protective orders" and "certain inherent powers" of the court protected under Article 30 of the Massachusetts Declaration of Rights); Suffolk Construction Co., Inc. v. Division of Capital Asset

Management, 449 Mass. 444, 457 (2007) (provisions of public records law do not preclude protection of privileged attorney-client records made or received by employee of state agency).

In Fremont, the SJC considered whether the public records law constitutes a legislative determination that the public interest in access to governmental records can override the traditional authority of courts to enter protective orders. Fremont, 459 Mass. at 213. The Court held it did not, reasoning that the authority to enter protective orders is an inherent power of the courts "essential to the function of the judicial department, to the maintenance of its authority, or to its capacity to decide cases." Id., *quoting* Querubin v. Commonwealth, 440 Mass. 108, 114 (2003). To nullify such an inherent power would "directly affect the capacity of the judicial department to function" and thereby constitute legislative encroachment into the judicial realm in violation of Article 30 of the Massachusetts Declaration of Rights. Id.[2]

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[2] Article 30 of the Massachusetts Declaration of Rights provides, in part: "In the government of this commonwealth, the legislative department shall never

- footnote continued -

The Rule governing protective orders, codified at Mass. R. Civ. P. 26(c), provides that a court may enter such orders for the purpose of protecting parties to litigation. Mass. R. Civ. P. 26(c) ("the court . . . may make any order which justice requires to protect a party or person . . .") Much like the benefits of a protective order, the litigation protection of the work product doctrine, codified at Mass. R. Civ. P. 26(b)(3), inures to the benefit of the party or person who receives it, rather than his lawyer. *See* In re Grand Jury Proceedings, 604 F.2d 798, 801 (3rd Cir. 1978). Thus, both judicial protections - protective orders and the work product doctrine - should receive equal treatment by the courts. Just as it would be an unconstitutional interference with the judiciary for the public records law to trump the ability of courts to enter protective orders (as the court held in Fremont), it would be equally unconstitutional for the public records law to trump the protection of the work product doctrine. *See* Spinelli v. Commonwealth, 393 Mass. 240, 241 (1984) ("The clear words of art. 30 prevent the Legislature

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exercise the executive and judicial powers, or either of them . . . ." Mass. Const. Part I, Art. 30.

from exercising judicial powers and any attempt to that end is a nullity."); O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 510 (1972) (inherent judicial power is "not limited to adjudication, but includes certain ancillary functions, such as rule-making and judicial administration . . . .).

If the public records law is read as a legislative determination that municipalities (unlike other litigants) do not enjoy protection under Rule 26(b)(3), then the legislature has exercised inherent judicial powers in violation of Article 30. In short, it has gone too far - the law (at least to the extent it mandates disclosure of work product) is a nullity. Consequently, the public records law should not be read so broadly. "Statutes are to be construed so as to avoid an unconstitutional result or the likelihood thereof . . . ." Adamowicz v. Town of Ipswich, 395 Mass. 757, 763-64 (1985).

Second, Judge Moses' Order should also be reversed on the grounds that he failed to recognize the heightened level of protection afforded opinion work product, as that protection was described by the SJC in Commissioner of Revenue v. Comcast Corp., 453

Mass. 293 (2009), a case decided ten years after General Electric. As reflected in his Order, Judge Moses analyzed the City's claim of work product protection solely through the prism of General Electric. *See* Order, p. 3, 7; Record Appendix, p. 245, 249. Thus, after concluding that the city solicitor's documents (albeit work product) constituted unexempt public records, he simply ruled, without further analysis, that they were not protected under Rule 26(b)(3). *See* id. Following Suffolk Construction and Comcast, however, Judge Moses clearly missed a step. As the SJC pointed out, not all work product is alike. That which falls into the "fact" category is discoverable upon satisfaction of the requisite two-part showing; but, that which falls into the "opinion" category should only be discoverable in "rare or 'extremely unusual' circumstances." Comcast, 453 Mass. at 314 (citations omitted). Thus, Judge Moses should have further determined whether the documents in dispute were "fact" work product or "opinion" work product. And, if the latter, he should have protected them under the post-General Electric guidance of Suffolk Construction and Comcast.

In Suffolk Construction (as set forth above), the SJC, on the heels of General Electric, ruled that the public records law does not preclude the protection of records under the attorney-client privilege. In reaching this decision, the Court emphasized that the attorney-client privilege is a "fundamental component of the administration of justice . . .."

> [To deny the protection of the attorney-client privilege to public records] would . . . severely inhibit the ability of government officials to obtain quality legal advice essential to the faithful discharge of their duties, place public entities at an unfair disadvantage vis-à-vis private parties with whom they transact business and for whom the attorney-client privilege is all but inviolable, and impede the public's strong interest in the fair and effective administration of justice.

Suffolk Construction, 449 Mass. at 446.

Two years later, the SJC acknowledged that the protection afforded "mental impressions, conclusions, opinions, or other legal theories" of a party's representatives, if not "absolute," is at least "heightened" under Rule 26(b)(3). Comcast, 453 Mass. at 315. And, when that representative is an attorney (as it was below), such "heightened" protection should apply to her work product, regardless of whether it is also a public record. After all, because an attorney's

advice to a municipal client is protected under the attorney-client privilege, it only follows that her thoughts, impressions and opinions - *i.e.*, the *very source* of such advice - should enjoy similar protection. Even if the public records law mandates the disclosure of fact work product, attorney opinion work product should be exempted from the public records law. *See* id.

Third, the Order below should be reversed on the grounds that Judge Moses interpreted the "deliberative process" exemption to the public records law too narrowly. G.L. c. 4, § 7, Twenty-sixth(d). Indeed, he failed to even address the exemption within his Order. Yet, the "deliberative process" exemption applies to the documents of the New Bedford city solicitor; therefore, such documents are not "public records" subject to mandatory disclosure.

The "deliberative process" exemption, also known as the "deliberative process" privilege, exempts from disclosure "inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency . . . ." G.L. c. 4, § 7, Twenty-sixth(d). In Suffolk Construction, the Court described this exemption as a "limited immunity from production"

for attorney work product in the face of the public records law. 449 Mass. at 457.[3] It is a "sub-species" of the work product privilege that prevents production of certain materials "while the deliberative process is ongoing and incomplete." Babets v. Secretary of Exec. Office of Human Services, 403 Mass. 230, 237 n. 8 (1988). The "deliberative process" exemption protects "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Suffolk Construction, 449 Mass. at 457, *quoting* In re County of Erie, 473 F.3d 413, 417 n. 3 (2nd Cir. 2007).

The materials at issue in this case fall under the "deliberative process" exemption and, therefore, the lower court erred in ordering their production. The documents reflect professional advice, recommendations and deliberations, including the

[3] The Secretary of the Commonwealth explains that "[t]he exemption is intended to avoid release of materials that could taint the deliberative process if prematurely disclosed. Its application is limited to recommendations on legal and policy matters found within an ongoing deliberative process." A Guide to the Massachusetts Public Records Law, published by the Secretary of the Commonwealth, Division of Public Records, at 14 (January 2013).

mental impressions and subjective evaluations of the City's expert, Andrew Smyth of TRC Environmental, Inc. As such, they were part of the process by which the City formulated its decisions and policies with respect to the defense of this litigation. They are accordingly protected under the "deliberative process" exemption. G.L. c. 4, § 7, Twenty-sixth(d).

II. THE ATTORNEY-CLIENT PRIVILEGE PROTECTS THE CITY OF NEW BEDFORD'S DOCUMENTS FROM DISCOVERY.

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); *see also* Suffolk Construction, 449 Mass. at 448-49 (privilege dates "at least from the age of Shakespeare"); U.S. v. Mass. Inst. of Tech., 129 F.3d 681, 684 (1st Cir. 1997) (tracing historical background of privilege to Roman times). It "shields from the view of third parties all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice." Suffolk Construction, 449 Mass. at 448 (citations omitted); *see also* Clair v. Clair, 464 Mass. 205, 215 (2013). The purpose of the attorney-client privilege is to "enable clients to make full disclosure to legal

counsel of all relevant facts, no matter how embarrassing or damaging these facts might be, so that counsel may render fully informed legal advice." Suffolk Construction, 449 Mass. at 449. It also encourages full and frank communications between attorney and client, and promotes the broad public interest in the observance of law and administration of justice. Id. (citations omitted). As the SJC explained, the attorney-client privilege secures the availability of justice to every citizen, despite being at odds with "society's need for full and complete disclosure." Id. (citations omitted). It is an "essential function" in our society, and exists so that attorneys may successfully perform their duties. Id., *citing* Hatton v. Robinson, 31 Mass. 416, 422 (1834).

The attorney-client privilege belongs to the client, and is equally available to municipalities and municipal officials alike. Suffolk Construction, 449 Mass. at 446. To hold otherwise, the SJC noted, would "severely inhibit the ability of government officials to obtain quality legal advice essential to the faithful discharge of their duties, place public entities at an unfair disadvantage vis-à-vis private

parties with whom they transact business and for whom the attorney-client privilege is all but inviolable, and impede the public's strong interest in the fair and effective administration of justice." Id.

Disclosing attorney-client communications to a third party ordinarily undermines the privilege. The derivative attorney-client privilege, however, is an exception to this rule which "shield[s] communications of a third party employed to facilitate communication between the attorney and client and thereby assist the attorney in rendering legal advice to the client." Commissioner of Revenue v. Comcast Corp., 453 Mass. 293, 306 (2009) (*citing* U.S. v. Kovel, 296 F.2d 918, 921-22 (2nd Cir. 1961)). Thus, when an attorney retains a third party to "enhance" her legal advice and/or to "clarify or facilitate" communications with her client, the derivative privilege protects such communications from discovery. *See* Chambers v. Gold Medal Bakery, Inc., 464 Mass. 383, 392 n. 23 (2013); Comcast, 453 Mass. at 308. The privilege is not restricted to communications with accountants; "statements made to or shared with necessary agents of the attorney or the client, including experts consulted for the purpose of facilitating the

rendition of such advice," are also protected.[4] Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 616 (2007). It is nonetheless limited to those situations where the third party's presence is "necessary" for effective communications between the attorney and her client, and where the advice sought is of a legal nature. Comcast, 453 Mass. at 306; Chambers, 464 Mass. at 392 n. 23

The derivative attorney-client privilege protects New Bedford's documents from discovery here. The communications and materials at issue were used by a city solicitor engaged in the general practice of litigation (with no expertise in environmental response actions) to communicate effectively with her client regarding legal advice concerning a complex environmental action. In short, the city solicitor was simply attempting to perform her duties to the City. In ordering disclosure of the disputed documents, Judge Moses interpreted the derivative privilege too narrowly. After readily acknowledging that the

[4] Judge Moses acknowledged that the rationale for application of the derivative attorney-client privilege "would logically also apply to an expert engineer, or other professional, retained or consulted by counsel." Order, p. 5; Record Appendix, p. 247.

information sought from Mr. Smyth "was intended to assist the city solicitor in advising the City as to the potential litigation,"[5] he then concluded, without analysis or explanation, that such information was, nonetheless, "not *necessary* to secure and facilitate" such communication. Order, p. 7; Record Appendix, p. 249 (emphasis added). This was a misapplication of the reasoning in Comcast. *See* Comcast, 453 Mass. at 308. To be protected, the third party need not be a strict interpreter, merely translating professional data into legal advice. Where the role of the third party is necessary "to *clarify or facilitate* communications between attorney and client," the derivative privilege should apply. Id. (emphasis added). As a retained professional expert, Mr. Smyth enhanced, clarified and facilitated the city solicitor's communications with the City regarding the technical environmental issues involved in the

[5] The withheld documents included "an extensive review of various historical matters pertaining to at least a portion of the subject site, and certain assessments and recommendations" made by Andrew Smyth, a professional engineer and senior project manager retained as an expert, to the city solicitor. Order, p. 2; Record Appendix, p. 244.

litigation; therefore, his communications with the city solicitor should be protected.

Further, the facts of this case distinctly differ from those faced by the SJC in Comcast, where the defendant corporation was seeking to withhold information from the government in a tax enforcement proceeding. *See* id. at 304. In such proceedings, a narrow construction of the privilege is "particularly appropriate." Id. (citations omitted). But that is not the situation here. To advance the public purposes of the attorney-client privilege as described in Comcast - *i.e.*, to encourage full disclosure of information between clients and attorneys, and to secure the availability of justice to all citizens - the derivative attorney-client privilege should be read more broadly than Judge Moses read it here. Municipal attorneys ought not to be discouraged from retaining the services of outside professionals to assist them in representing their clients - whether accountants, actuaries, architects, engineers, forensic psychiatrists, or surveyors - out of fear that their communications with such professionals will later be discoverable by opposing parties.

CONCLUSION

For the reasons set forth above, the trial court's Order on the Third-Party Defendants' Motion to Strike the City's Privilege and Work Product Objections below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing is in compliance with the rules of court that pertain to the filing of briefs, including, but not limited to, Mass. R. A. P. 16(a)(6), Mass. R. A. P. 16(e), Mass. R. A. P. 16(f), Mass. R. A. P. 16(h), Mass. R. A. P. 18 and Mass. R. A. P. 20.

/s/ John J. Davis

John J. Davis