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Dennis Moler, an individual and Marilynn Moler, an individual v. CW Management Corporation, a Utah Corporation, Christopher McCandless, an individual : Reply Brief

Utah Court of Appeals

Lincoln W. Hobbs; Lisa M. McGarry; Hobbs & Olson; Attorneys for Respondents.
Richard F. Ensor; Evan S. Strassberg; Young, Hoffman, Strassberg & Ensor; Attorneys for Appellants.

IN THE UTAH SUPREME COURT

DENNIS MOLER, an individual and MARILYNN MOLER, an individual, Plaintiffs and Petitioners, v. CW MANAGEMENT CORPORATION, a Utah Corporation, CHRISTOPHER McCANDLESS, an individual, Defendants and Appellees.	**APPELLEES' REPLY BRIEF** Supreme Court No. 20070048

ON INTERLOCUTORY APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY, JUDGE MEDLEY

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Plaintiffs and Petitioners,

v.

CW MANAGEMENT CORPORATION, a Utah Corporation, CHRISTOPHER McCANDLESS, an individual,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statues

Rules

RESPONSE TO "ISSUES ON APPEAL"

In addition to the issues of appeal set forth by the Appellant, Appellees respectfully suggest that another issue on appeal is:

1. Assuming that Ms. Moler-Lewis was a "representative" under Utah Rule of Evidence 504(a)(4), were some or all of the communications involving her not otherwise "confidential" pursuant to Rule 504(a)(6)?

The Appellees preserved this issue below by successfully pursuing their Motion to Compel testimony.

Lastly, in addition to the standard of review as set forth by the Appellant, Appellees point out that the parties seeking a privilege "has the burden of establishing that communication was privileged." Hoffman v. Conder, 712 P.2d 216, 218 (Zimmerman dissenting) (Utah 1985).

DETERMINATIVE RULES

Appellees agree that the Determinative Rules set forth in the Appellants' Brief are the rules that are determinative of this case.

RESPONSE TO STATEMENT OF THE CASE

The Molers' "Statement of the Case" mischaracterizes the record below and overstates the extent to which there was evidence about the age restricted nature of the community. For example, there is no evidence that the age restriction was discussed "in every conversation…between Dennis Moler and Chris McCandless;" indeed the evidence is to the contrary. Mr. Moler testified that these conversations were occasional, and his

daughter testified that she never heard Mr. McCandless talk about the legal restrictions in the community. Indeed, Ms. Moler-Lewis stated that discussions about the age restricted nature of the community were related only to the design aspects.

Furthermore, the Molers acknowledged that they were aware, before they moved to Redfeather Estates, of at least one exception to the age restriction. They acknowledged that they had granted consent to the purchase and occupancy by a family named Kosick; they contend they were unaware of the details of this exception, but the disclosure of this sale, prior to the Molers moving into the home, is undisputed. Furthermore, there is a lack of evidence to suggest that the public notice of the removal of the age restriction was withheld from the Molers. The Molers had constructive notice by virtue of the recordation of the Amended Declaration on August 21, 2002, before they closed on their purchase, that the age restriction had been removed as of that time.

Lastly and most importantly, there is no evidence in the Court below that Ms. Moler-Lewis was "empowered...to identify a law firm..." because of the Molers' alleged lack of familiarity with civil litigation. Rather her involvement in the choice of a law firm appears to have been more of convenience; she contacted her friend to discuss her parents' case. Notably, the retainer letter between the Molers and their lawyers was executed by Mr. Moler, himself. Further, when Mr. and Mrs. Moler prepared for their depositions, their daughter was not present.

RESPONSE TO APPELLANTS' SUMMARY OF ARGUMENT

The Appellants seek to have this Court accept the contention, apparently made after the fact, that Ms. Moler-Lewis was acting as a "representative" of her parents when she was involved in various communications which the Appellants seek to protect. Their argument seems to suggest that Ms. Moler-Lewis, while not licensed to practice law, was acting in the role of an attorney assisting her parents. Clearly, however, her non-licensure as an attorney at the time in question, coupled with her father's disavowal of her status as his attorney, makes her former status as an attorney irrelevant. The Court should view Ms. Moler-Lewis's involvement just as the Court would the presence of any other offspring or relative, and must analyze whether or not she can be reasonably considered to have been a representative of her parents. Despite the lack of specificity in Utah R. Evid. 504, it cannot be fathomed that the drafters of the Utah Rules of Evidence would allow anyone, regardless of their status or stature, to be designated as a "representative" after the fact.

Furthermore, even if Ms. Moler-Lewis acted as a representative in assisting her parents in selecting counsel, her involvement thereafter was not, in any sense, necessary. Rule 504(a)(6) provides that communications can be confidential only if they are "not intended to be disclosed to third persons other than to those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." There is no evidence that Ms. Moler-Lewis was necessary in order to communicate between the counsel selected by her

parents and her father, who was a 35-year veteran of the Federal Bureau of Investigation, who had participated in "ten to fifteen" depositions (R. at 1241). Even if she acted as a "representative of the client" in "obtain[ing] professional legal services," she did not "act on advice rendered..." to that relationship, and her involvement after her father's retention of Strassberg & Ensor was unnecessary.

RESPONSE TO APPELLANTS' STATEMENT OF FACTS

For purposes of this Appeal, Appellees do not object to the factual statements in the Appellants' Brief except as set forth below.

A1. While the Molers may not have been parties to a civil proceeding before the lawsuit, Dennis Moler had been deposed "ten to fifteen" times prior to his deposition in this case. (Dennis Moler Depo. at 10-11.)

B6. Appellees dispute the existence of any "fraudulent or wrongful acts."

B10. The retainer letter between the Molers and their counsel was executed by Dennis Moler. (Record at 1235-37.)

D14. Paragraph D14 of the Appellants' facts is contrary to the evidence in the record. A prerequisite to the existence of an attorney-client relationship with Strassberg & Ensor was a matter being opened and an invoice being generated. (Record at 1235.) Ms. Moler-Lewis testified in her deposition that her alleged retainer agreement was only "verbal." (Depo. of Wendy Moler-Lewis at 11-12);[1] she had never discussed the

[1] Ms. Moler-Lewis's deposition was taken on November 14, 2006, after the briefing and the ruling on the Defendants' Joint Motion to Compel Testimony and Produce

(footnote continued on next page)

compensation for legal services, and she had never received a bill. (Id. at 58.)

ADDITIONAL FACTS

1. Dennis Moler met to prepare for his deposition with his wife Marilynn and his counsel, and without his daughter present (Moler Depo. p.2, ll. 12-16).

2. At the outset of his deposition, Mr. Moler was asked about the nature of his retainer letter with his counsel, and about the documents he had reviewed at his deposition; his counsel objected to both of those questions and instructed the witness not to answer. At that time, counsel for the Plaintiffs sought the Court's intervention which was unavailable (Moler Depo. p.6, ll.. 7). (Record at 1240.)[2]

3. Mr. Moler, who was a 35 year veteran of the F.B.I., estimated that he had been deposed 10 or 15 times prior to his deposition which was taken on October 10, 2006 (Moler Depo. p.10, ll. 11-17). (Record at 1241.)

4. In his deposition, Mr. Moler was careful to point out that his daughter

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Documents. Consequently, her testimony was not considered by the Court when it heard and decided the Motion. Nonetheless, Ms. Moler-Lewis's deposition testimony was presented to the Court by the Plaintiffs' counsel in their response to the Defendants' Motion for Summary Judgment (Record at 1548-61), and it is thus properly part of the record, even though it has not, as of the preparation of this Brief, been "filed". See Conder v. A.L. Williams & Assoes., Inc., 739 P.2d 634, 641 (Ut. Ct. App. 1987)(Orme, J., concurring); See also, Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 45 (Ut. Ct. App. 1988)
Copies of the cited pages to Ms. Moler-Lewis's deposition are included in the Addendum hereto, and Appellees will seek to supplement the Record with both deposition transcripts.

[2] Where possible, for the convenience of the Court, reference is made to locations in the record where parts of Mr. Moler's deposition can be found.

Wendy "...is not a practicing attorney now. She graduated from law school, but is not a practicing attorney." (Moler Depo. p.14, ll. 15-17.) (Record at 1242.)

5. Mr. Moler testified when he signed the Real Estate Purchase Contract for the residence, his daughter Wendy was present, but not acting as his counsel (Moler Depo. p.32, ll. 23-24); he stated she was there "to help out her father. She was my daughter and we just had her there because Chris McCandless was acting as the real estate agent for Redfeather, and so I had her there just to help us in reviewing documents and give us her opinion." (Moler Depo. p.33, ll. 1-5.) (Record at 1244.)

6. Mr. Moler testified that he had had a conversation regarding Byron and Linda Kosick with Mr. McCandless in "either the last week of September or the first week of October in 2002," according to Mr. Moler's recollection of that conversation Mr. McCandless characterized the Kosicks as moving in under a "special exemption." At this time, Mr. Moler states he was advised that Mr. McCandless had "worked with Sandy City and come up and had an exemption for them [the Kosicks] to be able to come in and live in Redfeather..." Mr. Moler testified that the Kosicks bought into the community "because it was a 55 and older community. That's why they had bought in there just like we had what was advertised, promised, and sold was a 55 and older community. And they had been adamant that's what they want in Redfeather and that's why they bought there." (Moler Depo. p.52, ll. 16-25)

7. Mr. Moler was asked about discussions he'd had with his daughter since the filing of the lawsuit (Moler Depo. p.59, ll. 18)(Record at 1245). He was asked what

he had discussed with her in the lawsuit (Moler Depo. p.60) (Record at 1246) and his counsel objected. His counsel stated:

> Mr. Ensor: I'm going to object to that. It calls for attorney-client privilege. To the extent you can answer that question without in some way relating what you and I have discussed, then you may. Or in regard what we've asked you to do as part of this lawsuit. It seems to me there is not much there.
>
> Mr. Hobbs: Sounds like you're coaching your witness. He gets to tell me everything he has discussed with his daughter since the inception of the lawsuit, because he, himself, has advised me that she's not an attorney practicing law, so there is no attorney-client privilege. Any conversation in which she was present, whether or not you were there, there's no attorney/client privilege.
>
> Mr. Ensor: I disagree on two bases. No. 1, Wendy is a client of our firm in regard to this matter. And, No. 2, Wendy was acting as an agent assisting her father with the litigation, therefore any conversation would be privileged with regard to this lawsuit.
>
> Mr. Hobbs: How does she, being a nonlawyer, get to participate in the privilege?
>
> Mr. Ensor: You should go back and read the rule on privilege and look at your answer for that.
>
> Mr. Hobbs: You don't need to give me an answer like that. If you have a reason, why don't you tell me what the reason is?
>
> Mr. Ensor: A client or client's agents can come under privilege.
>
> Mr. Hobbs: That's an interesting position with respect to a motion for a protective order.
>
> Q. (By Mr. Hobbs) Tell me about all the discussions you've had with your daughter respecting this lawsuit.
>
> Mr. Ensor: I'm going to object on previous grounds and instruct the witness not to answer.

Q. (By Mr. Hobbs) Are you going to comply with your counsel's instructions not to answer?

A. Yes, sir.

Q. Do you have any knowledge of an attorney/client relationship between your daughter and the firm of Strassberg & Ensor?

A. Yes, sir.

Q. What's your knowledge of that? What do you understand that to be?

Mr. Ensor: Objection, vague. Answer if you can.

The Witness: I think that would be between Wendy and Rick and Evan.

Q. (By Mr. Hobbs) Do you know what they're representing in, with respect to?

A. I would say with respect to this case.

Q. Does she have any claim to the proceeds or the outcome of this lawsuit?

Mr. Ensor: Objection, vague, unclear, calls for a legal conclusion. You may answer.

The Witness: None.

Q. (By Mr. Hobbs) So why would she need an attorney with respect to this lawsuit, to your knowledge, if any?

Mr. Ensor: Objection, calls for a legal conclusion, no foundation, vague and unclear. You may answer.

The Witness: What was the question again?

(Question read.)

Q. (By Mr. Hobbs) Whey would she need - let me reask the

question. To your knowledge, why would she need an attorney in connection with this lawsuit?

Mr. Ensor: Same objections. You may answer if you can.

The Witness: I really can't answer that for her.

Q. (By Mr. Hobbs) Have you had any discussions with -- you can answer this question with a yes or no, if you would. Have you had any discussions with your daughter, Wendy, present, or with your counsel from Strassberg & Ensor?

Mr. Ensor: It's a yes or no question.

The Witness: Would you repeat the question?

Q. (By Mr. Hobbs) Have you had any conversations with your attorneys at Strassberg & Ensor at which your daughter, Wendy, has been present?

A. Yes.

Q. How many?

A. Now, can I clarify the question?

Mr. Ensor: Sure, at any time you can ask him to clarify a question.

The Witness: Because, I mean, Wendy I know has seen our attorneys. Are you saying just when we're having a lawyer client meeting?

Q. (By Mr. Hobbs) Yes.

Mr. Ensor: I think the question is how many times Wendy has been in the room when we've spoken with Dennis and Marilynn; is that correct?

Mr. Hobbs: That's correct.

The Witness: I don't recall Wendy coming with us to your office at all.

> Q. (By Mr. Hobbs) So you don't recall any conversations, at their office or otherwise, when you've had conversations with Mr. Strassberg or Mr. Ensor when your daughter's been present?
>
> A. Not that I would classify a lawyer/client meeting.

(Moler Depo. p.60, ll. 5 – p.64, ll. 6.) (Record at 1246.)

8. Mr. Moler stated that his daughter had had conversations with his counsel. He stated "I know she's had conversations with Rick. I mean, not Rick, I'm sorry, with Evan. Because her husband takes care of his dental work, so I know they've had conversations, you know, concerning that on numerous occasions. But as far as that we're a client, I couldn't give you a number." (Moler Depo. p. 65, ll.6-11.) (Record at 1247.)

9. Ms. Wendy Moler-Lewis testified that she did not have a written retainer agreement with Strassberg & Ensor; she testified that these lawyers were retained to "help me with depositions and responding to subpoenas and if there were any counterclaims or any lawsuits brought against me, that they would help me with that." (Moler-Lewis Depo. p. 11-12.) She had never received a bill for services, and had never discussed what she would be charged for services. Id. at 58.[3]

[3] Despite previously having been provided with a copy of Gold Standard Inc. v. American Barrick Resources Corp., 801 P.2d 909 (Utah 1990) (holding that "Retainer agreements are not generally protected by the attorney-client privilege..."), and despite having produced a copy of the Molers' retainer letter after the Plaintiff's filing of the Motion to Compel (Record at 1224), Ms. Moler-Lewis was instructed at her deposition not to disclose additional information respecting her alleged retention of Strassberg & Ensor (Wendy Moler-Lewis' Depo at 59.)

(footnote continued on next page)

ARGUMENT

POINT I

WENDY-MOLER LEWIS WAS NOT A "REPRESENTATIVE OF THE CLIENT" PURSUANT TO UTAH R. EVID. 504(a)(4).

The Molers, in reliance upon the language of Rule 504(a), seem to suggest that the category of persons who can be a "representative" under Utah R. Evid. 504(a) is without limit as to who the representative is, how necessary the assistance is, and when and how the representative must be identified as such. This position is obviously untenable, because if it were to be the state of the law, the presence of any third party in an attorney-client communication could be rationalized and excused, after the fact, based upon the third-party's status as an alleged "representative." Clearly this cannot be the case.

The advisory committee note to Rule 504 sets forth that:

> Rule 504 is based upon proposed Rule 503 of the United States Supreme Court. Rule 504 would replace and supersede Utah Code Ann. §78-24(8)(2)...
>
> The committee revised the proposed Rule of the United States Supreme Court to address the issues raised in Upjohn Co v. United States, 449 U.S. 383, 101 S.Crt 677 (1981) as to when communications involving representatives of a corporation are protected by privilege.

The advisory committee note specifically clarified that the term "representative of a client" would "preclude a general authorization..."

In this case there is no evidence that Ms. Moler-Lewis was "specifically

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The absence of a discussion regarding fees either refutes the existence of an attorney-client relationship, or is indicative of professional misconduct, as the "basis or role of the fee... shall be communicated to the client, preferably in writing or within a reasonable time after commencing the representation." Utah R. Prof. Conduct, Rule 1.5(b)

authorized" to communicate with her counsel prior to the communications taking place; indeed the record as set forth by the Appellants themselves suggests only that she assisted the Molers in selecting a counsel and thereafter she has given them occasional legal advice herself. In selecting the counsel she selected, she selected a colleague with whom she had worked while at the firm of VanCott Bagley. After the introduction was made, the retainer letter was signed by Dennis Moler.

Appellants' Brief attempts to imply that the Molers would have been unable to proceed in this litigation had Ms. Moler-Lewis not been their representative. They base this upon the Molers' lack of civil litigation experience, despite the fact that Mr. Moler himself had been with the FBI for 35 years. He had participated in ten to fifteen depositions. If Mr. Moler and his wife were not capable of being involved in civil litigation without the assistance of a daughter, then it is questionable as to what percentage of the Utah public would be capable of obtaining legal assistance. Furthermore, Ms. Moler-Lewis' particular background and legal education should not be considered, as she was not a member of the Utah State Bar at the time, and her parents specifically disavowed her status in that respect.

Looking at the various subsections defining a "representative of a client," the only one to which the Appellants point is the reference to "having authority to obtain professional legal services." In this case, as set forth above, the Molers themselves executed the retainer agreement. There is no evidence that Ms. Moler-Lewis acted on any advice given by her parents' counsel and no reasonable basis upon which she would

do so. Lastly, even assuming she was "specifically authorized to communicate with the lawyer concerning a legal matter" her presence would not have been necessary in those conversations in which her parents were present. To the extent that she was present in those conversations, she served no particular value to her parents, other perhaps than to look over the shoulders of her parents' hired lawyers; the only advantage she had in doing this, however, was her status as a lawyer, and that is not a basis to expand the attorney-client privilege.

POINT II

MS. MOLER-LEWIS IS NOT A REPRESENTATIVE OF HER PARENTS UNDER RULE 504(a)(4) AND IS THEREFORE NOT INCLUDED WITHIN THE ATTORNEY-CLIENT PRIVILEGE.

Courts have held that the attorney-client privilege should be narrowly construed and "generally does not extend to communications between a client and his or her counsel which are made in the known presence of a third party." Doe v. Poe, et al., 244 A.D. 2d 450, 451 (N.Y. App. Div. 2 Dept.). Further, "[t]he presence of an unnecessary person (*such as a friend or family member*, or by conversing where others could easily overhear) results in inapplicability of the privilege." Edward L. Kimball & Ronald N. Boyce, Utah Evidence Law 5-9 (Kimball & Boyce, 1996). (Emphasis added.)

However, courts have set limits on the assertion of agency as a way to preserve the purpose of the privilege. In the Giovan case, cited by Plaintiffs in the court below,[4] the

[4] Tellingly, the Molers have not presented a single case in their Brief which supports their proposed broad reading of Rule 504.

court states that an agent's "presence *must have been necessary* for the retention of legal advice." 1997 U.S.Dist. LEXIS 8816, *7(C.V.I. 1997). (Emphasis added.) To avoid a waiver of the privilege, an agent must be "essential to and in furtherance of the communication and absent disclosure of the communication to [the agent], the purpose of the attorney-client privilege would not have been fulfilled because the client could not or would not have obtained legal assistance." Id. It is not enough that the information was communicated through a third-party simply out of convenience. Dipalma v. Medical Mavin, Ltd., et al., 1998 U.S. Dist. LEXIS 1747, *7 (E.D.Pa. 1998).

Ms. Moler-Lewis is clearly not essential to the Plaintiff's legal representation, and she never was. Plaintiff Mr. Moler is a retired 35-year FBI veteran, and has been involved in more depositions than almost all citizens. Undoubtedly he has more than a casual familiarity with the legal process and he does not need his daughter's help to obtain legal assistance. He and his wife prepared for his deposition and attended his deposition without their daughter being present. Ms. Moler-Lewis and her parents apparently pick and choose what meetings she attends (if any),[5] which clearly establishes that her presence is not "essential to" or "necessary" in order for here parents to obtain adequate representation. That is the standard that must be met to meet the limited exception to the waiver.

Ms. Moler-Lewis' occasional involvement in some matters respecting this case is

[5] See Moler Depo p. 60, stating he could not recall having any meeting with his daughter and counsel "that I would classify a lawyer/client meeting."

clearly out of convenience or desire, and not need. She knows lawyers, has been a practicing lawyer, and is familiar with the process and pleadings. It is natural for her to help her parents. However, convenience and wanting to help does not create an agent relationship or an attorney-client privilege. Courts are and should be wary of extending the attorney-client privilege unnecessarily. Ms. Moler-Lewis is not a designated representative of the Plaintiffs and conversations in which she is present are not covered under the attorney-client privilege. And advice that Ms. Moler-Lewis gives to her parents, and information that they convey to her, likewise, is not privileged.

The nature, frequency and circumstances of Ms. Moler-Lewis's participation in communications with her parents' counsel is unknown, but could have included any or all of three scenarios: (1) she could have conferred with her parents and counsel, simultaneously; (2) She could have talked with her parents, without their counsel present, about what they had discussed with their counsel; or (3) she could have conferred with her parents' counsel about her parents' case, without her parents being present.

Only the last of these three scenarios could possibly have occurred without there having been a waiver or nonexistence of the privilege, and for those conversations to be privileged, her communication to counsel would have had to have been "reasonably necessary for the transmission of the communication".

The first category of communications – those which involved the Molers, their counsel and their daughter – would not fall within the exceptions of Rule 504, because her presence in such a conversation would not have been reasonably necessary, and she

would not be acting upon any advice given in those discussions. Thus these group conversations, if any occurred, were not privileged.

If the Molers told their daughter about their communications with their counsel, after those discussions had occurred, they would be waiving the privilege associated with the otherwise privileged communication, since such a post-conversation disclosure to their daughter would neither be "in furtherance of the rendition of professional services ... or [] reasonably necessary for the transmission of the communication."

The Appellants' Brief summarizes Ms. Moler-Lewis's involvement as having "spoken with her parents about drafts of pleadings" and having "discussed with them strategic matters pertaining to the lawsuit." (Appellants' Brief, Statement of Facts, ¶12.) These discussions would not have established her status as a "representative of the client" under Rule 504(a)(4), and would not be confidential under Rule 504(a)(6). Nothing in Rule 504 allows her to shield the advice that she, as a non-lawyer, apparently gave to her parents in these discussions, or to shield the information that they gave to her.

POINT III

PRIOR UTAH PRECEDENT RESTRICTS THE CLASS OF THIRD PARTIES WHO MAY BE PRESENT WITHOUT WAIVER OF THE PRIVILEGE.

The limitation of the "reasonable necessity" of a representative reflects the standard previously considered and adopted by the Utah Supreme Court in the case of Hoffman v. Conder, 712 P.2d 216 (Utah 1985). In that case the lower Court had held that the predecessor to current Rule 504 "applies only if the presence of a third person, who overhears a confidential communication is 'necessary for...urgent or life saving

procedures.' The proper standard is whether the third person's presence is reasonably necessary under the circumstances." 712 P.2d at 216-17, citing McCormick on Evidence, Section 91, at 217-19 (E. Cleary 3d Ed 1984). Appellants set forth no basis or present no argument as to why Ms. Moler-Lewis was "reasonably necessary for the transmission of [any] communication[s]" between her parents and her counsel other than to suggest that she was somehow allowed to "look over their shoulder." Clearly this is untenable and would place Ms. Moler-Lewis in a special status based upon her education and training; obviously if she had remained licensed, the attorney-client privilege would apply; in light of the fact that she was not licensed when the communications occurred, it does not apply.

POINT IV

NO LOGICAL BASIS DISTINGUISHES COMMUNICATIONS OCCURRING BEFORE, AS OPPOSED TO AFTER, THE RETENTION OF COUNSEL.

Point II of the Appellants' Argument seems to suggest that Ms. Moler-Lewis' status, and the confidentiality of her communications with her parents, somehow changed when her parents retained their counsel. Her father spoke freely in his deposition about discussions that occurred with her prior to the retention of Strassberg & Ensor, but they contend discussions with her after that, regardless of who is involved, are privileged.

Paragraph 11 of the Appellants' Statement of Facts set forth, "At all relevant times, dating back to at least December 2005, Ms. Moler-Lewis had the authority to obtain professional legal services, and to act on any advice rendered pursuant thereto, on behalf of her parents..." Thus in their own Statement of Facts the Appellants are

concluding that Ms. Moler-Lewis always was "a representative of the client" as defined by Rule 504(a)(4). Somehow, however, they imply that the Molers' disclosure of conversations *before* the retention of Strassberg & Ensor does not constitute a waiver of conversations that occurred *thereafter*. This makes no sense in light of the fact that the interest to be served by preservation of the privilege would have been the same before or after the retention of Strassberg & Ensor. Either Ms. Moler-Lewis's conversations with her parents are privileged, or they are not. The fact that her parents retained counsel in February 2006 would not change that.

The attorney-client privilege is obviously based upon policy considerations, and as the Appellants point out, it is to encourage candor between counsel and their client. The privilege can, however, be waived by the unnecessary presence of unnecessary third parties, and that is what happened here. It is illogical to suggest that Mr. Moler had no right to preserve the confidentiality of conversations between him and his daughter before they hired a lawyer, but that somehow his conversations with her after he hires a lawyer become privileged and confidential. This is particularly true when the Appellants' own stated Facts set forth no logical distinction as to how her status may have changed when counsel was retained.

POINT V

MS. MOLER-LEWIS WAS NOT A CLIENT WITH A COMMON INTEREST.

Appellants' Memorandum suggests, although they do not directly argue, that the commonality of interest between Ms. Moler-Lewis and her parents, and/or the fact that she may have been a client of Strassberg & Ensor, somehow establishes another basis for the privilege. While this is not directly argued, it should not distract the Court from the proper focus, which is that there is no evidence that the interests of Ms. Moler-Lewis were identical to those of her parents. She allegedly retained Strassberg & Ensor to defend herself in a potential claim for defamation, despite the fact that she had no evidence that such a claim was imminent. (*See* Depo of Wendy Moler-Lewis at 11.)[6]

CONCLUSION

Quite clearly, the conversations which occurred between the Molers and their counsel are privileged, and cannot be explored. However, equally clear is the fact that their daughter's involvement or presence in those conversations was not in any way necessary, and to the extent that she occasionally appeared in some of those meetings, she

[6] In the Court below, Plaintiffs argued that the attorney-client privilege is not waived when confidential information is shared with a third party who shares a common interest. United States v. [Redacted], 209 F.R.D. 475, 479 (D.Utah 2001). However in the next paragraph of that opinion, the court further clarifies the doctrine and states that for a community of interest to exist, the parties must have an "identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice…The key consideration is that *the nature of the interest be identical, not similar.*" Id. citing NL Indus., Inc. v. Commercial Union Ins. Co., 144 F.R.D. 225, 230-31 (D.N.J. 1992). (Emphasis added.)

was not acting as a "representative of the client." Clearly there is no privilege which exists as to the conversations in which Wendy Moler-Lewis was a party, and the trial court correctly granted the Motion to Compel. This Court can and should affirm the Appellees' Motion to Compel and should clarify that in light of the absence of privilege the Appellees have the right to depose Mr. Moler and Ms. Moler-Lewis regarding these conversations. To the extent that M. Moler and Ms. Moler-Lewis's recollections may be unclear, counsel themselves may be deposed as to those conversations.[7]

DATED this 17 day of July, 2007.

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LISA M. McGARRY

ATTORNEYS FOR DEFENDANTS/ APPELLEES CHRISTOPHER McCANDLESS AND CW MANAGEMENT CORPORATION

[7] The necessity of deposing the Appellants' counsel was not directly raised in the trial court below, on the assumption that Mr. Moler and Ms. Moler-Lewis would have, at the time of the original Motion, presumably had a good recollection of the matters that they discussed. In light of the delay occasioned by this Interlocutory Appeal, and the potential delay in the rescheduling of their depositions, however, the Court should clarify that the depositions of counsel will be allowed in the event that the information sought cannot be recalled by the witnesses.

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that on this 17 day of July, 2007, a true and correct copy of the foregoing **APPELLEES' REPLY BRIEF** was served upon the following in the manner indicated:

[✓] Mail
[ ] Fax
[ ] Fed Ex
[ ] Hand Delivery
[ ] Personally Served

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ADDENDUM

CERTIFIED COPY

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DENNIS MOLER, an individual and MARILYNN MOLER, an individual,	Civil No. 060902661
Plaintiffs,	Deposition of:
vs.	**WENDY MOLER-LEWIS**
SUNRISE CAPITAL, LLC, a Utah Limited Liability Corporation, CW MANAGEMENT CORPORATION, a Utah Corporation, CHRISTOPHER McCANDLESS, an individual, and FRANKLIN HOMES, INC., a Utah Corporation,	(Volume I)
Defendants.	

* * *

November 14, 2006
9:07 a.m.

HOBBS & OLSON, L.C.
466 East 500 South, Suite 300
Salt Lake City, Utah 84111
(801) 519-2555

* * *

Rossann J. Morgan
- Registered Professional Reporter -

Q. When did you acquire that?

A. I closed on that, I believe, end of July of this year.

Q. And your residence out at La Quinta Place, do you own that?

A. Yes.

Q. Is that in a homeowners association?

A. Not that I'm aware of. No, it's not a homeowners.

Q. And you met Mr. Strassberg at VanCott Bagley, correct --

A. Uh-hmm.

Q. -- when you worked together? It's my understanding that you have retained the firm of Strassberg & Ensor; is that correct?

A. Yes.

Q. And when did you -- when did you retain the firm?

A. It would have been January of this year.

Q. Do you have a written retainer agreement with them?

A. No, just verbal.

Q. What's the nature of your verbal agreement with them?

A. Well, obviously to help me with depositions

and responding to subpoenas and if there were any counterclaims or any lawsuits brought against me, that they would defend me with that.

Q. Have you, at any time, been threatened with a counterclaim related to this action?

A. It's my --

MR. ENSOR: I'm going to object to that and instruct the witness not to answer to the extent it reveals any attorney/client communications.

If you can answer that question otherwise, feel free.

THE WITNESS: No comment.

Q. **(BY MR. HOBBS)** Other than communications you've had with counsel, have you ever had any counterclaims threatened against you that you're aware of?

MR. ENSOR: Objection, vague.

THE WITNESS: Can you repeat that or what do you mean?

Q. **(BY MR. HOBBS)** Other than communications of threats of claims that you may have heard through counsel, have you become aware of any threats of claims related to this lawsuit against you?

A. No.

Q. So stepping back to your initial retention of

letters, yeah.

MR. HOBBS: Okay. Let's take a break.

MR. ENSOR: Off the record.

(A brief break was taken.)

Q. **(BY MR. HOBBS)** Who was the broker you were working with when you were at Stonebrook?

A. I can't remember his name.

Q. Did you have any association or dealings with Rita Luke while you were at Stonebrook?

A. No, not to my recollection.

Q. Pardon?

A. No, not to my recollection.

Q. Did you know Rita Luke prior to the Lukes' purchase in Red Feather?

A. No.

Q. Going back to the oral retainer agreement you have with Strassberg & Ensor, what's the nature of the compensation you're providing to them?

A. We didn't talk about that and I haven't received a bill yet, so...

Q. What exactly did you talk to them about with respect to the retention if you -- what did you talk to them about with respect to the retention?

MR. ENSOR: Objection. I'm going to instruct the witness not to answer. Calls for attorney/client

privilege.

MR. HOBBS: I thought we had established that the nature of the retention is not privileged?

MR. ENSOR: You're asking for her communications with us, what we discussed.

MR. HOBBS: With respect to your retention.

MR. ENSOR: And you've gone through that, I think.

MR. HOBBS: Well, I didn't go into any details. She said it was oral and she said it was for purposes of defending depositions and dealing with subpoenas, but I don't think she elaborated beyond that, and I think that it's not privilege.

MR. ENSOR: Her communications -- can you restate the question perhaps?

MR. HOBBS: I want to know about the discussion that she had with you when she retained your firm to represent her.

MR. ENSOR: I'm not going to allow you to go into discussions she had with us when she retained our firm. I mean, you've asked for details about the engagement, she's given you those.

MR. HOBBS: Well, I guess we can defer this part for a decision on the -- from the Court.

Q. **(BY MR. HOBBS)** During the conversation you