

2007

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

Utah Court of Appeals

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RESPONSE TO RESPONDENTS' ADDITIONAL ISSUE ON APPEAL

Respondents urge that, in addition to the issues identified in Petitioners' Opening Brief, there is another issue before this Court: "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)." This issue was not raised below and therefore has not been preserved for appeal. State v. C.R., 2001 UT APP. 66, ¶ 9, 21 P.3d 680, 683 (Utah App. 2001). However, in an abundance of caution Appellants have addressed that issue.

RESPONSE TO RESPONDENTS' FACTUAL STATEMENT

1. Appellants do not dispute this statement, but note that it is not found in the Record on appeal.

2. This statement of "fact" is wholly irrelevant to the issues on appeal. Moreover, Appellants dispute that it was their counsel that sought Court intervention. The Record shows that it was counsel for Respondents who sought Court intervention.

3. Appellants do not dispute this statement.

4. Appellants do not dispute that Mr. Moler testified substantially as set forth in this statement.

5. Appellants do not dispute that Mr. Moler testified substantially as set forth in this statement.

6. Appellants do not dispute that Mr. Moler testified substantially as set forth in this statement. However, this statement is not relevant to the issues on appeal, and the citation to the testimony does not include a Record citation.

7. Appellants do not dispute this statement.

8. Appellants do not dispute this statement.

9. Appellants do not dispute this statement, but note that its evidentiary support is not found in the Record on appeal.

ARGUMENT

Respondents concede that the determinative Rule at issue in this appeal is Utah Rule of Evidence 504. Respondents contend, however, that Appellants have failed to establish that Wendy Moler-Lewis was a “representative” of her parents for purposes of that Rule because: (1) there is no record evidence that Ms. Moler-Lewis was “specifically authorized to communicate with the lawyer concerning a legal matter.” (2) Ms. Moler-Lewis’ involvement in the litigation was not “necessary” to her parents’ legal representation, and (3) the Molers’ claim that Ms. Moler-Lewis is a “representative” of her parents is an “after the fact” concoction that this Court should not countenance. Finally, Respondents urge that, even if a privilege existed, it was waived when Mr. Moler testified about conversations with his daughter that *predated the existence of an attorney-client relationship*. Each of these arguments is either legally or factually inaccurate.

I. UNDISPUTED RECORD EVIDENCE DEMONSTRATES THAT MS. MOLER-LEWIS WAS A REPRESENTATIVE OF HER PARENTS.

Petitioners’ Opening Brief on Appeal argued in clear terms that Ms. Moler-Lewis was a “representative” of her parents because the undisputed facts established that she (a) had “authority to obtain professional legal services” on her parents behalf, *and* (b) was “specifically authorized to communicate with the lawyer concerning a legal matter.” See Appellants’ Opening Brief at 2. Nevertheless, Respondents argue that, “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.’” Respondents’ Brief at 12.

Appellants presented undisputed evidence to the trial court, and to this Court, establishing that Ms. Moler-Lewis had authority to, and did in fact, obtain legal services for her parents, **and** was authorized to communicate with Strassberg & Ensor concerning the Molers' lawsuit. (Moler Aff. (R. 1169) ¶¶ 5, 8; Moler-Lewis Aff. (R. 1173-1174) ¶¶ 8, 12.) That evidence was never rebutted by Defendants.

Furthermore, Appellants argued and presented evidence—again undisputed—that Ms. Moler-Lewis was involved in meetings and conversations between counsel and the Molers, that she helped review pleadings before they were filed, and that she has communicated with attorneys in connection with the lawsuit. (Id. ¶¶ 12-13.) When performing all these acts, Ms. Moler-Lewis was acting with the consent and knowledge of her parents. (Id. ¶ 12; Moler Aff. (R. 1169) ¶ 8.) Accordingly, the record below and on appeal demonstrates clearly that Ms. Moler-Lewis was a representative of her parents as defined under Rule 504.

II. THE PLAIN LANGUAGE OF RULE 504 DOES NOT REQUIRE THAT A PERSON'S PARTICIPATION IN THE PRIVILEGE BE NECESSARY BEFORE THAT PERSON MAY BE DEEMED A "REPRESENTATIVE."

Although Respondents repeatedly posit that Ms. Moler-Lewis not a "representative" of her parents because her participation was not "necessary" to her parents' representation, Respondents point to no language in Rule 504(a)(4) that establishes any such "necessity" requirement. As discussed in Appellants' Opening Brief, this Court's decision in Hoffman v. Conder, 712 P.2d 216 (Utah 1985), is inapposite. That case predated the adoption of the current Rule 504 and did not address

the situation presented here: whether a designated representative of a party is included within the scope of the attorney-client privilege.

Unable to find a “necessity” requirement in Rule 504(a)(4), or in any case decided after that Rule was adopted, Respondents apparently seek to bootstrap into the definition of a “representative” the “reasonably necessary” language in Rule of Evidence 504(a)(6). That Rule, however, does not address when a person is a “representative” of a party, but rather defines when a communication is confidential. As discussed in Appellants’ Opening Brief, Rule 504(a)(6) defines communications as confidential if they are “not intended to be disclosed to third persons *other than 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.” (Emphasis added.) Here, the evidence of record establishes that the communications between and among the Molers, their counsel, and Ms. Moler-Lewis were “in furtherance of the rendition of professional legal services to the client,” and were therefore confidential. (R. 1170, 1174). Even if, as Respondents urge, the communications were merely out of convenience rather than necessity, there is no evidence to suggest that those communications were not made to further the Molers’ legal representation.

Respondents also seem to argue that Ms. Moler-Lewis cannot be considered a representative of her parents because she did not participate in every attorney-client communication. (See Respondents’ Brief at 14.) Nothing in Rule 504 requires that a representative attend every attorney-client meeting, lest the representative lose that status.

Finally, Respondents argue that the privilege does not apply to communications between Ms. Moler-Lewis and her parents in which the advice of Appellants' counsel was discussed. However, the plain language of Rule 504(b) extends the privilege to communications "between the client and the client's representatives, lawyers, lawyer's representatives ... and among the client's representatives, lawyers, lawyer's representatives ... *in any combination.*" In other words, not surprisingly, conversations about the legal representation that occur between the client and the client's representative are privileged whether or not an attorney is present.

III. RESPONDENTS' ARGUMENT THAT THE APPOINTMENT OF MS. MOLER-LEWIS AS A REPRESENTATIVE WAS AN "AFTER THE FACT" CONCOCTION IS A RED HERRING.

Respondents contend that Appellants' appointment of their daughter as their representative was an "after the fact" designation that defies the purpose of Rule 504. This argument is a red herring. Respondents never identify the point in time that Appellants' appointment of their representative was purportedly "after." The undisputed facts of record demonstrate that Ms. Moler-Lewis was authorized by her parents to speak with counsel on their behalf from the very outset of this litigation. In fact, the very first conversation with Strassberg & Ensor about this case occurred between Mr. Strassberg and Ms. Moler-Lewis. (R. 1174). Moreover, Ms. Moler-Lewis attended and participated in the first meeting between Mr. Strassberg and Appellants (R. 1174, 1169). Accordingly, Appellants' appointment of their daughter as their representative predated whatever undefined point in time Respondents believe is the litmus test for the timely appointment of a representative.

IV. TESTIMONY ABOUT CONVERSATIONS PREDATING THE EXISTENCE OF AN ATTORNEY-CLIENT RELATIONSHIP DOES NOT WAIVE THE PRIVILEGE.

Although Respondents urge that there is “no logical basis” on which to “distinguish[] communications occurring before, as opposed to after, the retention of counsel,” the distinguishing basis is logical and obvious. It is axiomatic that no attorney-client privilege can exist unless and until an attorney-client relationship is created. Here, it is undisputed that no such relationship came into existence until the end of 2005. (R. 1173-74). Hence, when Mr. Moler testified about conversations with his daughter that occurred before the Molers retained counsel, he was not and could not possibly have been disclosing any privileged matter. Accordingly, no waiver occurred.

CONCLUSION

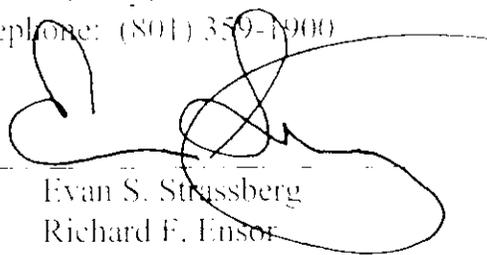
This Court has noted that the purpose of the attorney-client privilege is “to encourage candor between attorney and client and promote the best possible representation of the client.” Gold Standard, Inc., v. American Barrick Resources (USA), Inc., 801 P.2d 909, 911 (Utah 1990). The extension of the privilege to representatives of the client acknowledged that the promotion of “the best possible representation of the client” can be served by allowing someone other than the attorney and the client to participate in the legal representation. The undisputed facts in this case establish that Wendy Moler-Lewis was appointed as her parents’ representative so that she could help her parents receive “the best possible representation.” Accordingly, for the foregoing reasons, and those set forth in Appellants’ opening brief on appeal, Appellants

respectfully request that this Court REVERSE the trial court's order granting Defendants' motion to compel.

DATED this 31st day of August, 2007.

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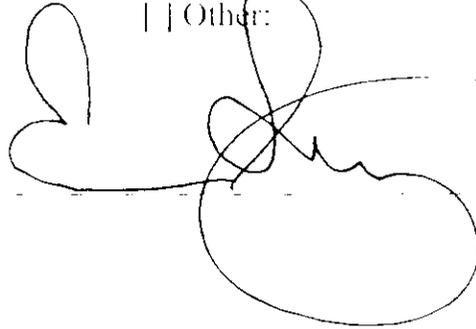
COUNSEL FOR PLAINTIFFS AND APPELLANTS

CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES that on this 31st day of August, 2007, a true and correct copy of the foregoing was served upon the person(s) named below, in the manner indicated:

Lincoln W. Hobbs, Esq.
Lisa M. McGarry, Esq.
Hobbs & Olson, L.C.
466 East 500 South, Suite 300
Salt Lake City, Utah 84111

- U.S. Mail
- Federal Express
- Hand-Delivery
- Telefacsimile
- Other:

A handwritten signature in black ink, appearing to be 'Lisa M. McGarry', written over a horizontal dashed line.