

1989

Gold Standard, Inc. v. American Barrick Resources Corporation : Brief of Appellant

Utah Supreme Court

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BRIEF

KET NO.

890393

IN THE SUPREME COURT OF THE STATE OF UTAH

GOLD STANDARD, INC.,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	BRIEF OF APPELLANT
	:	GOLD STANDARD, INC.
	:	
AMERICAN BARRICK RESOURCES	:	Case No. 890393
CORPORATION; BARRICK RESOURCES	:	
(USA), INC.; TEXACO, INC.;	:	Priority No. 10
GETTY OIL COMPANY; and GETTY	:	
MINING COMPANY,	:	
	:	
Defendants.	:	

INTERLOCUTORY APPEAL FROM AN ORDER ENTERED IN
THE THIRD JUDICIAL DISTRICT COURT OF TOOELE COUNTY,
STATE OF UTAH, BY THE HONORABLE FRANK G. NOEL

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Company	
(not parties to the appeal)	

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STATEMENT OF JURISDICTION AND PROCEEDINGS BELOW

This case is on interlocutory appeal from an Order of the Third Judicial District Court of Tooele County, State of Utah, entered by the Honorable Frank G. Noel, District Court Judge, denying plaintiff's Motion to Compel Production of Document.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The issue on appeal is whether the district court inappropriately extended a privilege, whether based on the attorney-client privilege or work-product immunity, to prevent discovery of an agreement that is admitted to be part and parcel of a commercial transaction that is at issue in the lawsuit.

PERTINENT STATUTE AND RULES

Utah Code Ann. § 78-24-8(2) (1989):

Privileged Communications:

There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:

* * *

(2) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given therein, in the course of professional employment; nor can an

attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact, the knowledge of which has been acquired in such capacity.

(Remainder of § 78-24-8 omitted.)

Rule 26(b)(3), Utah Rules of Civil Procedure:

Trial Preparation: Materials. Subject to the provisions of Subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under Subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) 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. In ordering discovery of such materials 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.

(Remainder of Rule 26(b)(3) omitted.)

NATURE OF THE CASE

This appeal presents for review the district court's error in keeping from the plaintiff, Gold Standard, Inc. ("Gold Standard"), an agreement that is part and parcel of a

commercial transaction. This case involves Gold Standard's rights and interests in the Mercur Mine, located in Tooele County, Utah. Gold Standard has sued Getty, Texaco and Barrick for tortious conduct, breach of contract, interference with property rights, and conspiracy. Gold Standard's claims against Texaco and Barrick involve, to a great extent, the transfer of the Mercur Mine from Texaco to Barrick.

COURSE OF THE PROCEEDINGS

The district court has denied Gold Standard's motion to compel American Barrick Resources Corporation ("Barrick") to produce an agreement dated June 11, 1985, (the "June 11 Agreement") and signed in counterpart by the defendants. The June 11 Agreement is, by defendants' own admission, part and parcel of the arrangement for the sale of the Mercur Mine from Texaco to Barrick. It is, therefore, directly relevant to the claim that the defendants structured the sale of the Mercur Mine in derogation of Gold Standard's rights and interests.

For two years after Gold Standard filed its original complaint, defendants represented, without qualification, that the complete agreement for the Mine's transfer was embodied in a "Stock Purchase Agreement" dated May 15, 1985. Barrick's privilege logs, amended at various points from March 4, 1988,

through February 15, 1989, never disclosed the existence of the June 11 Agreement. Barrick's response to interrogatories indicated that the Stock Purchase Agreement disclosed all consideration paid to Texaco and contained all terms of the sale. See Appendix "A," Response to Plaintiff's First Set of Interrogatories to the Barrick Defendants, at 26-27, 30, 51-52. Likewise, not a single one of the key Barrick, Getty, or Texaco executives involved in the sale of the Mercur Mine ever admitted the existence of the June 11 Agreement during their respective depositions.

It was not until the November 18, 1988, deposition of Mr. Stephen R. Dattels, one of Barrick's principal negotiators, that Gold Standard learned that the "Stock Purchase Agreement" did not in fact reflect all of the terms and conditions of the transfer, but that a separate agreement sent to counsel was also part and parcel of this transaction. After months of requests, Barrick's counsel finally identified this agreement as the June 11 Agreement.

Gold Standard immediately moved the district court for an order to compel production of this agreement. In response to Gold Standard's motion, Barrick submitted the June 11 Agreement to the district court for in camera review and argued that the terms of the June 11 Agreement, which it would not

describe at argument or in its moving papers, demonstrated an entitlement to protection under the attorney-client privilege and as attorney work-product. The defendants, however, have never disputed that the June 11 Agreement is part and parcel of the sales arrangement. The district court, in turn, held that the June 11 Agreement was "privileged." R. at 4754.

STATEMENT OF FACTS

1. Gold Standard specifically alleges in its Third Amended Complaint:

(a) That Getty, and its parent, Texaco, denied Gold Standard's rights, including its right of first refusal, by undertaking to sell the Mercur Mine without affording Gold Standard the opportunity to match the successful bid (R. at 4399);

(b) That Texaco and Barrick structured the terms of the sales agreement to transfer the Mercur Mine so as to diminish Gold Standard's interest (R. at 4395);

(c) That Barrick extracted minerals from the Mercur Mine despite notice of Gold Standard's rights and claims such that Barrick committed knowing trespass and conversion (R. at 4388); and

(d) That Barrick and Texaco conspired, in the negotiations and agreement for the transfer of the Mercur Mine, to:

i. Transfer the Mercur Mine from Getty Oil Company so as to avoid recognizing the rights of Gold Standard, including its right of first refusal (R. at 4385);

ii. To keep from Gold Standard its property interest by denying its 25% working interest and by miscalculating its purported 15% net profit interest (R. at 4385); and

iii. To prevent Gold Standard from asserting its rights and to destroy Gold Standard as a business. R. at 4385.

2. Barrick, in its negotiations with Texaco for the purchase of the Mercur Mine, sought "[c]larification of the Gold Standard claim." Appendix "B," letters dated April 2, 1985, and April 19, 1985, Exhibits 1177 and 424, respectively. In Barrick's final letter offering to purchase the Mercur Mine, however, Barrick removed any mention of a clarification of Gold Standard's claim. Appendix "C," letter dated April 19, 1985, Exhibit 425.

3. According to Barrick's chairman, Peter Munk, Texaco informed Barrick that it would rather take less money but was unwilling to accept any kind of ongoing liability for Gold Standard's claims. See Appendix "D," Deposition Testimony of Peter Munk, at 384-385.

4. Shortly before the sale of the mine, Texaco represented to the State of Utah that the value of the mine exceeded one hundred million dollars (\$100,000,000). Appendix "E," Application for Certificate of Authority. The final purchase price for the Mercur Mine, as reflected in the "Stock Purchase Agreement," was thirty-one million dollars (\$31,000,000) in cash and "a production payment in the amount of nine million dollars (\$9,000,000)." The indemnification provision of the "Stock Purchase Agreement," moreover, does not cover Gold Standard's claims. Appendix "F," May 15, 1985, "Stock Purchase Agreement," Exhibit 426, ¶ 2.3 and Schedule F.

5. Stephen R. Dattels, one of Barrick's principal negotiators, testified that "Barrick asked for a warranty from Texaco with respect to Gold Standard and to be indemnified for any breach of that warranty." Appendix "G," November 18, 1988, Deposition of Stephen R. Dattels, at 279. In response to Gold Standard's further question whether the Stock Purchase Agreement reflected "the entire agreement between Barrick and Texaco with respect to the acquisition of the Mercur Mine," Barrick's counsel instructed the deponent not to answer because "there is an additional document that may come within the purview of that [question] that is covered by the work product privilege." R. at 4273-4274, 4281.

6. At the completion of Mr. Dattels' deposition, Barrick's counsel agreed to provide Gold Standard with foundational information with respect to the "additional document." On November 23, 1988, counsel for Gold Standard sent a letter requesting that foundational information, but received no response. See Appendix "H," Transcript of July 13, 1989, Hearing, at 7-8.

7. On April 12, 1989, nearly 5 months after promising to provide this foundational information and after Gold Standard's counsel had made several follow-up requests, Barrick's counsel finally disclosed that the "additional document" that Mr. Dattels identified as part and parcel of the entire arrangement for the transfer of the Mercur Mine, is an agreement dated June 11, 1985. R. at 4270-4271, 4281. According to Barrick's privilege log, the document is addressed to Parsons, Behle & Latimer at that time Barrick's counsel.

SUMMARY OF ARGUMENT

The district court erred when it extended the attorney-client privilege, or the work-product doctrine, to an agreement that the defendants admit is part and parcel of the business transaction transferring ownership of the Mercur Mine from Texaco to Barrick. First, the attorney-client privilege does not protect executed commercial agreements from discovery. Likewise, an executed commercial agreement does not

fall within the work-product doctrine because it is created for a nonlitigation purpose. Next, the defendants, who have the burden of proof, failed to establish privilege or work-product immunity. Finally, the district court's decision would permit all manner of agreements, whether lawful or not, to evade discovery by simply "funneling" them to counsel. Unless the district court is reversed, Gold Standard may be precluded from putting before the trier of fact the entirety of the commercial agreement at issue in this lawsuit. The order certainly precludes Gold Standard from obtaining, through discovery, a thorough understanding of the transaction and of the defendants' motivations and purposes in entering into the transaction.

ARGUMENT

This Court has, in effect, previously decided this question. In Jackson v. Kennecott Copper Corp., 495 P.2d 1254 (Utah 1972), the Court rejected a claim of privilege and protection because the information was merely "funneled" to counsel. Id. at 1257. In this case, the district court has permitted the defendants to address a commercial agreement to counsel and then claim privilege for that agreement. Jackson requires the reversal of the district court.

The June 11 Agreement is at the heart of Gold Standard's allegations that Barrick and Texaco structured the sale of the Mercur Mine so as to destroy Gold Standard's rights

and interests and to permit Barrick to acquire the mine for a lower price in return for accepting some risks as to Gold Standard's claims. The June 11 Agreement will evidence Barrick's intent and role in structuring the sale of the Mercur Mine. The agreement may also contain terms of liability, risk sharing, or indemnity--evidence Gold Standard cannot obtain from another source. Undoubtedly the June 11 Agreement lies at the heart of the questions of title, property rights, breach of fiduciary and contractual obligations, and conspiracy raised by Gold Standard.

I. An Agreement That Is Part and Parcel Of
A Commercial Transaction Cannot Fall
Within The Purview Of The Attorney-
Client Privilege.

The attorney-client privilege does not cover an executed commercial agreement. The privilege only applies to communications involving legal advice because the purpose behind the privilege is to promote those communications between counsel and client that enable the attorney to give more informed legal advice. It is to be narrowly construed and granted only in accordance with its fundamental purpose:

The attorney-client privilege is intended to be strictly confined within the narrowest possible limits consistent with the logic of its principle, and the privilege is designed

to protect only such information a client communicates to his attorney so that the attorney may properly, competently and ethically carry out his representation.

In Re Witness Before the Grand Jury, 631 F. Supp. 32, 32-33 (E.D. Wis. 1985) (citing, United States v. Weger, 709 F.2d 1151, 1154 (7th Cir. 1983)) (emphasis added). See also Jackson, 495 P.2d at 1257; Fisher v. United States, 425 U.S. 391, 403 (1976). The June 11 Agreement was not communicated to counsel in order to gain legal advice; rather, it is a business document, executed in counterpart by parties on both sides of the sale of the Mercur Mine.

Defendants could not have a legally protectable expectation of confidentiality in executing an agreement that was part of an arms-length commercial transaction. A protectable expectation of confidentiality necessarily involves a need to divulge the communication in confidence; the mere hope that the terms of a transaction will remain secret is not enough. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (quoting Trammel v. United States, 445 U.S. 40, 51 (1980) for the proposition that "the attorney-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking

representation.") The lack of a protectable expectation shatters the claim of privilege. J. Gergacz, Attorney Corporate-Client Privilege, at 3-39 (1987).

A commercial agreement, by definition, is a business document. The attorney-client privilege only protects legal advice. In order to fall within the privilege's protection, a party must establish that "the primary purpose of submitting the material to its attorney [is] for legal analysis and advice." Jackson, 495 P.2d at 1257. See also Gergacz, at 3-31 (requiring that "the legal aspects of the communication are dominant") (citations omitted). Otherwise, the communication is discoverable:

The attorney-client privilege protects confidential disclosures made by a client to an attorney to obtain legal advice Fisher v. United States, 425 U.S. 391, 403 (1976). . . . The privilege does not permit an attorney to conduct his client's business affairs in secret.

In re Grand Jury Subpoenas, 803 F.2d 493, 496 (9th Cir. 1986), corrected, 817 F.2d 64 (1987) (citations omitted) (emphasis added). See also In Re Walsh, 623 F.2d 489, 494 (2d Cir.), cert. denied, 449 U.S. 994 (1980) ("The [attorney-client] relationship itself does not create 'a cloak of protection which is draped around all occurrences and conversations which

have any bearing, direct or indirect, upon the relationship of the attorney with his client.'" (citing United States v. Goldfarb 328 F.2d 280, 281-282 (6th Cir. 1964)). An agreement to allocate risks or costs, to represent or warrant the merit of claims, or to set forth consideration for the transfer of a mine is a business document by its very nature.

Similarly, the law does not protect the "external trappings" of the attorney-client relationship, such as the existence of the relationship, the fees paid, "and the basic terms of the attorney's employment." Gergacz, at 335 (citations omitted). See also In Re Grand Jury Subpoenas, 803 F.2d at 496; In re Walsh, 623 F.2d at 494; Olive v. Isherwood, Hunter & Diehm, 656 F. Supp. 1171, 1173 (D.V.I. 1987); Real v. Continental Group, Inc., 116 F.R.D. 211, 214 (N.D. Cal. 1986); 8 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2017; Hellerstein, "A Comprehensive Survey of the Attorney-Client Privilege and Work-Product Doctrine," Current Problems in Federal Civil Practice (1988).

In Bailey v. Meister Brau, Inc., 55 F.R.D. 211 (N.D. Ill. 1972), the court rejected the claim of privilege for a retainer agreement. In Bailey, "[p]laintiff, a former chief operating officer and director of the Black Company, alleged that the defendants, Meister Brau, the Black family, and the

executors of the Black estate, conspired to breach his contractual right to purchase the company." Id. at 212. In line with this theory, plaintiff claimed that the attorney, who was also an officer of the Black Company, may have received the fees from Meister Brau as "a reward for improper cooperation in the purchase of the Black Company." Id. at 214. To this end, plaintiff sought discovery of the attorney's retainer agreement and amount of fees. The attorney objected on the grounds that the information sought was protected by the attorney-client privilege. The Bailey court held that such agreements are usually not protected and ordered discovery of the document. Id. at 214-15.

It is uncontroverted that the June 11 Agreement is part and parcel of the commercial transaction that transferred ownership of the Mercur Mine from Texaco to Barrick. It is a commercial agreement, negotiated by the parties at arms-length, and signed in counterpart. By its very nature, it does not contain the type of communication the privilege protects. For that reason, there is no case that allows a party to hide a commercial agreement that is part and parcel of a business transaction by way of the attorney-client privilege.

II. The Work-Product Doctrine Does Not Allow The Defendants To Shield A Commercial Agreement From Discovery.

The work-product doctrine is meant to protect legal analyses and theories, not an executed commercial agreement written for the purpose of transferring ownership of a gold mine.^{1/}

The work-product doctrine is a narrow exception to the otherwise "liberal scope of discovery." Trail Mountain Coal Co. v. Arco Coal Sales Co., 749 P.2d 637, 639 (Utah 1988). It allows a party to withhold "documents and tangible things . . . prepared in anticipation of litigation." Utah R. Civ. P. 26(b)(3). As in the case of the attorney-client privilege, application of the work-product doctrine is limited to those instances where its use would further its intrinsic purposes. Simon v. G.D. Searle & Co., 816 F.2d 397, 400 (8th Cir.), cert. denied, 484 U.S. 917 (1987).

The work-product doctrine only protects that material which is created as preparation for trial or for use at trial:

^{1/} The district court limited its decision to finding that the June 11 Agreement was "privileged" (R. at 4754). Both the trial court and the defendants have treated both the attorney-client privilege and the work product immunity as privileges. Gold Standard, therefore addresses the applicability of the work product doctrine to this controversy.

Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision.

Fed. R. Civ. P. 26(b)(3) advisory committee's note (citations omitted) (emphasis added). See, e.g., Mercy v. County of Suffolk, 93 F.R.D. 520, 522 (E.D.N.Y. 1982). The doctrine is intended to ensure the proper functioning of the adversary system by creating a "zone of privacy" within which a lawyer may conduct the preparation for trial free from intrusion by opposing counsel. See Hickman v. Taylor, 329 U.S. 495, 510-11 (1947); Hellerstein, at 132.

Discovery into a commercial agreement does not affect an attorney's preparation for trial. While the doctrine protects interview notes and legal memoranda, it does not protect a document signed in counterpart by six parties that is part and parcel of a business transaction.

III. Defendants' Naked Assertion Of Attorney-Client Privilege And Attorney Work-Product Does Not Satisfy Their Burden of Proof.

The burden of proof is on the party asserting the existence of the attorney-client privilege or the applicability

of the work-product doctrine. See Jackson, 495 P.2d at 1257; Sobol v. E.P. Dutton, Inc., 112 F.R.D. 99, 102 (S.D.N.Y. 1986); City Consumer Services, Inc. v. Horne, 100 F.R.D. 740, 747 (D. Utah 1983). Apart from making vague and unsubstantiated general assertions, the only particularized offer of proof that the defendants made below was to offer the conclusory affidavit of Patrick J. Garver which asserted, without more, that the Agreement contained "confidential communications" and "was prepared in anticipation of litigation." R. at 4321.^{2/} This is a wholly inadequate showing. See, e.g., Jackson, 495 P.2d at 1255-57 (although the defendants submitted an affidavit, their generalization that litigation was anticipated was legally insufficient to satisfy their burden of proof); cf. United States v. El Paso Co., 682 F.2d 530, 541 (5th Cir. 1982), reh. denied, 688 F.2d 840, cert. denied, 466 U.S. 94 (1984) (blanket assertions of attorney-client privilege are unacceptable as they "disable the court and the adversary party from testing the merits of the claim of privilege").

^{2/} Gold Standard moved to strike Mr. Garver's Affidavit. The Motion to Strike was submitted for decision with the discovery question. The District Court did not expressly rule on that motion in deciding the discovery question.

IV. In Effect, The District Court's Decision
Would Permit The Use Of Privilege To Cloak
All Manner Of Damaging Material.

The district court's decision would permit a party to hide potentially damaging material by simply reducing it to writing, stamping it "confidential," and sending it off to counsel. But this Court has already held that a document is not protected merely because it was "funneled" to an attorney.

In Jackson, the plaintiffs alleged that the defendant, by "negligently allowing acid or other harmful substances to flow in the air . . . , caused damage to the vehicles of the various plaintiffs." 495 P.2d at 1255. During the discovery phase of the case, the plaintiffs propounded interrogatories to the defendant that addressed "the existence and the location of any records concerning the amount of acid or smelting materials which escape during a designated period of time." Id. The defendant refused to answer, responding "that the record of emissions is maintained in the legal counsel files as privileged information collected at the request of legal counsel." Id. The Court rejected this claim of privilege and held the information was discoverable:

The type of information which defendant has compiled in the records is discoverable;

defendant cannot foreclose the discovery process by the simple expedient of funneling the matter into its counsel's custody.

Id. at 1257 (emphasis added). See also In Re Grand Jury Testimony of Attorney X, 621 F.Supp. 590, 592 (E.D.N.Y. 1985) (a party is not entitled to invoke the attorney-client privilege where counsel is no more than a "mere 'conduit'") (citations omitted).

In this case, the District Court's decision threatens to prevent Gold Standard from putting before the trier of fact not only the purchase agreement in its entirety but that very part of the purchase agreement that specifically addresses Gold Standard. In its first offer letters to Texaco, Barrick evidenced a serious concern for Gold Standard's claims, conditioning its bid on clarification of the claims to a working interest and to a first right of refusal. (See Fact No. 2) Texaco, in turn, represented that it would not accept any ongoing liability for Gold Standard's claims. (See Fact No. 3) Once Barrick removed all reference to Gold Standard in its final offer letter (See Fact No. 2), Texaco agreed to sell the mine, valued at over \$100 million, to Barrick for \$31 million with a potential \$9 million production payment. (See Fact No. 4) After the Stock Purchase Agreement was signed but

before any money changed hands, the parties executed a separate agreement as to Gold Standard's claims and merely funneled it to Barrick's counsel. Through the first two years of discovery, the defendants refused to disclose the very existence of this agreement. Even after Mr. Dattels disclosed its existence, the defendants would not identify the agreement for nearly five months. (See Fact Nos. 6-7) And now the district court has prevented Gold Standard from conducting discovery into the defendants' decision to remove from the offer letters any condition and to except from the indemnity of the Stock Purchase Agreement any warranty as to Gold Standard's claims.


Gold Standard has a right to establish that the defendants agreed not to recognize Gold Standard's rightful interest in the mine but rather chose to risk litigation. Likewise, Gold Standard has a right to establish that part of the consideration for the transfer of the mine was the allocation of risks and costs associated with Gold Standard's claims. And Gold Standard has the right to establish the defendants' intentional wrongful conduct by presenting to the jury the June 11, 1985 Agreement. The Court should not frustrate the truth-finding process by allowing these defendants to hide the commercial transaction by simply fashioning their agreement to appear to be some privileged communication.

CONCLUSION

Just as the Court ordered discovery in Jackson, it should be ordered here. There is no basis in law or fact for the district court to permit the defendants to use the attorney-client privilege or work-product doctrine to keep from Gold Standard and from the trier of fact terms of a commercial agreement that go to the heart of Gold Standard's claims. Accordingly, Gold Standard requests this Court to reverse the district court's decision.

DATED this 11 day of December, 1989.

JONES, WALDO, HOLBROOK & McDONOUGH

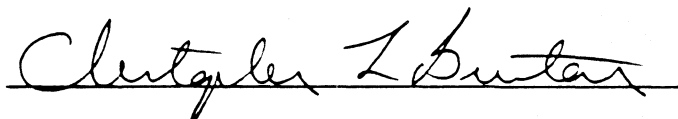
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of December, 1989, I caused four (4) copies of the foregoing BRIEF OF APPELLANT GOLD STANDARD, INC. to be hand-delivered, to:

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