STATE OF MICHIGAN

GENESEE COUNTY CIRCUIT COURT

BUSINESS COURT

BENTLEY'S BEST, LLC, et al.,

Plaintiffs,

v.

ANDREW D. SUSKI, et al.,

Defendants.

Case No. 14-102314-CB

Judge: M. Randall Jurrens (P27637)

OPINION AND ORDER DENYING USEWICK PARTIES' RENEWED MOTION FOR RECONSIDERATION OF AUGUST 26, 2019 PROTECTIVE ORDER

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On August 26, 2019, following notice and hearing on defendants' written motion, and upon 7-days notice, *MCR 2.602(B)(3)*, the court entered a Protective Order Re: Email of 12/13/2013.

On September 3, 2019, plaintiffs filed a motion for reconsideration, but withdrew their motion on September 6, 2019.

On September 10, 2019, plaintiffs filed a renewed motion for reconsideration of the Order of August 26, 2019.

A motion for reconsideration will be granted only if the moving party "demonstrate[s] a palpable error by which the court and the parties have been misled and show[s] that a different disposition of the motion must result from correction of the error", *MCR 2.119(F)(3)*. A "palpable error" is defined as "[e]asily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, manifest." *Luckow v Luckow*, 291 Mich App 417, 426; 805 NW2d 453 (2011).

At issue here is a December 13, 2013 email with an attached letter from defendants' then-attorney to Andy Suski suggesting language for Suski to send to his business' secured creditor.[1] During the course of discovery, the attorney-client communication was produced as part a larger production of defendants' electronic files in response to plaintiffs' request; but, importantly, the email and attached letter were disclosed in a context indicating they had been electronically "sent" by Suski to his business' CPA.

However, there is no direct evidence that the forwarded email and letter were opened and read by the CPA. Also, there is no evidence that a letter including the attorney's recommended language, in whole or in part, was ever actually sent to Suski's business' creditor.

When the email and letter were attached to plaintiffs' motion for leave to file a sixth amended complaint, defendants filed a motion for protective order on the basis that the email and

[1] Technically, the email was sent by the attorney's secretary to his client's secretary/administrative assistant. Without more, this does not appear to negate an otherwise privileged attorney-client communication. *Leibel v General Motors Corp*, 250 Mich App 229, 236; 646 NW2d 179 (2002) ("The attorney-client privilege attaches to direct communications between a client and his attorney as well as communications made through the respective agents").

attachment were privileged attorney-client communications, and that they had been only inadvertently produced in the course of pretrial discovery.

Prompted by plaintiffs' written and oral arguments that plaintiff Usewick was entitled to the communications as a member of defendant Suski Used Cars, LLC (SUC), the court analyzed the issue under the Michigan limited liability company act, *MCL 450.4101 et seq*. Concluding plaintiff Usewick failed to demonstrate satisfaction of the requirements for admission as a member of a limited liability company, *MCL 450.4501*, the court concluded she was not entitled to access the limited liability company's privileged attorney-client communications and, therefore, defendants were was entitled to "claw back" the email and attachment.

Plaintiffs' reconsideration motion redirects the court's attention from the common law attorney-client privilege to the statutory accountant-client privilege[2], *MCL 339.732(1)*[3]:

> Except by written permission of the client or the heir, successor, or personal representative of the client to whom the information pertains, a licensee, or a person employed by a licensee, shall not disclose or divulge and shall not be required to disclose or divulge information relative to and in connection with an examination or audit of, or report on, books, records, or accounts that the licensee or a person employed by the licensee was employed to make. Except as otherwise provided in

[2] This is not, strictly speaking, a wholly new issue that the court would be justified in summarily declining to consider, *Yoost v Caspari*, 295 Mich App 209, 220; 813 NW2d 783 (2012) ("[A] trial court has discretion on a motion for reconsideration to decline to consider new legal theories or evidence that could have been presented when the motion was initially decided").

Although not raised in either parties' previous written arguments, the accountant-client privilege was implicated when, during oral arguments, plaintiffs' counsel acknowledged receiving the subject communication in an email dump produced during the pretrial discovery process that documented the communication being forwarded by Suski to his accountant (July 12, 2019 hearing transcript, p 142). In response, defense counsel asserted that the email "is a communication between Mr. Suski and his accountant with regard to matters dealing with the business for whom Mr. Riley does CPA work and therefore is subject to the statutory privilege" (July 12, 2019 hearing transcript, p 144). Unfortunately, neither side further developed the [in]applicability of the statutory privilege before the motion was initially decided.

[3] Throughout their motion (i.e. pp 5, 6, 6 n 5, 7, and 10), plaintiffs erroneously reference "MCL 339.372".

> this section, the information derived from or as the result of professional service rendered by a certified public accountant is confidential and privileged.

Although, generally, no response to a motion for reconsideration may be filed, *MCR 2.119(F)(2)*, the court invited defendants to respond to several factual and legal questions (see attached September 19, 2019 letter to counsel). However, even with Suski's subsequent written response, the court voiced some lingering concerns (see attached October 30. 2019 email to counsel) that resulted in the court holding oral arguments on November 8, 2019. Still dissatisfied, the court invited supplemental written arguments regarding the effect of Suski's dissemination of his attorney's communication to his accountant.

To resolve this now-belabored issue, the court begins with the proposition that the email and letter were privileged communications between attorney and client and, while subject to waiver, such communications do not lose their protections when disseminated inadvertently. *Leibel v General Motors Corp*, 250 Mich App 229, 241; 646 NW2d 179 (2002). In granting the Protective Order of August 26, 2019, the court was merely resurrecting the status quo existing prior to disclosure of a privileged communication nestled in Suski's business records. That the communication had been inadvertently produced in the course of pretrial discovery shouldn't, without more, change its essential, privileged, status. To allow plaintiffs to utilize undeserved knowledge defeats the protection to which privileged communications are entitled. "To hold otherwise would seriously erode one of the law's most protected privileges." *Id*.

Second, even if the unplanned revelation of the privileged communication's dissemination can be utilized, defendants argue the communication is protected by the common-interest doctrine. As articulated in *Nash Estate v Grand Haven*, 321 Mich App 587; 909 NW2d 862 (2017):

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his

> representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client. [*Nash*, at 595, quoting *United Stated v BDO Seidman, LLP*, 492 F3d 806 (CA 7, 2007)]
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> Although occasionally termed a privilege itself, the common interest doctrine is really an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person. In effect, the common interest doctrine extends the attorney-client privilege to otherwise non-confidential communications in limited circumstances. For that reason, the common interest doctrine only will apply where the parties undertake a joint effort with respect to a common legal interest, and the doctrine is limited strictly to those communications made to further an ongoing enterprise. Other than these limits, however, the common defense doctrine does not contract the attorney-client privilege. [*Nash*, at 596, quoting *United Stated v BDO Seidman, LLP*, 492 F3d 806 (CA 7, 2007)]

Here, as the court understands, defendants' then-attorney recommended language for a letter to be sent to defendants' secured creditor in hopes of averting threatened adverse action by, among other things, engaging the business' accountant to audit relevant business transactions. Defendant Suski then forwarded the communication to the accountant, presumably to advise him of and/or confirm his engagement. As in *Nash*, the client's representatives (i.e. defendants' attorney and accountant) have a common interest in achieving a successful outcome for their mutual client. Accordingly, under the common-interest doctrine, the attorney–client privilege would not be waived by Suski's disclosure of the subject email/letter to his business accountant.

Next, plaintiffs argue that once disseminated, the email/letter lost its common-law attorney-client privilege and became subject only to the statutory accountant-client privilege, *MCL 339.732(1)*. Since the common law did not recognize a privilege between an accountant and client, this statutory privilege is to be strictly construed. *People v Safiedine*, 163 Mich App 25, 30-31; 414 NW2d 143 (1987). "The statute applies only to confidential information passed from client to accountant." *Estate of Martin*, unpublished opinion per curiam of the Court of Appeals issued

November 17, 1998 (Docket No. 204854). Accordingly, while the privilege applies to evidence of the substance of information conveyed by client to accountant, it does not apply to evidence of the subject matter of work the accountant is request to complete. *Id*.

Here, however, although there is evidence the email was sent by Suski to his accountant, the parties concede there is no evidence that the email was opened and read. Without more, the court is not comfortable in trading the attorney-client privilege in favor of the accountant-client privilege without greater confidence the document's dissemination was ever actually effectuated. Accordingly, notwithstanding extraordinary efforts undertaken by counsel and the court to comprehend the applicability of the statutory accountant-client privilege in this case, the court concludes it need not analyze beyond the common law attorney-client privilege.

Finally, as initially asserted in their response to the request for protective order, plaintiffs' renewed motion for reconsideration continues to argue any privilege is subject to the recognized exception for fraud and illegality. As stated in *People v Paasche*, 207 Mich App 698, 705; 525 NW2d 914 (1994):

> The crime-fraud exception to the attorney-client privilege is predicated on the recognition that where the attorney-client relationship advances the criminal enterprise or fraud, the reasons supporting the privilege fail. As the Supreme Court in *United States v Zolin*, 491 US 554, 562–563, 109 SCt 2619, 2626, 105 LEd2d 469 (1989), stated:
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> > "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reasons for the protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—"ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing, but to future wrongdoing.*" [Citations omitted. Emphasis in original.]

> We agree with the Supreme Court's reasoning and determine that where advice from an attorney refers to future, not past, wrongdoing, the crime-fraud exception applies to the otherwise privileged communication.

In order for the crime/fraud exception to apply, the proponent of the exception "must show that there is a reasonable basis to (1) suspect the perpetration or attempted perpetration of a crime or fraud and (2) that the communications were in furtherance thereof. *Paasche*, at 707.

However, here, the attorney is not a party, the client, although a party-defendant, is not being sued for fraud related to the attorney-drafted letter, and moreover, the client never even sent a letter to its secured creditor containing its attorney's proposed language. Without more, the court is unpersuaded there is a reasonable basis to suspect the attorney's work-product was in furtherance of fraud.

In conclusion, the court is not persuaded it committed palpable error that, by correction, would result in a different disposition. Accordingly, plaintiffs' renewed motion for reconsideration is denied.

IT IS SO ORDERED.

Date: March 4, 2020

/s/ (P27637)
M. Randall Jurrens, Business Court Judge