STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

PETER B. RUDDELL,

Plaintiff,

V

MELISSA D. CUPP,

Defendant.
_____/

No. 18-406-CB

OPINION AND ORDER RE: DEFENDANT'S MOTION FOR PROTECTIVE ORDER

At a session of said Court held in Lansing,
Ingham County, Michigan, on October 9, 2018

PRESENT: Honorable Joyce Draganchuk
Circuit Judge

This is a dispute concerning certain emails and whether they should be disclosed in the course of discovery. The emails in question originated as a single email from Defendant's attorney to Defendant. Defendant then forwarded the email in two separate emails to her fiancé, Mr. Reitz. Mr. Reitz is subpoenaed for a deposition on October 15 and is required to produce documents that would likely include the two emails between Defendant and Mr. Reitz. Defendant filed a motion for protective order that was argued on October 3. The matter was taken under advisement because it was necessary to review the emails *in camera*, which review the Court has now completed.

Defendant claims that the email from her attorney is work product. Plaintiff disputes this because no litigation was pending when the email was sent. Work product is notes, working papers, memoranda or similar materials prepared in anticipation of litigation. It is not required that the attorney prepare the document only after a claim has

arisen. Instead, the facts or situation of a claim must have arisen with a prospect of litigation. The Court concludes that the email is work product.

Next, Plaintiff argues that when Defendant forwarded the email to her fiancé, Mr. Reitz, the email lost its privileged status. Michigan law recognizes waiver upon voluntary disclosure of work product to a third party since such action necessarily runs the risk the third party may reveal it, either inadvertently or under examination by an adverse party. *D'Alessandro Contracting Grp., LLC* v. *Wright*, 308 Mich. App. 71, 862 N.W.2d 466 (2014). "That principle is not ironclad." *Id.* at 81. Application of the common interest doctrine may preclude waiver.

The common interest doctrine derives from federal law. The *D'Allessandro* Court noted that courts in Michigan had not expressly addressed the common interest doctrine. Michigan courts have looked to the federal law in applying the common interest doctrine because of the similarity between state and federal rules regarding the work-product privilege. *D'Allessandro* described the common interest doctrine as follows:

> The federal courts have concluded that the disclosure of work product to a third party does not result in a waiver if there is a reasonable expectation of confidentiality between the transferor and the recipient. *Id*. at 82.

Following the above description of the common interest doctrine, the *D'Allessandro* Court quoted *United States* v. *Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010):

> A reasonable expectation of confidentiality may derive from common litigation interests between the disclosing party and the recipient . . . [T]he existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. This is true because when common litigation interests are present, the transferee is not at all likely to disclose the work product material to the adversary. *Id*. at 83.

Deloitte considered the common litigation interests between a company and an independent auditor and concluded that there was no common litigation interest. Instead, the *Deloitte* Court found no waiver and protected the documents from discovery because the corporation had a reasonable expectation of confidentiality and the auditor was not a potential adversary.

D'Allessandro also cited to *In re Chevron Corp*., 633 F.3d 153, 165 (3d Cir. 2011) with the following description of the common interest doctrine:

> [T]he work-product doctrine protects an attorney's work from falling into the hands of an adversary, and so disclosure to a third party does not necessarily waive the protection of the work-product doctrine. Rather, the purpose behind the work-product doctrine requires a court to distinguish between disclosures to adversaries and disclosures to non-adversaries, and it is only in cases in which the material is disclosed in a manner inconsistent with keeping it from an adversary that the work-product doctrine is waived. *Id*. at 83.

True to the above description, the 3rd Circuit Court of Appeals applied the doctrine in *In re Chevron* to conclude that providing documents to a court ordered expert to prepare a damages assessment report was inconsistent with keeping those documents confidential from Chevron. The Court did not employ a common litigation interest analysis.

The point is that the doctrine is not limited only to situations of common litigation interests. The doctrine is broader than that and has been applied by the courts in a manner broader than a common litigation interest. The *In re Chevron* ruling did not depend on a common litigation interest test. In *Deloitte*, there was found to be no common litigation interest. Instead, both Courts applied a reasonable expectation of confidentiality test. The fact that a reasonable expectation of confidentiality *may* arise from common litigation interests does not mean that it has to.

Plaintiff points to *Est of Nash* v. *City of Grand Haven*, 321 Mich. App. 587, 909 N.W.2d 862 (2017), *appeal denied sub nom*. *Nash* v. *City of Grand Haven*, No. 156804, 2018 WL 4691218 (Mich. Sept. 27, 2018), where the Court of Appeals quoted *United States* v. *BDO Seidman, LLP*, 492 F.3d 806, 814–817 (7th Cir. 2007). The *Seidman* Court was applying the common interest doctrine to the attorney-client privilege and stated that the doctrine only applies where the parties undertake a joint effort with respect to a common legal interest and the communications are made to further an ongoing enterprise. *Est of Nash*, 596.

The citation to federal law in *Est of Nash* is not persuasive. The fact that *Est of Nash* applied the doctrine as described in *Seidman* to attorney work product is also unpersuasive here. There is an abundance of federal law that is persuasive in concluding that the doctrine is intended to protect expectations of confidentiality and it is not drawn so narrowly as to only apply when there is a common litigation interest.

Defendant disclosed attorney work product to her fiancé, Mr. Reitz. In her Affidavit, Defendant stated that she considers Mr. Reitz to be her closest friend and confidante. Further, she shared such information with him with the understanding and expectation that the information would be kept strictly confidential (Affidavit of Melissa D. Cupp attached to Defendant's motion for protective order). One can easily conclude that the distinction between disclosing to an adversary and disclosing to a non-adversary is clear cut here. Mr. Reitz is in no way an adversary. He is a trusted confidante. There was a reasonable expectation of confidentiality between Defendant and her fiancé when the attorney work product was forwarded. Therefore, Defendant did not waive the privilege by forwarding her attorney's email to her fiancé.

IT IS HEREBY ORDERED that Defendant's motion for protective order is **GRANTED** and the emails will be produced with the redactions proposed by Defendant.

/S/
_____
Hon. Joyce Draganchuk (P39417)
Circuit Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the above Opinion and Order upon the attorneys of record by placing said document in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on October 9, 2018.

/S/
_____
Michael Lewycky
Law Clerk/Court Officer