UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

Case No.: 2:18-cv-13330
Hon. Marianne O. Battani

v.

THE CHARTER TOWNSHIP OF MILFORD, a Michigan municipal corporation, **TOWNSHIP OF MILFORD BOARD**, a public body, **DONALD D. GREEN**, in his personal capacity and in his official capacity as Supervisor of Milford Township, and **TIMOTHY C. BRANDT**, in his personal capacity and in his official capacity as Building and Zoning Administrator of Milford Township,

Defendants.

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO MOTION TO COMPEL PRODUCTION OF SUBPOENAED DOCUMENTS FROM NONPARTY MICHAEL DARGA

A. Defendants have failed to carry their burden that the six emails constitute Attorney-Client Privileged communications. Even if they have carried their burden, the privilege has been waived by 1) the inclusion of third-party Michael Darga and 2) through the strategic disclosure of Ms. Elowsky's emails within this litigation (see ECF No. 31-13).

In their Response, Defendants acknowledge "the general rule that 'the presence of a third party during discussions between the attorney and client will destroy the privilege.'" *Response* at PageID 953. Defendants acknowledge that

"Mr. Darga is not a Township official" and do not dispute that Mr. Darga, a third-party, was present during Ms. Elowsky's conversations with Township officials. *Id.* at PageID 956. Defendants nonetheless attempt to preserve the attorney-client privilege by claiming Mr. Darga was an "agent" of Defendants during these conversations.

As an initial matter, Defendants have failed to establish whether Ms. Elowsky was rendering legal advice in the six emails, or simply discussing factual matters; such an analysis requires the Court's *ex parte* review. Indeed, Defendants' Response does not describe the nature of the six contested emails or the facts within them.

Further, Defendants fail to cite any binding caselaw to support the proposition that a fact witness, such as an engineer, can be privy to attorney-client privileged communications without waiving the same, as argued in Plaintiffs' Motion (with supporting law).

Defendants' sole citation to a case within the Sixth Circuit is *City of Sterling Heights v. United Nat. Ins. Co.*, No. 03-72773, 2005 WL 5955828 (E.D. Mich. June 30, 2005). In *Heights*, the Hon. Nancy Edmunds conducted an *in camera* review and concluded the emails constituted attorney-client privileged and work product protected information involving "litigation strategy, possible liability, and similar subject matter." *Heights*, 2005 WL 5955828, at *1.

Judge Edmunds also concluded there was no waiver when defendant shared the documents with its "re-insurers."

There are a number of important distinctions.

First, Judge Edmunds actually inspected the documents to determine the contents. At the present time, neither the Court nor Plaintiffs know what the emails include. Do they include important factual information? Do they demonstrate Defendants' reasoning or lack thereof? Do they corroborate Plaintiffs' claims that Defendants misused the Milford Ordinances to fabricate hurdles and to obstruct Plaintiffs' construction of their home? We do not present know.

Second, re-insurers are aligned with their insureds and constitute true agents. Here, Mr. Darga is a **fact witness** and is not a true agent of Milford; indeed, Mr. Darga has separate counsel, and refused to allow Defendants' counsel to represent him at deposition or in mediation.

There is a separate reason why attorney-client privilege does not apply: **Defendants have waived the privilege through their filings in this case**. Specifically, in Defendants' Response to Plaintiffs' Motion for Entry of a Qualified Protective Order, Defendants cite and attach a September 25, 2018 email from Defendants' attorney, Jennifer Elowsky, to Defendant Donald Green, Defendant Timothy Brandt, and two board members of Defendant Milford: Holly Brandt and William Mazzara. *See* ECF No. 31-13 (Exhibit L). The law is clear

that a party cannot use the attorney-client privilege as a sword *and* a shield; as demonstrated by ECF No. 31-13, Defendants are selectively and strategically disclosing communications from Ms. Elowsky. This constitutes a waiver of the attorney-client privilege not only as to this document but also to the six emails which are within days or weeks of the September 25 email.

B. Defendants have failed to carry their burden that the six emails constitute Work Product Protected material. Even if Defendants have carried their burden, Plaintiffs have a substantial need for the emails and will experience undue hardship if they are not provided.

Defendants also claim work product protection applies, but assessment is impossible without *in camera* inspection. Notably, Defendants do acknowledge that three of the emails pre-date the filing of Plaintiffs' instant lawsuit; indeed, they are shortly before the crucial October 8 letter. Do Defendants mean to argue that communications to Mr. Darga before his October 8 letter were in anticipation of litigation, and therefore guided how Defendants redirected Mr. Darga to reverse his initial conclusions? Is that not directly relevant to Plaintiffs' claims in this case? To shield that crucial information from Plaintiffs deprives Plaintiffs of the very evidence they need to support their claims.

Along these lines, even if the work product doctrine applies, Plaintiffs can overcome the need upon a showing of 1) a "substantial need" and 2) undue hardship to obtain the "substantial equivalent" of the materials by other means. *Hickman v Taylor*, 329 US 495; 67 S Ct 385 (1947).

There is a substantial need for the emails because they involve arguably the key witness in this case, Mr. Darga, and his communications to Defendants regarding the Hacks' home. Indeed, Defendants' Response acknowledges the emails "took place **immediately before** Mr. Darga issued his [revised October 8, 2018] letter to the Township Board which contained the recommendation that the Township approve Plaintiffs' requested fill and grade permit based on the contained conditions . . . and the day after the Township Board voted to accept the recommendations." *Response* at PageID 951 (emphasis supplied). Logic dictates that these contain critical factual information relating to this dispute.

There undue hardship to obtain the equivalent of these emails by other means, namely deposition. Indeed, it is impossible to obtain the information through other means based on the parties' conflicting positions regarding the attorney-client privilege. The Court can appreciate that Defendants' counsel has asserted the attorney-client privilege regarding these same emails; how then can Plaintiffs' counsel obtain the contents of the email through the deposition of Mr. Darga? The attorney-client privilege can be, and will be asserted, until this Court overrules it.

Conclusion

Defendants have failed to carry their burden to establish that the six contested emails are attorney-client privileged or work product protected. If the

emails were originally attorney-client privileged, that privilege was waived through disclosure to Mr. Darga and by strategic disclosure of similar communications in this lawsuit (ECF No. 31-13). If the emails constitute work product, Plaintiffs have overcome that protection.

Accordingly, the Court should compel production of the six emails to Plaintiffs or, in the alternative, order the six emails produced to this Court for the Court's *in camera* inspection and further determination.

Respectfully submitted,

/s/ R.J. Cronkhite
R.J. Cronkhite (P78374)
Attorneys for Plaintiffs

Dated: March 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that on **March 8, 2019**, I electronically filed the above document(s) with the Clerk of the Court using the ECF system, which will send notification of such filing to those who are currently on the list to receive e-mail notices for this case.

/s/ R.J. Cronkhite
Attorney for Plaintiffs