

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

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

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.

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**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL
PRODUCTION OF SUBPOENAED DOCUMENTS FROM NON-PARTY
MICHAEL DARGA AND INCORPORATED BRIEF IN SUPPORT**

NOW COME the Defendants, **THE CHARTER TOWNSHIP OF MILFORD, TOWNSHIP OF MILFORD BOARD, DONALD D. GREEN** and **TIMOTHY C. BRANDT**, by and through their attorneys, **O’CONNOR, DeGRAZIA, TAMM & O’CONNOR, P.C.**, in Response to Plaintiffs’ Motion to Compel Production of Subpoenaed Documents from Non-party Michael Darga, state as follows:

1. Defendants neither admit nor deny the allegations alleged in Paragraph 1 as Plaintiffs’ Motion speaks for itself. Defendants further state that the emails requested by Plaintiffs’ counsel are privileged attorney-client communication and attorney-client work product exempt from disclosure. See *Sandra TE v South Berwyn School District* 100, 600 F.3d 612, 619 (7th Cir 2010) (citing *Upjohn Co. v United States*, 449 U.S. 383, 394-99, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). See also FED. R. CIV. P. 26(b)(3); *Hickman v Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

2. Defendants admit that they have asserted attorney-client privilege and attorney work product privilege over emails, correspondence and/or communications between representatives of Hubbell Roth & Clark (“HRC”) including Michael Darga, who serves as the Township engineer and the offices of the Township Attorney Jennifer Elowsky. The communications with legal counsel

for the Township were for the purposes of supplying legal advice in anticipation of litigation and therefore are not subject to disclosure. (Id).

3. Defendants admit that on or about December 4, 2018, Plaintiffs served a subpoena on counsel for Mr. Darga requesting Mr. Darga appear for deposition and produce documents pertaining to Plaintiffs' property. Defendants further state that Plaintiffs did not provide defense counsel with a copy of the subpoena at the time it was served as required by a FED. R. CIV. P. 45(a)(4).

4. Defendants admit that Michael Darga is an associate of HRC which was retained by the Defendants to serve as a consultant and that any communications between HRC, including Mr. Darga and counsel for the Township was for the purposes of supplying legal advice in anticipation of litigation and, therefore, constitutes attorney-client and/or attorney work produce which is not subject to discovery.

5. Defendants admit that HRC, through Michael Darga, did not object to the topographical and grading plans prepared by Boss Engineering (dated 08/14/2018) based on the assumption that "the existing contours on the plan are from the predevelopment of the property and accurately reflect the predevelopment conditions." See ECF No. 29-3, Pg ID 793. Defendants later learned that the elevations of the subject property had been changed requiring additional

information to determine the impact of additional fill material for construction of the driveway.

6. The allegations alleged in Paragraph 6 are denied as untrue. HRC and Mr. Darga were requested to review the grading plan presented by Boss Engineering following a Township hearing in which Plaintiffs' neighbor gave a presentation outlining the impact of the construction and grading activities that the construction and grading activity on Plaintiffs' property was having on his adjacent property. (See ECF No. 16-6, PG ID 520). The October 8, 2018 letter from Michael Darga (ECF No. 29-4, PG ID 695) speaks for itself. Defendants deny that it placed any unlawful or unauthorized conditions on the Plaintiffs.

7. Defendants neither admit nor deny the allegations alleged in Paragraph 7 as Plaintiffs' subpoena speaks for itself. Defendants further state that Plaintiffs did not provide defense counsel with a copy of the subpoena at the time it was served as required by FED. R. CIV. P. 45(a)(4).

8. Defendants neither admit nor deny the allegations alleged in Paragraph 8 as the exhibit (ECF No. 29-5, PG ID 797) speaks for itself. Defendants admit that upon learning of the subpoena served by Plaintiffs, the Township asserted an attorney-client and/or work product privilege regarding communications generated for the purposes of supplying legal advice to the Township in anticipation of litigation.

9. Defendants neither admit nor deny the allegations alleged in Paragraph 9 as the October 21, 2018 correspondence (ECF No. 29-6, PG ID 800) speaks for itself.

10. Defendants neither admit nor deny the allegations alleged in Paragraph 10 as the October 21, 2018 correspondence (ECF No. 29-6, PG ID 800) speaks for itself.

11. No contest.

12. Defendants admit that they asserted attorney-client and attorney work product privilege regarding emails between representatives of HRC including Michael Darga and Township Attorney Jennifer Elowsky which include attorney-client and/or attorney work product privilege generated for the purposes of supplying legal advice to the Township in anticipation of litigation.

13. Defendants admit that attorney Jennifer Elowsky is counsel for the Defendants and that Michael Darga, P.E. was retained by the Township as a consultant and as a result communications between representatives of HRC and the offices of the Township Attorney constitute attorney-client and/or attorney work product privilege as they were generated for the purposes of supplying legal advice to the Township in anticipation of litigation. See *Upjohn Co., supra*.

14. The allegations alleged in Paragraph 14 are denied as untrue. The communications between Township Attorney Jennifer Elowsky and HRC were

communicated in the course of a consultant relationship and, therefore, did not constitute disclosure to a third party. See *Upjohn Co.*, *supra*.

15. Defendants neither admit nor deny the allegations alleged in Paragraph 15 as Plaintiffs' correspondence (ECF No. 29-7, PG ID 803) speaks for itself.

16. Defendants neither admit nor deny the allegations alleged in Paragraph 16 as the referenced correspondence (ECF No. 29-8, PG ID 806) speaks for itself.

17. Defendants neither admit nor deny the allegations alleged in Paragraph 17 as FED. R. CIV. P. 45 speaks for itself. Defendants further state that FED. R. CIV. P. 45(a)(4) requires that before serving a subpoena commanding the production of documents, a "copy of the subpoena must be served on each party." Furthermore, according to FED. R. CIV. P. 45(e)(2), privileged material may be withheld.

18. Defendants neither admit nor deny the allegations alleged in Paragraph 18 as the court rules speak for itself. Defendants further state that Plaintiff is not entitled to discovery materials subject to attorney-client and/or attorney work product privilege. FED. R. CIV. P. 26(b)(5) and 45(2).

19. Defendants admit that a party may obtain discovery of “nonprivileged” materials relevant to a claim or defense pursuant to FED. R. CIV. P. 26(b)(1).

20. The allegations in Paragraph 20 are denied as untrue. Defense counsel has no record of receiving a request for concurrence prior to Plaintiffs filing the present motion in direct violation of 7.1(a). Defendant further states that Plaintiffs’ Motion fails to comply with local rule 7.1(a)(2).

WHEREFORE Defendants respectfully request this Honorable Court deny Plaintiffs’ Motion.

Respectfully submitted,

By: /s/ Richard V. Stokan, Jr.

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Dated: March 1, 2019

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WREN BEAULIEU-HACK, an individual,

Plaintiffs,

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BRIEF IN SUPPORT OF
DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL
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ISSUE PRESENTED

- I. Whether the Plaintiffs are entitled to discovery confidential privileged communications between the Township attorney and Township consultants?

Plaintiffs answer “yes”

Defendants answer “no”.

This Court should answer “no”.

MOST CONTROLLING AUTHORITY

The controlling or most appropriate authority for the relief sought, in addition to FED. R. CIV. P. 26, is: *Upjohn Co. v United States*, 449 U.S. 383, 394-99, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) and *Hickman v Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

Background

This case arises out of allegations that the Township of Milford, along with its agents, unlawfully imposed preconditions upon Plaintiffs in their construction of a residential driveway. Defendants deny the allegations and maintain that their actions were appropriate and lawful for the reasons set forth in Defendants' Motion for Summary Judgment. (ECF No. 16).

In response to the present motion, Defendants rely upon and incorporate the statement of facts contained in Defendants' Response to Plaintiffs' Motion for Entry of Qualified Protective Order (ECF No. 31).¹ Specific facts pertaining to Plaintiffs' subpoena of records is set forth below.

Plaintiffs' Subpoena of HRC Records

On or about December 4, 2018, Plaintiffs' counsel served a subpoena on Township engineer Michael Darga, P.E. of Hubbell, Roth & Clark, Inc. ("HRC") for the production of documents and to testify at a deposition. The subpoena was served and deposition scheduled without notice to Defense counsel prompting

¹ Defendants specifically direct the Court to the facts pertaining to the communications involving HRC. Contrary to Plaintiffs' assertions, although Mr. Darga, did not object to the Plaintiffs' topographical and grading plans prepared by Boss Engineering (dated 08/14/2018), his recommendation was based on the assumption that "the existing contours on the plan are from the predevelopment of the property and accurately reflect the predevelopment conditions." See ECF No. 29-3, Pg ID 793. Furthermore, it was only after the neighboring property owner voiced additional concerns regarding the change in grade on Plaintiffs' property that the Township requested that Mr. Darga re-review the plans. See ECF No. 16-6, Pg ID 520-521.

Defendants to file an Emergency Motion for Protective Order (ECF No. 11) which was granted by this Court on December 18, 2018. (ECF No. 18). Although the Court's order precluded Plaintiffs' counsel from unilaterally scheduling Mr. Darga's deposition, counsel for HRC, Kevin J. Gleeson ("Gleeson") advised Defendants that he intended to comply with Plaintiffs' request to produce documents. In response, Defense counsel advised Mr. Gleeson that the Township was asserting attorney-client / work product privilege over any emails, correspondence and/ or communications between representatives of HRC and the offices of the Township Attorney Jennifer Elowsky. (Ex. A, December 21, 2018 Correspondence).

On or about December 21, 2018 Mr. Gleeson's response to Plaintiffs' subpoena followed and documents were produced with the exception of those communications which the Township maintains are privileged and exempt from disclosure. (See ECF No. 29-6, Pg ID 800). Specifically as to the Township, the privilege relates to the following:

- Email of October 3, 2018 from Township attorney Jennifer Elowsky to Michael Darga and other Township officials;
- Email of October 5, 2018 from Michael Darga to Township attorney Jennifer Elowsky;
- Email of October 8, 2018 from Township attorney Jennifer Elowsky to Michael Darga and other Township officials;

- Email of October 18, 2018 from Township attorney Jennifer Elowsky to Michael Darga and other Township officials;
- Email of October 18, 2018 from Michael Darga to Township attorney Jennifer Elowsky;
- Emails of October 18, 2018 from Township attorney Jennifer Elowsky to Michael Darga and other Township officials;

The email communications took place immediately before Mr. Darga issued his letter to the Township Board which contained the recommendation that the Township approve Plaintiffs' requested fill and grade permit based on the contained conditions (See ECF No. 29-4, Pg ID 795) and the day after the Township Board voted to accept the recommendations. (See ECF No. 16-8, Pg ID 526-540). Moreover, the communications on October 18, 2019 were after Plaintiffs filed the present lawsuit.

Plaintiffs' counsel now claims that the privilege log prepared by Mr. Gleeson was deficient because it did not "describe the nature of the documents." (ECF No. 29, Pg ID 780). It is unclear what more description Plaintiffs' counsel requires regarding the nature of the communications. The privilege log (See ECF No. 29-6, Pg ID 800) specifically identifies the documents as email communications between representatives of HRC and the Township attorney and the date of said communication. Any greater disclosure of the content of the communications in a privilege log would defeat the purpose of the privilege and disclose the content of the communications.

Plaintiffs now seek to compel production of the communications between representatives of HRC and the Township attorney on grounds that the privileged was waived. (See ECF 29-7, Pg ID 803). For the reasons set forth below, the motion should be denied.

Law & Argument

PLAINTIFFS ARE NOT ENTITLED TO DISCOVERY PRIVILEGED COMMUNICATIONS BETWEEN THE TOWNSHIP'S LEGAL COUNSEL AND A TOWNSHIP AGENT

Rule 26(b) defines the scope of discovery including subpoenas issued pursuant to Rule 45. Rule 26(b) allows a party to obtain discovery concerning any non-privileged matter that is relevant to any party's claim or defense. Fed. R. Civ. P. 26(b). Federal Rule of Civil Procedure 45 governs subpoenas and provides that a nonparty served with a subpoena may make written objections to the subpoena before the time specified for compliance. Fed. R. Civ. P. 45(d)(2)(B). Pursuant to Fed. R. Civ. P. 45(e)(2) a party may withhold material subject to a subpoena under a claim of privilege.

In this case, Plaintiffs' request is limited to six email communications between the Township attorney and the Township's engineer Michael Darga, P.E. (See Plaintiffs' Motion, ECF No. 29, Pg ID 782). It is Plaintiffs' argument that by including Mr. Darga in the communications that any attorney-client privilege was waived. Plaintiffs' reliance upon *Maday v. Pub. Libraries of Saginaw*, 480 F.3d 815, 821 (6th

Cir. 2007) and *Carfagno v. Jackson Nat'l Life Ins. Co.*, No. 5:99CV118, 2001 WL 34059032, at *7 (W.D. Mich. Feb. 13, 2001), however, is misplaced.

In *Maday*, the court held that a former librarian who put her emotional state at issue in the case waived any psychotherapist-patient privilege that otherwise might have applied to her conversations with her social worker. Because the plaintiff relayed the substance of conversations with her prior attorney to the social worker, the court determined that the plaintiff waived any attorney-client privilege to those conversations. *Maday, supra* at 821. No such waiver has occurred in this case and the communications remain between Township agents and its legal counsel.

Plaintiffs' reliance upon *Carfagno v. Jackson Nat'l Life Ins. Co.*, No. 5:99CV118, 2001 WL 34059032, at *7 (W.D. Mich. Feb. 13, 2001) is even further misplaced. First, *Carfagno* was a diversity case governed by the law of the State of Texas. Second, although the court recognized the general rule that "the presence of a third party during discussions between the attorney and client will destroy the privilege", the facts of the case involved the "joint defense doctrine" "which grant[s] the protection of the attorney-client privilege to communications by the client 'to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein.'" *Carfagno, supra* at 7 (citations omitted). As a result, the court denied the plaintiffs' motion to compel. (*Id.*)

In the case at hand, the communications which the Defendants have asserted privilege over are direct communications between legal counsel for the Township and its retained agent at HRC. Thus, the communications do not involve a third party or waiver of privilege.

It is well established that the attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961). The purpose of the privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981). “The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.” *Id.* “The lawyer–client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.” *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980). Additionally, the purpose is to encourage clients to make a full disclosure to their legal counsel. *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976); see also *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888) (privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of

persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”).

Initially recognized as an individual client’s right Courts have extended the privilege to corporate clients. *Upjohn Co.*, *supra* at 390 (citing *United States v. Louisville & Nashville R. Co.*, 236 U.S. 318, 336, 35 S.Ct. 363, 369, 59 L.Ed. 598 (1915)). In extending the privilege protection to corporate clients courts recognized that legal counsel may be required to obtain information from all levels including officers and agents. As the Supreme Court explained, “the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice ... [because] [t]he first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant.” *Id.* at 390–91 (citation omitted).

In *Upjohn*, the communications sought to be discovered “concerned matters within the scope of the employees’ corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.” *Upjohn Co.*, *supra* at 394. As a result, the Supreme Court held that “[c]onsistent with the underlying purposes of the attorney–client privilege, these communications must be protected against compelled disclosure.” *Id.* at 395.

The same rationale applies to the communications between the Township attorney and representatives of HRC.

Although Mr. Darga is not a Township official, at all times relevant to the communications at issue in this motion he was serving as an agent of the Township and acting as its engineer. “[T]he majority of case law” recognizes that an independent contractor serves “as a ‘representative’ of [the client] to the degree necessary to establish the attorney-client privilege.” See *U.S. ex. rel. Fry v. The Health All. of Greater Cincinnati*, No. 1:03-CV-167, 2009 WL 5033940, at *4 (S.D. Ohio Dec. 11, 2009) (citing *Burlington Indus., Inc. v. Rossville Yarn, Inc.*, No. 4:95-cv0401-H, 1997 WL 404319, at *3 (N.D.Ga. June 3, 1997)); see also *FTC v. Glaxosmithkline*, 294 F.3d 141 (D.C.Cir.2002) (holding that communications with independent contractors hired to aid with public relations and government affairs maintained privilege where the independent contractors worked with the client's attorneys in the same manner as employees); *In re Bieter*, 16 F.3d 929, 937 (8th Cir.1994) (noting that “it is inappropriate to distinguish between those on the client's payroll and those who are instead ... employed as independent contractors”). In *City of Sterling Heights v. United National Insurance Company*, No. 03–72773, 2005 WL 5955828 (E.D.Mich. June 30, 2005) (Edmunds, J.), the Court denied a plaintiffs' motion to compel addressed to a defendant observing that “ ‘[t]he presence of a third party who is an agent of the client will not destroy the attorney-client privilege.’ ” *City of Sterling Heights*, 2005 WL

5955828, * 1 (quoting *Safeguard Lighting Sys., Inc. v. North Am. Specialty Ins. Co.*, 2004 WL 3037947, *2 (E.D.Pa. Dec.30, 2004)). Consequently, there has been no waiver of the attorney-client privilege and Plaintiffs are not entitled to discover the privileged communications between the Township attorney and the Township's agent at HRC.

To the extent Plaintiffs seek to compel the facts underlying the communications the information can be ascertained during the deposition of Mr. Darga. See *Upjohn Co., supra* at 395. (“The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.”)

WHEREFORE Defendants respectfully request this Honorable Court deny Plaintiffs' Motion.

Respectfully submitted,

By: /s/Richard V. Stokan, Jr.

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Dated: March 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2019, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF efile system which will send notification of such filing to all counsel of record and I hereby certify that I have mailed by United States Postal Service the Paper(s) to the following non-efile participants: None.

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