

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

ELIZABETH JOHNSON HARMER, )  
)  
Plaintiff/Counter-Defendant, )  
)  
v. )  
)  
KATHERINE JOHNSON CANNATA )  
and SIDNEY JOHNSON, JR., )  
)  
Defendants/Counter-Plaintiffs, )  
)  
and )  
)  
KATHERINE JOHNSON CANNATA and )  
SIDNEY JOHNSON, JR., )  
)  
Counter-Plaintiffs/ )  
Third-Party Plaintiffs, )  
)  
v. )  
)  
WYATT-JOHNSON AUTOMOTIVE )  
GROUP HOLDINGS, LLC; )  
WYATT-JOHNSON AUTOMOTIVE, LLC; )  
WJK, LLC; WYATT-JOHNSON )  
NASHVILLE FORD, LLC; )  
WYATT-JOHNSON VEHICLE )  
SALES, LLC; and JOHNSON REALTY )  
STRATEGIC INVESTORS, LLC, )  
)  
Third-Party Defendants. )

Case No. 23-0314-BC

JURY DEMAND

**ORDER**

Pursuant to the Court's April 4, 2024 Memorandum and Order, Plaintiff delivered for *in camera* review two boxes of documents included on her privilege log at issue in the Individual Defendants' March 1, 2024 motion. The Court has reviewed the documents and is ready to rule regarding the asserted privileges, other than a few documents about which the Court has questions that are set out herein. The Court hereby incorporates the law cited in its April 4, 2024 Order.

## CATEGORIES OF DOCUMENTS AND ASSOCIATED PRIVILEGES

### Jeff Mobley Documents

In the Court's April 4, 2024 Order, the Court ordered Plaintiff to produce the 11 Mobley Documents. According to Plaintiff's Notice of Submission filed on April 17, 2024 with the *in-camera* documents, Plaintiff acknowledged she had produced these documents, but that she still asserted her claim of privilege as to them. Upon *in camera* review, the Court hereby REVISES its prior Order as to the Mobley Documents as follows.

Plaintiff relies on the following privileges as to these documents: attorney/client, accountant/client, common interest, work product. Based upon the Court's review, it is apparent that Plaintiff and her husband Wendell sought legal advice from Jeff Mobley and his law firm starting April 20, 2018 and were introduced to him for this purpose through a mutual friend/attorney. That relationship continued at least through July 23, 2018. Mr. Mobley appeared to have been providing them advice in that context. Therefore, the documents relative to that period are PRIVILEGED pursuant to the ATTORNEY/CLIENT PRIVILEGE and not discoverable and include CR00001-CR00051.

The Court is less clear about the relationship for the period November of 2018 through August of 2019, particularly given information in the file that Mr. Mobley was representing Plaintiff's mother at some point. The documents relative to that period are UNCLEAR and include CR00052-CR00062. The Court will take up the issue of those documents at the next case management conference, set below.

### Sherrard Roe Voigt Harbison

It is undisputed that this firm, and its member John Voigt, represented the Harmers and the Powells at all times relevant to this action. The ATTORNEY/CLIENT PRIVILEGE attaches

to their communications. According to Plaintiff's Responses to Interrogatory No. 17, she retained Sherrard Roe on or around December 19, 2019. However, the issue is whether the inclusion of BDO, Withum, and/or Merrill Lynch on their communications destroyed the attorney-client privilege and whether another privilege applies to protect the communications from disclosure.

Plaintiff relies on the following privileges as to these documents: attorney/client, accountant/client, common interest, and/or work product. In particular, Plaintiff argues that BDO, Withum, and Merrill Lynch acted as agents of Plaintiff and were integral "insiders" with respect to the communications, which did not destroy the attorney-client privilege. Further, that many of Plaintiff's communications with BDO are covered under the Kovel doctrine, which recognizes that the attorney-client privilege covers communications to an accountant "made in confidence for the purpose of obtaining legal advice from the lawyer." *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961). Finally, that Plaintiff's communications with BDO and Withum are also protected by the accountant-client privilege.

#### *BDO Documents*

The vast majority of the documents include communications with BDO, and about half of them were generated prior to the June 29, 2020 closing (the "Family Transaction") and half of them after. The BDO communications commenced on November 12, 2019 and continued into April of 2022. Most communications were with BDO representative Karen Stone, but other BDO representatives were included from time to time, usually brought in by Ms. Stone as a resource on the matters she was handling for Plaintiff and her husband. The only engagement letter between the Harmers and BDO is dated October 30, 2020, which letter describes a scope of services including all types of tax services and financial advising. (CR02124). BDO is also apparently a party to a "Kovel Agreement" with the Harmers, Bill and Fran Powers and their lawyers, John

Voigt and his firm Sherrard Roe Voigt Harbison (“Sherrard Roe”). The actual agreement is not among the documents but is discussed among those persons and was apparently executed in the May 11, 2020 timeframe. (CR00370-CR00377).

Of the BDO documents, Plaintiff identified 429 between herself, her husband, and/or Fran Powers and BDO representatives only. No attorney is copied on these communications. Plaintiff also identified 15 documents between those parties along with Sherrard Roe. Plaintiff primarily relies on the attorney/client and/or accountant/client privilege to protect these communications from disclosure, although also infrequently cites the common interest and/or work product privilege.

In support of the attorney/client privilege, Plaintiff argues that BDO is an agent of Plaintiff and an “insider” for purposes of the withheld communications. When a third party in whose presence otherwise privileged communications take place is either an “agent of the client” or “so integral as to be considered an ‘insider’ with respect to communications with the client” the confidentiality of such communications is not destroyed and the attorney-client privilege applies to prevent disclosure. *See Jones v. Nissan N. Am., Inc.*, No. 3:07-0645, 2008 WL 4366055 (M.D. Tenn. Sept. 17, 2008) (citing *Royal Surplus Lines Ins. V. Sofamor Danek Grp.*, 190 F.R.D. 463 (W.D. Tenn. 1999)). Further, that the *Kovel* doctrine applies which recognizes that the attorney/client privilege covers communications to an accountant “made in confidence for the purpose of obtaining legal advice from the lawyer.” *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961). Finally, that Plaintiff’s confidential communications with BDO are protected by the accountant/client privilege, which prohibits the disclosure of any information that is communicated to or obtained by the client’s accountant “by the reason of the confidential nature of their employment.” Tenn. Code Ann. § 62-1-116(a). The Court finds the communications are

protected by the attorney/client privilege under the *Kovel* doctrine and the accountant/client privilege.

Attorneys' factual investigations "fall comfortably within the protection of the attorney-client privilege." *Genesco, Inc. v. Visa U.S.A., Inc.*, 302 F.R.D. 168, 190 (M.D. Tenn. 2014) (quoting *Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 619 (7th Cir. 2010)). Under the *Kovel* doctrine, it has been held that the attorney-client privilege extends to counsel's communications with agents and experts who are retained by counsel for the purpose of providing legal advice. *Kovel*, 296 F.2d at 922; *see also Genesco, Inc.*, 302 F.R.D. at 190. The *Kovel* court "analogized the role of the accountant to that of a translator who puts the client's information into terms that the attorney can use effectively." *Federal Trade Commission v. TRW, Inc.*, 628 F.2d 207, 212 (D.C. Cir. 1980). In *Kovel*, the privilege extended to an accountant who was retained by counsel, and the *Kovel* court explained:

Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege, any more than would that of the linguist in the second or third variations of the foreign language theme discussed above; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.

*Kovel*, 296 F.2d at 922. Accordingly, the *Kovel* court held that the attorney/client privilege extends to non-lawyers, such as accountants, where the client's communications to the non-lawyer is necessary to assist the lawyer in understanding the situation so he or she can render legal advice.

As for the accountant/client privilege, under Tennessee law, the privilege belongs to the client. *Fed. Ins. Co. v. Arthur Anderson & Co.*, 816 S.W.2d 328, 331 (Tenn. 1991). "The purpose of the accountant-client privilege is to insure an atmosphere wherein the client will transmit all relevant information to his accountant without fear of any future disclosure in subsequent

litigation.” *Id.* (citing *Ernst & Ernst v. Underwriters National Assurance Co., et al*, 178 Ind. App. 77, 381 N.E.2d 897 (1978)). The Individual Defendants argue that the accountant/client privilege does not protect disclosure of third-party information that is not the client’s financial information. The Court does not find such a distinction exists under the accountant/client privilege and the facts of this case. The Supreme Court in *Fed. Ins. Co. v. Arthur Anderson & Co.* noted that “an accountant must rely upon a wide variety of sources of information in order to perform his professional obligations and satisfy his duties to those who rely upon his work.” *Id.* While not part of a formal audit, the information received regarding the Family Transaction to navigate the deal and its effects thereafter concerned the financial condition of the client.

BDO was advising the Harmers and the Powells regarding the Family Transaction leading up to it, and then matters related to it after the fact. BDO was central to Plaintiff’s team advising her on the agreement, its impact on her, tax consequences, expectations afterwards and all matters related to it. Plaintiff’s communications with BDO were necessary to assist Sherrard Roe in understanding the situation so her attorney could render legal advice. Given the Kovel Agreement and the October 30, 2020 engagement letter, the Court finds that BDO communications are PRIVILEGED pursuant to the ATTORNEY/CLIENT and ACCOUNTANT/CLIENT PRIVILEGE.

*Merrill Lynch*

The privilege log identifies three sets of documents involving a representative from Merrill Lynch: 1) 9 documents including Plaintiff, her husband, and/or Fran Powers with Sherrard Roe and Merrill Lynch; 2) 19 documents including Plaintiff, her husband, and/or Fran Powers with BDO and Merrill Lynch; 3) 49 documents including Plaintiff, her husband, and/or Fran Powers

with Sherrard Roe, BDO, and Merrill Lynch. At issue is whether the inclusion of Merrill Lynch on the communications breaks any applicable privilege.

The communications with this entity commenced on June 5, 2020 with Matthew Miller introducing himself to John Voigt as newly involved on behalf of Plaintiff and Fran Powers. (CR00401). There is not an engagement letter with Merrill Lynch in the subject documents; thus, the scope of work is not defined. It appears Merrill Lynch was retained to weigh in on the Family Transaction document and would be involved in investing funds transacted as a result. Miller was added to the group communications from that date through September 11, 2020.

Plaintiff describes Mr. Miller's role in her response to the motion to compel as follows:

In early June 2020, Plaintiff's counsel at Sherrard reached out to Mr. Miller and requested his assistance. Merrill Lynch was also a vital part of Ms. Harmer's legal team in the weeks leading up to and after the buyout transaction, assisting Sherrard with analyzing terms of various aspects of the buyout transaction and suggesting various courses of action to Sherrard counsel. As shown in Plaintiff's log, the vast majority of withheld communications involving Merrill Lynch are from the time period immediately before and after the buyout transaction and include legal counsel and/or BDO on the communication. From the log, one can readily determine that Merrill Lynch played a supporting role to counsel and other entities within the privilege.

Plaintiff relies on the following privileges as to these documents: attorney/client, accountant/client, and/or common interest. Plaintiff argues that Miller was an "insider" and agent of Plaintiff who played a supporting role to counsel and other entities within the privilege. Accordingly, Plaintiff argues the attorney/client privilege extends to protect the communications with Miller. The Court concludes, from the case law below, that the communications identified on the privilege log are not discoverable because Miller constitutes an "insider" to whom the attorney-client privilege applies. Miller acted more like the client's agent rather than a third party and therefore the attorney-client privilege was not waived.

In *Smith County Educ. Ass'n v. Anderson*, the Tennessee Supreme Court held that the chief negotiator for the Board of Education was an “agent” of the Board whose presence in a meeting with the Board and its attorney did not waive the attorney-client privilege. The Supreme Court explained:

The attorney-client evidentiary privilege only extends to communications from the client to the attorney. D. Paine, *Tennessee Law of Evidence*, § 96, p. 111–112 (1974), and confidentiality is destroyed when those communications take place in the presence of a third party. *Hazlett v. Bryant*, 192 Tenn. 251, 257, 241 S.W.2d 121, 123 (1951). The privilege is designed to protect the client and because it belongs to the client, may be waived by him. When the third party in whose presence such communications take place is an agent of the client, the confidentiality is not destroyed. McCormick § 91 (2d ed. 1972); D. Paine, *Tennessee Law of Evidence*, § 97, p. 112 (1974).

When the Board discussed the present lawsuit with its attorney on September 3 and 16, 1982, it did so in the presence of Dr. Fields. As chief negotiator for the Board, Dr. Fields was the Board's agent; therefore, the confidentiality of those communications was not waived by his presence.

*Smith Cnty. Educ. Ass'n v. Anderson*, 676 S.W.2d 328, 333 (Tenn. 1984).

In *Jones v. Nissan N. Am., Inc.*, the district court, applying federal common law, held that communications with a non-employee doctor was within the privilege where the doctor had a “significant relationship” with the defendant client and the transaction subject to the suit.

Although it is generally accepted that disclosure of otherwise privileged communication to a third party constitutes waiver of the attorney-client privilege, this case raises the question whether disclosure to Dr. Kubina, the medical director of Nissan's medical department, albeit employed by Comprehensive Health Services, constitutes a waiver of the privilege. Neither party has offered Sixth Circuit authority on this question, and the undersigned has found such authority to be scanty. Nevertheless, the District Court for the Western District of Tennessee, construing Tennessee privilege law, has held that the attorney-client privilege is not waived by disclosure to a third-party whose involvement in the matter at issue is so integral as to be considered an “insider” with respect to communications with the client. *Royal Surplus Lines Ins. co. v. Sofamor Danek Group, Inc.*, 150 F.R.D. 463, 471-72 (W.D. Tenn. 1999). In *Royal Surplus Lines*, the Western District cited with approval *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994). In *Bieter*, the court held that an independent contractor, not an agent or employee of the client, was so intimately involved with real estate development project that disclosure to him of otherwise



privileged documents in the course of confidential communications with counsel did not destroy the privilege. 16 F.3d at 939-40.

**Though the nature of the transaction here is markedly different, the undersigned Magistrate Judge finds that Dr. Kubina, as medical director of Nissan's medical clinic and custodian of records of medical restrictions applicable to Nissan employees, had a “significant relationship to the [client] and the [client's] involvement in the transaction that is the subject of the legal services.”** 16 F.3d at 938. Here, the inquiry consisted of the legal implications of medical restrictions mentioned by Chancellor Smith in Mr. Jones's workers compensation case, and their effect, if any, on Mr. Jones' continued employment at Nissan. Dr. Kubina, as medical director, was the custodian of employees' medical records and the repository of information on medical restrictions applicable to Nissan employees. The undersigned Magistrate Judge finds that, under these circumstances, Dr. Kubina's presence during discussions by and among Mr. Coss and Mr. Berger, both in-house counsel to Nissan, and Kitty Boyte, Nissan's trial counsel in the workers compensation case, did not constitute a waiver of the attorney-client privilege.

*Jones v. Nissan N. Am., Inc.*, No. 3:07-0645, 2008 WL 4366055, at \*7 (M.D. Tenn. Sept. 17, 2008) (emphasis added).

Accordingly, when a third party in whose presence otherwise privileged communications take place is either an “agent of the client” or “so integral as to be considered an ‘insider’ with respect to communications with the client” the confidentiality of such communications is not destroyed and the attorney-client privilege applies to prevent disclosure. Further, it has been held that the representative need not be hired at the direction of the attorney in order to fall within the privilege. *Royal Surplus Lines Ins. v. Sofamor Danek Grp.*, 190 F.R.D. 463, 471 (W.D. Tenn. 1999) (citing *Smith*, 676 S.W.2d at 333; McCormick 3rd § 91; Cohen on Evidence § 501.4.)).

In *Royal Surplus Lines Ins. v. Sofamor Danek Grp.*, the district court analyzed the *Smith* case and ultimately held that the relationship between an insurance broker and defendant insured was such that it justified extending the attorney-client privilege to protect communications. In so finding, the Court relied on *In re Bieter Co.*, 16 F.3d 929, 938 (8th Cir. 1994) which held that “a rigid approach to analyzing the parameters of the attorney client relationship did not accurately

reflect the realities and complexities of corporate activities,” and “that sound legal advice and advocacy serves important public interest and depends on the free flow of information to the attorney.” *Royal Surplus Lines Ins.*, 190 F.R.D. at 471 (citing *Bieter*, 16 F.3d at 937–38).

While the documents the Court reviewed do not support Plaintiff’s position that Sherrard Roe brought Miller into the matter, they do support the other statements set out above. Miller, a wealth management advisor, was engaged by Plaintiff to assist with the terms of the Family Transaction and the financial impact thereafter. The communications demonstrate that he was significantly involved and assisted Plaintiff’s legal counsel in navigating the terms of the deal. Accordingly, the Court finds that Miller/Merrill Lynch was an “agent” rather than a third party and that the ATTORNEY-CLIENT PRIVILEGE applies to these communications with Miller/Merrill Lynch and that they are PRIVILEGED.

#### *Withum Documents*

The privilege log identifies two sets of documents involving a representative from Withum: 1) 64 documents including Plaintiff, her husband, and/or Fran Powers with Sherrard Roe and Withum; and 2) 87 documents including Plaintiff, her husband, and/or Fran Powers with Sherrard Roe, BDO, and Withum. Plaintiff relies on the following privileges as to these documents: attorney/client, accountant/client, and/or common interest. Plaintiff again argues that Withum is an “agent” or an “insider” to which the attorney/client privilege applies. Further, that the accountant/client privilege applies to Withum because it is an accounting entity licensed under the accountancy act.

Plaintiff explains in her response the relationship that underlies her privilege assertion as follows:

Stuart McCallum and his associates at Withum. Mr. McCallum works for Withum, a certified public accounting firm that was retained by Sherrard to assist counsel

with the post-buyout investigation. Melissa Kramer works for Withum as a Certified Public Accountant. Once again, Plaintiff communicated directly with Withum about dealership issues; Withum was on communications with legal counsel at Sherrard, Holland & Knight, and BDO; and Plaintiff claimed privilege over those communications which were made in confidence.

Withum was engaged by Plaintiff's attorneys to conduct a valuation of certain companies involved in the Family Transaction for Plaintiff and Fran Powers to potentially sell their ownership interests. Withum was engaged on or about September 9, 2020, as reflected in an engagement letter with Sherrard Roe dated September 11, 2020. Sherrard Roe's clients in this regard were Plaintiff and Fran Powers. (CR01280, CR01310-CR01405). Sherrard Roe terminated the engagement on behalf of Ms. Powers on April 13, 2021. (CR02759). Plaintiff primarily communicated with Withum representative Stuart McCallum, who provided valuation services and answered additional related questions that arose regarding the Family Transaction. He also worked with CPAs Melissa Kramer and Tom Reck from Withum. Voigt relied upon Withum and McCallum's expertise to provide legal advice to his clients. McCallum was significantly involved in the valuation of the businesses and the post-buyout investigation, and he entered into an engagement letter with Sherrard. Accordingly, the Court finds that McCallum/Withum was an "agent" rather than a third party and that the ATTORNEY-CLIENT PRIVILEGE and ACCOUNTANT/CLIENT PRIVILEGE applies to these communications with McCallum/Withum and that they are PRIVILEGED.

*LBMC Documents*

There are a number of documents in which LBMC representatives were copied. (CR03321 - CR03373). The Court is unclear what relationship Plaintiff had with LBMC at any time relevant to this matter. The Complaint alleges that "LBMC served as professional tax and accounting advisors for the Johnson family-owned businesses and for individual members of the Johnson

Family.” (Complaint, ¶5). In Plaintiff’s Responses to Interrogatory No. 5, she identified James R. Meade, Jr. and Timothy Sturm from LBMC as persons with knowledge concerning the engagement of and services provided by LBMC to the family business, meetings with the Johnson family members, and various tax and valuation aspects of the June 2020 sale. Plaintiff is ORDERED to file a pleading within seven (7) business days providing additional information in that regard so the Court can rule on these documents.

Trey Harwell/Neal & Harwell

There is one document on which attorney Trey Harwell of the firm Neal & Harwell is blind copied. (CR00661). The Court is unaware of Plaintiff’s relationship with Harwell and what privilege, if any, that would cover that relationship. Plaintiff is ORDERED to file a pleading within seven (7) business days providing additional information in that regard so the Court can rule on this document.

Blank Document

CR00129 is a blank document and thus is not protected by any privilege.

**IMPACT OF PRIVILEGE ASSERTIONS**

Text Messages

The Individual Defendants argue that even if the information exchanged with BDO and Withum is considered privileged, Plaintiff has waived any such privilege by her routine sharing of such information with non-privileged third parties, including Jane Holt and Jonathan Thomastan, and the communications should be produced. The attorney/client privilege belongs to the client, and the client may waive the privilege either by communicating in the presence of others who are not bound by the privilege, or by voluntarily divulging the communication to third parties. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 213 (Tenn. Ct. App. 2002). “If a client divulges the

communications he seeks to protect, then he has waived the attorney-client privilege with respect to the reported communications and the attorney may testify to its contents.” *Outpost Solar, LLC v. Henry, Henry & Underwood, P.C.*, No. M2016-00297-COA-R9-CV, 2017 WL 6729292, at \*5 (Tenn. Ct. App. Dec. 29, 2017) (quoting *State v. Buford*, 216 S.W.3d 323, 326 (Tenn. 2007)). Upon review, Plaintiff made narrow text message disclosures to non-privileged third parties that discussed in general her suspicion of fraudulent activity. The Court does not find such disclosures warrant extending the waiver beyond the information that was disclosed.

#### Implied Waiver

The Individual Defendants also assert that Plaintiff has put the protected information “at issue” in her Complaint, and, therefore, she cannot use privilege as both a sword and shield. The Court does not find that Plaintiff has waived these privileges with her pleadings. However, the Court will be open to motions in limine or other evidentiary restrictions on Plaintiff’s ability to assert certain affirmative defenses to her contract obligations based upon a lack of knowledge or information regarding the transactions at issue. Plaintiff cannot rely on the privileges as a shield to providing the documents yet argue that she was without advice or an ability to determine what she was agreeing to in the Family Transaction. In particular, because a jury demand has been made in this matter, the Court informs the parties that it will be open to limiting the evidence in this regard, as well as jury instructions that clarify what can and cannot be considered.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the privileges cited herein apply to the communications with the parties to whom they are associated. The Court reserves ruling on how these findings will impact the parties’ use of certain evidence, claims and defenses as the litigation proceeds. As discovery continues and the allegations and defenses become clearer, the Court will be in a better position to set more definite parameters.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff is to PROVIDE document CR00129.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff is to FILE A NOTICE explaining her relationship with LBMC and Trey Harwell/Neal & Harwell within seven (7) days of this Order.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that within five (5) days of entry of this Order, that Plaintiff shall coordinate with the Deputy Clerk for Part II to retrieve all boxes containing privilege log documents. The Court does not hold nor keep *in camera* documents after a review is complete and an Order is entered.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the next case management conference is scheduled for **Tuesday, June 18, 2024 at 1:30 p.m. CT.**

It is so ORDERED.

  
\_\_\_\_\_  
ANNE C. MARTIN  
CHANCELLOR, PART II  
DAVIDSON COUNTY BUSINESS COURT

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