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John J. Goger
Fulton County Superior Court, Judge

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IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

GUS H. SMALL, as and only as Administrative Trustee of the Trust for Richard Charles Bunzl and His Lineal Descendants, The Trust for Suzanne Irene Bunzl and Her Lineal Descendants, and The Trust for the Lineal Descendants of Walter Henry Bunzl; BUNZL TRUSTS INVESTMENTS, LLC f/k/a Coronado Investments, LLC; and BUNZL TRUST PROPERTIES, LLC f/k/a Capital Piedmont Partners, LLC, Plaintiffs, v. WILLIAM C. LANKFORD, JR. and MOORE STEPHENS, TILLER, LLC, Defendants.	CIVIL ACTION NO. 2016CV280892 Bus. Case Div. 4

ORDER ON DEFENDANT LANKFORD'S MOTION TO COMPEL DISCOVERY AND PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

The above styled action is before the Court on Defendant William C. Lankford's Motion to Compel Discovery and Plaintiffs' Motion for Protective Order. In his Motion to Compel Discovery, Defendant Lankford asks the Court to compel Plaintiffs to produce various documents from the current Administrative Trustee's (Gus H. Small) files. Plaintiffs, in turn, request that the Court issue a protective order under O.C.G.A. §9-11-26(c).

Mr. Small is the Administrative Trustee of three separate trusts at issue in this litigation which were established for the benefit of the descendants of Walter Henry Bunzl (the "Bunzl

Trusts"). Mr. Small was appointed and approved Administrative Trustee of the Bunzl Trusts on June 23, 2015 while this litigation was ongoing. He is also an attorney and claims to have provided legal services to the beneficiaries. Mr. Small and two limited liability companies ("LLCs") which are primarily owned by the Bunzl Trusts have brought this action against Defendants Lankford and Moore-Stephens & Tiller, LLC, an accounting firm where Mr. Lankford was a member. Plaintiffs allege Defendants breached their duties when performing accounting services for the Bunzl Trusts and the LLCs. Plaintiffs assert claims for professional negligence/malpractice, an accounting, attorneys' fees and expenses, and punitive damages.

In the instant motion, Defendant Lankford asserts Plaintiffs have refused to respond to requests for the production of certain categories of documents from Mr. Small's trustee files which Defendant argues are relevant to Plaintiffs' claims. Plaintiffs argue the requested documents and information relating to the administration of the Bunzl Trusts during Mr. Small's tenure as trustee or not relevant, the requests are overly broad, and the documents and information are protected from disclosure under the attorney client privilege and the "common interest" doctrine.

I. Applicable standards

With respect to the general scope of discovery, O.C.G.A. §9-11-26(b)(1) provides:

> **Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action**, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial **if the information sought appears reasonably calculated to lead to the discovery of admissible evidence…**

(Emphasis added). *See also* Bowden v. The Med. Ctr., Inc., 297 Ga. 285, 291, 773 S.E.2d 692, 696 (2015) ("[I]n the discovery context, courts should and ordinarily do interpret 'relevant' very broadly to mean any matter that is relevant to anything that is or may become an issue in litigation") (quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)) (internal quotations omitted).

O.C.G.A. §9-11-26(c) generally governs the entry of protective orders and authorizes courts to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." O.C.G.A. §9-11-26(c). "The issuance of a protective order is a recognition of the fact that in some circumstances the interest in gathering information must yield to the interest in protecting a party." Bd. of Regents of Univ. Sys. of Georgia v. Ambati, 299 Ga. App. 804, 811, 685 S.E.2d 719, 726 (2009) (citation omitted). Nevertheless, protective orders should not be used as a means to hinder legitimate discovery and the burden is on the movant to show "good cause" for its entry. O.C.G.A. §9-11-26(c). As summarized by the Court of Appeals of Georgia in Caldwell v. Church, 341 Ga. App. 852, 802 S.E.2d 835 (2017):

> "O.C.G.A. § 9-11-26(c) does establish a general statutory basis for the entry of protective orders limiting or curtailing discovery under appropriate circumstances, provided such limitations do not have the effect of frustrating and preventing legitimate discovery." Christopher v. State of Ga., 185 Ga. App. 532, 533, 364 S.E.2d 905 (1988) (citation and punctuation omitted). Such protective orders, which are within the discretion of the trial judge, "are intended to be protective—not prohibitive—and, **until such time as the court is satisfied by substantial evidence that bad faith or harassment motivates the discoveror's** [sic] **action, the court should not intervene to limit or prohibit the scope of pretrial discovery**." Bullard v. Ewing, 158 Ga. App. 287, 291, 279 S.E.2d 737 (1981)

Caldwell, 341 Ga. App. at 861 (emphasis added).

With respect to the attorney-client privilege, O.C.G.A. §24-5-501(a)(2) "exclude[s] from evidence on grounds of public policy…[c]ommunications between attorney and client." Importantly, "[t]he statutes setting out attorney-client privilege are not…broadly construed" but rather the privilege is "confined…to 'its narrowest permissible limits under the statue of its creation." Tenet Healthcare Corp. v. Louisiana Forum Corp., 273 Ga. 206, 208, 538 S.E.2d 441, 444 (2000) (citing Atlantic Coast Line .R. Co. v. Daugherty, 111 Ga. App. 144(1), 141 S.E.2d 112 (1965)). Indeed, "[i]nasmuch as the exercise of the privilege results in the exclusion of evidence, a narrow construction of the privilege comports with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is the object of all legal investigation." Tenet Healthcare Corp., 273 Ga. at 208 (citations and punctuation omitted).

Thus, only communications between counsel and the client are protected and the privilege "extends only to confidential communications made for the purpose of facilitating the rendition of legal services to the client." Southern Guar. Ins. Co. of Georgia v. Ash, 192 Ga. App. 24, 28, 383 S.E.2d 579, 583 (1989). A communication is not privileged simply because it is made by or to a person who happens to be a lawyer. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977). Further, the burden is on the party asserting the privilege "to prove that his communications to counsel were privileged and thus not subject to discovery." Peterson v. Baumwell, 202 Ga. App. 283, 285, 414 S.E.2d 278, 280 (1991). *See also* Georgia Cash Am., Inc. v. Strong, 286 Ga. App. 405, 413, 649 S.E.2d 548, 555 (2007) ("[A party's] suggestion that the fact that an attorney might have reviewed or commented upon a document automatically protects the document under the attorney-client privilege is unsupported by any authority and, in fact, conflicts with prior opinions by this Court").

Georgia courts have also recognized the "common interest" privilege or doctrine. It "allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others." In re Teleglobe Commc'ns Corp., 493 F.3d 345, 364 (3d Cir. 2007), as amended (Oct. 12, 2007). *See* Restatement (Third) of the Law Governing Lawyers § 76 (2000) ("If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged under §§ 68-72 that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication").

As used by Georgia courts, the common interest doctrine applies where:

> (1) the communication is made by separate parties in the course of a matter of common interest; (2) the communication is designed to further that effort; and (3) the privilege has not been waived. The privilege does not require a complete unity of interests among the participants, and it may apply where the parties' interests are adverse in substantial respects.

McKesson Corp. v. Green, 266 Ga. App. 157, 161 n.8, 597 S.E.2d 447, 452 (2004), aff'd, 279 Ga. 95, 610 S.E.2d 54 (2005) (citing United States v. Bergonzi, 216 F.R.D. 487, 495 (N.D. Cal. 2003)). Under the doctrine, "[a] transfer of documents to a party with 'strong common interests' in sharing the work product, or a transfer made with a guarantee of confidentiality, does not waive the [privilege]." McKesson Corp., 266 Ga. App. at 161. However, the common interest doctrine only applies with respect to communications or documents that are otherwise privileged. *See* Restatement (Third) of the Law Governing Lawyers § 76, *supra*; Holland v. Island Creek Corp., 885 F. Supp. 4, 6 (D.D.C. 1995) ("Under the common interest rule, individuals may share information **without waiving the attorney-client privilege**...") (emphasis added).

II. Disputed Discovery Requests

The following discovery requests from Defendants' First Request for Production of Documents ("RPD") are at issue in the instant motion:

> **RPD No. 1**: Please produce all Documents relating to services provided by Gus H. Small to the Bunzls, the Bunzl Trusts, and/or the Bunzl Entities.
>
> **RPD No. 2**: Please produce all bills, invoices, fee schedules, and/or other Documents relating to fees paid or incurred relating to services Gus. H. Small provided to the Bunzls, the Bunzl Trusts, and/or the Bunzl Entities.
>
> **RPD No. 3**: Please produce all receipts, payments, and/or other Documents relating to any costs incurred or paid by Gus H. Small for which he was reimbursed by the Bunzls, the Bunzl Trusts, and the Bunzl Entities.
>
> **RPD No. 4**: Please produce all Communications between Gus H. Small and the Bunzls relating to services provided to the Bunzls, the Bunzl Trusts, and/or the Bunzl Entities.
>
> **RPD No. 5**: Please produce all demands, requests, reports, evaluations, Communications, and/or other Documents sent to or from Gus H. Small relating to the Bunzl Trusts and/or the Bunzl Entities, including their management, records, or administration.
>
> **RPD No. 6**: Please produce all Documents and Communications sent to or from Gus H. Small relating to any transaction affecting the Bunzl Trusts and/or the Bunzl Entities.
>
> **RPD No. 7**: Please produce all profit and loss statements, balance sheets, tax returns, and any other Document relating to the finances of the Bunzl Trusts and/or the Bunzl Entities that have come into existence since Gus. H. Small has served as Administrative Trustee.
>
> **RPD No. 8**: Please produce all inventories, accountings, and appraisals relating to the Bunzul [sic] Trusts and/or the Bunzl Entities that have come into existence since Gus H. Small served as Administrative Trustee.
>
> **RPD No. 9**: Please produce all reports, analyses, memoranda, and summaries prepared by or for Gus H. Small relating to the Bunzls, the Bunzl Trusts, and/or the Bunzl Entities that have come into existence since Gus H. Small has served as Administrative Trustee.

III. Analysis and Conclusions of Law

Applying the authorities summarized above, the Court generally finds that the requested documents related to the administration of the Bunzl Trusts during Mr. Small's tenure as Administrative Trustee are relevant, particularly in light of Mr. Small's investigation in his capacity as trustee of the status and assets of the Bunzls Trust as well as Plaintiffs' broad claims for damages.

To the extent Plaintiffs assert any of the requested documents are protected from disclosure under the attorney-client privilege, they have not identified any particular documents they contend are covered under the privilege nor have they provided a privilege log. Moreover, Plaintiffs cannot broadly assert attorney-client privilege to protect documents from disclosure merely because Mr. Small not only acts as the Administrative Trustee but also serves the Bunzl Trusts and/or the Bunzls in some undefined, ad hoc legal capacity. Only communications by a client seeking legal advice fall under the privilege. As noted by the Court of Appeals of Georgia in Southern Guar. Ins. Co. of Georgia:

> It further is required that the attorney's advice must primarily concern legal advice rendered "in the line of his profession." See [Taylor v. Taylor, 179 Ga. 691, 693, 177 S.E. 582, 583 (1934); Atlanta Coca-Cola Bottling Co. v. Goss, 50 Ga. App. 637, 179 S.E. 420, 421 (1935); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 616 (8th Cir. 1977)]. "**The privilege does not simply follow an attorney by virtue of his profession**." Agnor, supra at 52. Moreover, "[t]he attorney-client privilege extends only to confidential communications made for the purpose of facilitating the rendition of *legal* services to the client. [Cit.] **Thus, where the attorney acts merely...as a business adviser [cit.] the privilege is inapplicable.**" United States v. Horvath, 731 F.2d 557, 561 (USCA 8th Cir.) "[T]he privilege would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid disclosure....[I]t seems well settled that the requisite professional relationship is not established when the client seeks *business or personal advice*, as opposed to legal assistance." (Emphasis supplied.) Radiant Burners v. American Gas Assn., 320 F.2d 314, 324 (U.S.C.A. 7th Cir.), cert. den. 375 U.S. 929, 84 S.Ct. 330, 11

> L.Ed.2d 262; see In the Matter of Walsh, 623 F.2d 489, 494 (U.S.C.A. 7th Cir.), cert. den. 449 U.S. 994, 101 S.Ct. 531, 66 L.Ed.2d 291 (business and other advice not privileged should be distinguished from professional legal services); see also [Marriott Corp. v. Am. Acad. of Psychotherapists, Inc., 157 Ga. App. 497, 502(3)(a), 277 S.E.2d 785, 789 (1981)]; see generally 98 ALR2d 241, § 5; 97 C.J.S., Witnesses § 280.8910.

Southern Guar. Ins. Co. of Georgia, 192 Ga. App. at 28 (emphasis added).

The same rationale applies for an attorney-trustee administering a trust and rendering non-legal as well as legal advice. Insofar as the burden rests with Plaintiffs to establish that the privilege applies, the Court finds Plaintiffs have not met that burden. Further, to the extent Plaintiffs assert "[a] common interest privilege against disclosure should be applied to communications between the Trustees for the Bunzl Trustees in this case,"[1] that doctrine does not create a privilege. Rather it is intended to allow for the sharing of otherwise privileged information among individuals with a common interest in a legal dispute without waiving the privilege. Insofar as no showing has been made that any particular documents are privileged, it does not appear that the doctrine has application.

Given the above, Defendant Lankford's Motion to Compel is GRANTED with respect to RPD Nos. 2, 3, 7, and 8. The motion is also granted with respect to RPD No. 5 but the Court narrows that request to the production of "demands, requests, reports, [and] evaluations" sent to or from Gus H. Small in his capacity as Administrative Trustee relating to the management, records, or administration of the Bunzl Trusts and/or the Bunzl Entities. Similarly, the Motion to Compel is granted with respect to RPD No. 9 but the Court narrows that request to the production of "all reports, analyses, memoranda, and summaries" prepared by or for Mr. Small in his capacity as Administrative Trustee relating to the Bunzls, the Bunzl Trusts, and/or the Bunzl Entities that have come into existence since Mr. Small has served as Administrative

[1] Plaintiffs' Response in Opposition to Defendant William C. Lankford's Motion to Compel Discovery and Motion for Protective Order, p. 16.

Trustee. Plaintiffs are ORDERED to supplement their production as to the foregoing discovery requests within **thirty (30) days** of this order.

However, the Court finds RPD No. 1 (seeking "all Documents relating to services provided by [Mr. Small]"), RPD No. 4 (seeking "all Communications between [Mr. Small] and the Bunzls relating to services provided"), and RPD No. 6 (seeking "all Documents and Communications sent to or from [Mr. Small] relating to any transactions affecting the Bunzl Trusts and/or the Bunzl Entities") are overly broad and not appropriately tailored to the claims and defenses at issue in this litigation. Defendants' Motion to Compel is DENIED with respect to the foregoing requests.

In light of the Court's rulings herein, Plaintiffs' Motion for a Protective Order is DENIED.

SO ORDERED this 5 day of March, 2019.

JOHN J. GOGER, JUDGE
Fulton County Superior Court
Business Case Division
Atlanta Judicial Circuit

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