STATE OF MICHIGAN

COURT OF APPEALS

DAVID HARTMAN, M.D.,

Plaintiff-Appellee/Cross-Appellant,

v

METROPOLITAN HOSPITAL and WILLIAM CUNNINGHAM, D.O.,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
March 16, 2004

No. 241173
Kent Circuit Court
LC No. 01-008202-CZ

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Defendants appeal by leave granted, and plaintiff cross appeals, from an order of the circuit court partially granting plaintiff's motion to compel the production of documents. We reverse and remand.

Plaintiff is a physician and became employed by defendant hospital in 1990 in its emergency room. In 1991, the emergency room physicians on the hospital's staff, including plaintiff, formed a professional corporation known as Certified Emergency Medical Specialists, PC (CEMS). CEMS then contracted with the hospital to provide emergency room services.

In 1999, another emergency room physician, Dr. Daryl Lawrence, sent a letter to defendant Cunningham, the hospital's senior vice-president, complaining that plaintiff had discriminated against her because of her gender and that he had created a hostile work environment. Cunningham scheduled a meeting with plaintiff and Dr. Robert Morris, the chairman of the emergency room department, to discuss the allegations. According to plaintiff, Cunningham told Dr. Morris that if CEMS did not terminate plaintiff's employment, the hospital would not renew its contract with CEMS. Plaintiff further alleges that Cunningham informed him that if he voluntarily stepped down, the hospital would not investigate the charges and would give a favorable letter of recommendation. Plaintiff resigned under protest.

Plaintiff further alleges that the hospital retained its outside counsel, the law firm of Varnum, Riddering, Schmidt & Howlett, to conduct an investigation of the sexual harassment charges. This investigation allegedly generated a written report that concluded that there was no credible, objective evidence to support Dr. Lawrence's allegations against plaintiff. Thereafter, plaintiff filed the instant action alleging tortious interference with a contract and sought a copy of

the report generated by Varnum during discovery. Defendants opposed the request, citing both the attorney-client privilege and the work-product privilege. The trial court ordered partial disclosure of the Varnum report. Specifically, the trial court ordered that, in the event the parties could not stipulate to the results of the investigation, defendants would be required to produce copies of all witness statements or summaries of witness statements (including summaries prepared by an attorney) contained in the Varnum report, excluding any legal opinions, conclusions or impressions of counsel.

Defendants first argue that the Varnum report was protected under the attorney-client privilege. Whether that privilege applies is a legal question which this Court reviews de novo. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618; 576 NW2d 709 (1998). Similarly, the question of what constitutes a waiver of the privilege is a question of law which this Court reviews de novo. *Leibel v General Motors Corp*, 250 Mich App 229, 240; 646 NW2d 179 (2002). Once this Court determines that the privilege is applicable, we must determine whether the trial court's order was an abuse of discretion. *Reed Dairy Farm, supra* at 618.

The attorney-client privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents. *Id.* The scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his or her advisor that are made for the purpose of obtaining legal advice. *Id.* at 618-619. Where an attorney's client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization authorized to speak on its behalf in relation to the subject matter of the communication. *Id.*, citing *Hubka v Pennfield Twp*, 197 Mich App 117, 121; 494 NW2d 800 (1992), rev'd on other grounds 443 Mich 864; 504 NW2d 183 (1993). "[F]acts confidentially disclosed to an attorney by employees of the client are covered by the attorney-client privilege." *Id.* at 122.

The Varnum report was generated at least in part for the purpose of giving the hospital legal advice in the event that either the complainant or plaintiff pursued legal action against the hospital. Although the trial court excluded from its discovery order those portions of the Varnum report containing reference to litigation strategy, the hospital's employees and independent contractors spoke freely to the hospital's attorneys about the performance of their colleague or superior presumably not only because of the promise of confidentiality but also because the attorneys were the hospital's attorneys. "The purpose of the attorney-client privilege is to permit a client to confide in the client's counselor, knowing that the communications are safe from disclosure." *Co-Jo, Inc v Strand*, 226 Mich App 108, 112; 572 NW2d 251 (1997). Hence, even the interviewees' factual statements upon which the legal opinions and recommendations were made are privileged statements. See, e.g., *Hubka, supra* at 122.

Plaintiff argues that defendants waived the attorney-client privilege with respect to the Varnum report by voluntarily disclosing a portion of the report during a meeting with plaintiff and plaintiff's counsel. But a limited or partial disclosure of a privileged document does not waive the privilege as to the entire document. See, e.g., *In re Dayco Corp Derivative Securities Litigation*, 99 FRD 616, 619 (SD Ohio, 1983).

Furthermore, plaintiff's reliance on *Hardy v New York News Inc*, 114 FRD 633 (SD NY, 1987), is misplaced. In relying on *Hardy*, plaintiff argues that the attorney-client privilege should not apply to documents prepared in the discharge of a legal duty and that the Varnum

report in this case was prepared in the discharge of a legal duty to investigate the sexual harassment claim. Plaintiff's argument fails for two reasons. First, the document at issue in *Hardy* was not a report prepared by an attorney in anticipation of litigation, but a document prepared by a non-attorney in drafting an affirmative action plan. Second, plaintiff points to no legal duty by defendants to investigate a sexual harassment claim. That is, a prompt and adequate investigation leading to appropriate remedial action may be an effective strategy to avoid liability for a hostile work environment claim, *Chambers v Trettco, Inc*, 463 Mich 297, 312; 614 NW2d 910 (2000), but there is no legal duty to do so.

For the above reasons, we conclude that the trial court erred to the extent that it concluded that any portion of the Varnum report was not protected by the attorney-client privilege. The trial court should have ruled that the report need not be disclosed.

In light of our conclusion under the attorney-client privilege, we need not consider the parties' arguments regarding the work-product privilege.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendants may tax costs.

/s/ Michael R. Smolenski
/s/ David H. Sawyer
/s/ Stephen L. Borrello